



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the draft Updated Supplementary Procedures for ICANN's Independent Review Process

The Centre for Communication Governance at National Law University, Delhi (CCG) thanks ICANN for the opportunity to submit this comment.

In examining the Updated Supplementary Procedures (USP) in the context of CCWG-Accountability Final Report and the ICANN Bylaws, our comment identifies areas where the IRP falls short of the Bylaws and the CCWG-Accountability Recommendations. We also make recommendations on improving the USP to comply with the mandate of CCWG-Accountability.

We first provide a brief background to the IRP and then discuss the three areas where the USP needs to be amended. This relates to the provisions on 1) time limit for filing claims, 2) independence and impartiality of independent review panelists and 3) the accessibility of the IRP to claimants from developing countries.

Background

The Independent Review Process (IRP) is very important since it holds ICANN to its mission, preventing overreach.¹ It also attempts to ensure compliance with the Bylaws

¹ Section 1.1 (c) of the ICANN Bylaws clearly limit ICANN's mission by stating that it shall not regulate the content of "services that use the Internet's unique identifiers". Available at <<https://www.icann.org/resources/pages/governance/bylaws-en>> (last accessed 25/01/17). Also see CCWG-Accountability Final Report for WS1, available at <<https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>> at p 33, para 174 (last accessed 17/01/17).

and Articles of Incorporation.² With this in mind, the Cross Community Working Group on Accountability (CCWG-Accountability) focused on strengthening the IRP in Work Stream 1 (WS1).³ These were incorporated into the ICANN bylaws as a fundamental bylaw.⁴ The Supplementary Procedures have been updated to comply with the amended bylaws. The USP however, falls short of many of the recommendations in the CCWG-Accountability Report and the Bylaws as discussed below.

1. Time-limit to file claims

The current supplementary procedure does not stipulate a time limit for filing an IRP. However, Section 4.3 (n) (iv) (A) of the Bylaws⁵ tasks the IRP Implementation Oversight Team (IOT) with developing rules of procedure that include the time within which a claim needs to be filed. Accordingly, the Section 4 of the USP proposes that a claim should be filed with the ICDR (International Centre for Dispute Resolution) “no more than 45 days after a CLAIMANT becomes aware of the material [e]ffect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”⁶

We understand the need to prescribe time limits for the speedy completion of arbitration proceedings. However, barring all claims after one year of the action or inaction is extremely problematic. ICANN policy processes take place over a long time. It is highly likely that a policy would be implemented more than a year after the Board has approved it. It must be remembered that the IRP is a check on abuse of ICANN’s power, and its protection must be safeguarded.⁷

² Id, CCWG-Accountability.

³ For a full list of CCWG-Accountability recommendations on the IRP, see id, pp. 33-36.

⁴ Section 4.3, ICANN Bylaws, available at <<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>> (last accessed 24/01/17).

⁵ Section 4.3 is a fundamental bylaw.

⁶ Section 4, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, available at <<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>> (last accessed 17/01/17).

⁷ Milton Mueller, *Putting Your Rights On The Clock: The IRP Supplementary Rules* (7th January 2017), available at <<http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/>> (last accessed 17/01/17).



CCWG-Accountability's external counsel noted that [emphasis added] "Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and **without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws** (and is inconsistent with the terms of Annex 7 of the CCWG Report)."⁸ The counsel also noted that alignment with Section 4.3 (n) (iv) (A) of the Bylaws⁹ would require the provision of a clause for 'reasonably should have known',¹⁰ as well as omission of the strict 12-month limitation period.

It should also be noted that arbitral institutions do not usually impose time limits on the submission of a claim. A survey of leading arbitral institutions such as the International Chamber of Commerce,¹¹ the London Court of International Arbitration¹² and the Stockholm Chamber of Commerce¹³ suggests that this is not a common practice. They do however, impose time limits during the arbitral proceedings. This includes time limits on the appointment of arbitrators¹⁴ and making the final award.¹⁵ The ICDR Rules which govern the IRP also does not impose a time limit on filing claims.¹⁶ In keeping with international practice, we recommend that the USP not contain a time limit on filing claims.

Further, as Professor Mueller notes, since a claimant is time-barred from challenging the policy, a successful challenge to an implementing action does nothing to prevent similar

⁸ Legal Memorandum from Sidley Austin LLP (4th January 2017), available at <<https://mm.icann.org/pipermail/iot/attachments/20170106/9dcc4fb4/Sidley-ResponsetoCertifiedQuestionofCCWGIoT-January42017-0001.pdf>> at p 4 (last accessed 17/01/17).

⁹ ICANN Bylaws, supra, n. 1.

¹⁰ Section 4.3 (n)(iv)(A) of the bylaws states that the Rule of procedure should include "The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute". Supra, n. 8, at p 4.

¹¹ ICC Rules of Arbitration (2012), available at <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>> (last accessed 24/01/17).

¹² LCIA Arbitration Rules (2014), available at <http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article_1> (last accessed 24/01/17).

¹³ SCC Arbitration Rules (2017), available at <http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf> (last accessed 24/01/17).

¹⁴ See for instance, Article 12 of the ICC Rules; Article 5 of the LCIA Rules; Article 17 of the SCC Rules.

¹⁵ See for instance, Article 30 of the ICC Rules; Article 43 of the SCC Rules.

