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**Business Constituency Submission**

**GNSO//CSG//BC**

Comments on Revised Proposal of the ACDR to Serve as a UDRP Provider

The Business Constituency (BC) bases this comment upon a prior position adopted by the BC in accordance with its charter. Two BC position documents are cited here:

BC Comment on ICANN Proposal to Recognize New Domain Name Dispute Provider (Oct-2010)

<http://forum.icann.org/lists/acdr-proposal/msg00004.html>

BC comments on Preliminary Issue Report on current state of the UDRP (Jul-2011)

<http://www.bizconst.org/Positions-Statements/BC_on_UDRP_Issues_Report_July_2011.pdf>

As noted, the BC submitted a comment on the application of the Arab Center for Dispute Resolution (ACDR) to become an accredited UDRP provider when it was first put out for public comment in October 2010. That comment is attached to this document.

The Summary of the BC’s 2010 Comment stated:

*The Business Constituency (BC) cannot support approval of this or any other UDRP accreditation application at this time on the grounds that no new UDRP providers should be accredited until ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities.*

Two and one half years have passed since the BC submitted that comment, yet there still is no “standard mechanism” for assuring uniform administration of the UDRP, nor even a process in place to develop such a mechanism.

The BC’s 2010 comment stated the rationale for our concerns:

*ICANN appears to be transitioning from an environment in which the vast majority of UDRP cases (approximately 98%) were handled by two arbitration providers (WIPO and NAF) and in which significant gTLDs were based in a limited number of national jurisdictions to one in which the majority of gTLDs and UDRP providers may well be headquartered in a widely distributed group of jurisdictions.*

*In the future, business interests may well be investing substantial amounts in these new gTLDs, for both defensive, new branding, and other purposes.*

*In this type of environment it is even more important that all UDRP providers be subject to uniform and enforceable responsibilities, as that is the only means of furthering the goal that UDRP decisions are consistent within and among UDRP providers, and that the UDRP remains an expedited and lower cost remediation for addressing cybersquatting.*

Since 2010, a number of ensuing developments – including applications for 1400 new gTLDs, as well as ICANN’s announcement that it will divide its operations between Los Angeles, Singapore, and Istanbul – indicate that projected responsibilities are arriving at an accelerated pace. This is turn increases the need for a mechanism to ensure uniform implementation of the UDRP in all regions and among all arbitration providers.

To be clear, the BC is not opposed to increasing the ranks of accredited UDRP providers. The BC recognizes that relevant and high-quality legal expertise can be found in all regions of the world, and that businesses may well prefer to have UDRP cases handled by regional entities rather than the now-dominant providers located in Europe and the United States.

Yet the BC remains concerned that an expansion of UDRP providers in the absence of a standard mechanism may lead to a divergence of UDRP case law between various providers. That could erode uniform application of the Policy and increase business sector risk and uncertainty.

The ACDR’s revised application of March 1, 2013 speaks to and is illustrative of these concerns. In the application section “Our Vision”, it states:

*While we put impartiality and professionalism first, we also take into account the necessity for gradual invergance [sic] of the rules applied by UDRP providers. Hence, we acknowledge the importance of constant interaction among the existing providers in order to stay aware of the conflicting policies and to interactively discuss them.*

We commend ACDR for recognizing the need for uniformity of rules applied by UDRP providers and its commitment to “constant interaction” in pursuit of that goal. Yet no UDRP provider has any authority to require another to apply the rules in a consistent manner; rather, it is ICANN that accredits all UDRP providers and therefore ICANN’s responsibility to establish the enforceable mechanism that can best achieve that goal.

ACDR’s application’s Initial List of Neutrals also raises relevant concerns:

*In line with the vision of ACDR, panelists will be invited from different nationalities and with different approaches to IP and other related fields. The selection of the panelists will be according to their experience and knowledge.*

ACDR’s reference to “different approaches to IP” seems at odds with the need for uniform approaches in UDRP jurisprudence.

Also, while many of the initial panelists listed in ACDR’s Annex 1 have impressive credentials (indeed, one is a long-time participant in the BC’s leadership) we do note that fifteen of the thirty-three listed neutrals have no prior experience in UDRP administration. This raises the issue of how such panelists will be made familiar with existing UDRP practice prior to initiating their own participation in the process.

