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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 shown as Appendix 1 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 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.

Appendix 1 – 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) 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