¹⁶ Similar to other institutions, ICDR does not impose time limits on filing a claim, but imposes limits on filing counter claims and in the appointment of arbitrators. See, ICDR Rules of Arbitration, available at <<https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestrelease>> (last accessed 24/02/17)

future actions.¹⁷ This is of concern, as the IRP enhancements envisioned by the CCWG-Accountability were meant to “produce consistent and coherent results that will serve as a guide for future actions”,¹⁸ which Section 4 of the USP fails to do. CCG appreciates that the IOT has already taken note of this concern and will be discussing it once the public comment period has ended.¹⁹

2. Independence and Impartiality of Independent Review Panelists

The independence of IRP panelists is essential to the completion of an IRP in a just and transparent manner. Section 4.3 (q)(i) of the ICANN Bylaws requires that Independent Review Panelists be independent of ICANN, its Supporting Organizations and Advisory Committees. Section 4.3(q)(i)(A) requires panelists to disclose any material relationships to the parties and Section 4.3(q)(i)(B) calls on the IOT to develop further independence requirements. Similarly, the CCWG-Accountability proposal recommends that panelists be term limited.²⁰

The USP in Section 3 addresses the issue of independence.²¹ But it merely echoes Section 4.3(q)(i)(A) of the ICANN by laws in requiring the disclosure of material relationships. It does not address the issue of term limits raised in the CCWG-Accountability proposal. The USP also does not contain any new independence requirements as per the mandate of the ICANN Bylaws. In the absence of such recommendations, it is useful to look at internationally accepted standards on the independence of arbitrators.

The independence and impartiality of arbitrators is an important facet of international arbitration. The standards for independence vary based on the circumstance of the case.²² The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration is a useful, internationally accepted standard that can be applied

¹⁷ Milton Mueller, *supra*, n. 7.

¹⁸ Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 1.

¹⁹ IOT Meeting #13 (13th January 2017), Notes, recordings and transcripts available at <<https://community.icann.org/pages/viewpage.action?pageId=63149880>> (last accessed 17/01/17).

²⁰ Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 9, para 41.

²¹ Section 3, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, *supra*, n. 6.

²² For a discussion on independence of arbitrators, see Michael Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration”, *The International and Comparative Law Quarterly*, Vol. 38, No. 1 (Jan., 1989), pp. 26-52.

to the IRP.²³ Rather than a list of criteria, the Guidelines list general and practical standards that can be applied to different situations of conflict.²⁴ The standards are classified across three lists (red, orange and green) based on the extent of the conflict involved.²⁵

Instead of sending the USP back to the IOT on this issue, we recommend that the USP make a reference to the IBA Guidelines so it may be applied on a case to case basis.

3. Accessibility to Claimants from Developing Countries

Both the ICANN by laws²⁶ and the CCWG-Accountability report²⁷ call for the IRP to be an accessible process. The latter calls on ICANN to establish processes to facilitate access to pro bono representation for community, non-profit other complainants who would not normally be able to use the IRP process.²⁸ However, the USP does not contain any specific rules that enable access to such claimants.²⁹

To make the IRP more accessible, it might be instructive to follow the practices of other international organizations. The World Trade Organization (WTO) for instance makes special provisions to enable Least Developed Countries (LDCs) to access the Dispute Settlement System.³⁰ According to Van den Bossche and Gathii there are three kinds of strategies that can make the WTO dispute settlement system more accessible.³¹ These are

²³ International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, (2014), available at

<<http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafec8918>> (last accessed 23/01/17).

²⁴ Khaled Moyeed et al, “A Guide to the IBA’s Revised Guidelines on Conflicts of Interest”, Kluwer Arbitration Blog, 29th January 2015, available at < <http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/>> (last accessed 23/01/17).

²⁵ Id.

²⁶ Section 4.3 (a) (viii) states that the IRP should “secure the accessible, transparent, efficient, consistent, coherent and just resolution of disputes”.

²⁷ Annex 07, CCWG-Accountability Final Report for WS1, supra, n. 1, at p. 11, paras 60-61.

²⁸ Id, para 60.

²⁹ Article 5 (Conduct of Independent Review) and Article 8 (Discovery Methods) of the USP require the IRP Panel to be guided by considerations of accessibility. However, they do not contain any recommendations on enabling access to the IRP as mentioned in the CCWG-Accountability report.

³⁰ Peter Van den Bossche and James Gathii, “Use of WTO Dispute Settlement by LDCs and LICs”, Trapca 2013, available at < <http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>> at pp. 51-52 (last accessed 23/01/17).

³¹ Id, at pp. 45-53 (last accessed 23/01/17).



experience based, resource based and rules based strategies.³² Since this comment looks at revising the IRP procedures, rules based strategies within WTO are relevant to this context.

The WTO Dispute Settlement Understanding (DSU) (analogous to the supplementary procedures in ICANN) contains rules that apply specifically to disputes involving developing countries. Article 24 requires that WTO members exercise restraint while bringing disputes against LDC members.³³ It also requires that the Chairman of the Dispute Settlement body help mediate disputes before they go to a WTO panel.³⁴ The Cooperative Engagement Process in Section 4.3 (e) suggests that ICANN like the WTO encourages community members to attempt to settle disputes through mediation before using the IRP. In this context, a special allowance for developing countries could be made in similar terms to Article 24 of the WTO DSU. The USP can be amended to include a similar provision.

Article 27 of the DSU requires that the WTO Secretariat provide support through legal and technical expertise when requested by a developing country member.³⁵ Similarly, the ICANN secretariat can provide for legal and technical support to developing country claimants. .³⁶ This can be achieved by a provision in the USP that requires the ICANN secretariat to provide or make provisions to provide legal and technical support where necessary.

In addition to the CCWG-Accountability recommendation on pro bono access, we recommend that ICANN enact rules in the USP to enable better access to the IRP to developing country claimants.

³² Id.

³³ Article 24, WTO Dispute Settlement Understanding, available at <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#24> (last accessed 23/01/17).

³⁴ Id.

³⁵ Article 27, WTO Dispute Settlement Understanding.

³⁶ Id.