Finally, in ACDR’s application section on Online Discussion, it is stated:

*The ACDR will establish an online discussion medium, accessible by panelists only, enabling them to communicate with each other and exchange perspectives and experience on all matters relating to the Center’s UDRP process and legal practice of domain dispute resolution.*

*Any significant legal perspectives or points of critical practice importance which would have the effect of further development in the field will be published on the Center’s website in the form of panelists’ views on UDRP practice.*

And in the section titled Publishing the Decision of the Panelists, it is further stated:

*ACDR will have its own system/search tool for researching the Center’s decisions resolved under UDRP. The tool will assist complainants, respondents, their counsel, panelists, providers and members of the public who are concerned with the DNS, the UDRP practice, as well as IP protection in general, in researching decisions on domain names.*

These statements raise concern that ACDR’s focus on the “Center’s UDRP process and legal practice” and development of a search tool aimed at only the “Center’s decisions”, there may arise an ACDR arbitration practice that over time begins to differ in significant ways from that of other UDRP providers. Instead, ICANN needs to foster the development of tools that provide comprehensive information about UDRP practice among and across all accredited providers, and that fosters a uniform approach to its application and consistent outcomes in every region of the world.

The ACDR has set impressive goals for itself, stating: “During the start-up period, the ACDR will be ready to start with a limitation not exceeding 50 per month.” That would total 600 decisions per year, or more than one-tenth of total UDRP cases at present levels. And, following the start-up period, the ACDR might even decide a greater annual percentage of cases. The BC has no objection to such a scenario, other than our continuing concern about the lack of a standard mechanism to ensure uniformity in UDRP practice.

The ACDR has submitted an impressive proposal, and we recognize the need and legitimacy of regional UDRP providers as the DNS expands to encompass new gTLDs and IDNs across the globe. But, regretfully, we still cannot support its approval at this time because ICANN has still failed to implement, or even begin to develop, “a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities*”.* We implore ICANN to expeditiously address this matter.

Attachment – BC Comment of October 28, 2010

**BC Comment on ICANN Proposal to Recognize New Domain Name Dispute Provider**

\*Background\*

There is a pending request for comment regarding the application of the Arab Center for Domain Name Dispute Resolution (ACDR) to become a certified Uniform Dispute Resolution Procedure (UDRP) arbitration provider.

 \*Summary\*

The Business Constituency (BC) cannot support approval of this or any other UDRP accreditation application at this time on the grounds that no new UDRP providers should be accredited until ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities.

\*Explanation\*

The BC notes that the voluntary registration or renewal of a gTLD domain must be undertaken via an ICANN-accredited registrar. All registrars are subject to a uniform contractual agreement with ICANN, the Registrar Accreditation Agreement (RAA). ICANN recently strengthened the RAA with additional amendments and the addition of flexible enforcement options, and a Final Report proposing additional RAA amendments has just been delivered to the GNSO for its consideration.

In stark contrast, the involuntary termination or transfer of a domain can be ordered under the authority of a UDRP provider that has been accredited by ICANN but which is not bound by any constraints on or requirements pertaining to the exercise of that delegated authority. This has led to increasing concerns about the lack of adequate procedural and substantive consistency in the UDRP process. Such concerns are likely to grow if additional providers are accredited in the absence of the uniform framework of a standard mechanism.

The BC strongly advocates that ICANN must first implement a standard mechanism with any and all UDRP arbitration providers that defines and constrains their authority and powers, and establishes regular and

standardized review by ICANN with flexible and effective means of enforcement. The ultimate sanction of cancelling accreditation is an extreme sanction that ICANN has demonstrated a reluctance to initiate in other contexts.

ICANN appears to be transitioning from an environment in which the vast majority of UDRP cases (approximately 98%) were handled by two arbitration providers (WIPO and NAF) and in which significant gTLDs were based in a limited number of national jurisdictions to one in which the majority of gTLDs and UDRP providers may well be headquartered in a widely distributed group of jurisdictions.

In the future, business interests may well be investing substantial amounts in these new gTLDs, for both defensive, new branding, and other purposes. In this type of environment it is even more important that all UDRP providers be subject to uniform and enforceable responsibilities, as that is the only means of furthering the goal that UDRP decisions are consistent within and among UDRP providers, and that the UDRP remains an expedited and lower cost remediation for addressing cybersquatting.

The BC notes that the issue of whether UDRP providers should be under a standard mechanism with ICANN is almost entirely separable from the question of whether the UDRP evaluation standards for determining the existence of cybersquatting should be reformed. There is no need to debate the substantive elements of the UDRP in order to address the fundamental issue of whether UDRP providers should be under a standard mechanism