

## IPC Comments on Board Governance Committee Working Group Report on GNSO Improvements

The Intellectual Property Constituency (IPC) of the GNSO thanks the ICANN Board for this chance to comment on the Board Governance Committee Working Group Report on GNSO Improvements, see <http://www.icann.org/topics/gnso-improvements/gnso-improvements-report-15oct07.pdf>. We also thank the Working Group for its diligent efforts in preparing the report and in reaching out for input from all interested parties. IPC hopes that its comments, and those of others in the community, will be carefully considered before the Board moves forward on any of the Working Group's recommendations.

### **Overall Objective and Summary**

In its report, the Working Group stated, "Above all, we have sought ways to improve inclusiveness and representativeness in the GNSO's work, while increasing its effectiveness and efficiency." The IPC believes that it is imperative for the Board to keep these overall objectives clearly in mind when reviewing the recommendations contained within the Working Group's report. A focus on these objectives leads, in our view, to a strategy of phased implementation of the Working Group's report, and specifically to a deferral of most of the recommendations for restructuring the GNSO council (as laid out in Chapter 5 of the report). This submission spells out the reasons for this strategy, and also identifies a few other proposals which should be considered as part of the GNSO review.

### **The Need for Phased Implementation**

The Working Group report contains many valuable recommendations that deserve prompt implementation. However, we strongly urge that the Board adopt a phased implementation approach to the Working Group's recommendations, both for practical reasons, and because some of these recommendations are premature and require considerable additional study and discussion.

On the practical side, one need only review the six-page summary of the Working Group's recommendations and action items (pages 47-52) to realize that phased implementation is inescapable. The report calls for the GNSO Council, and the ICANN staff, to produce at least 25 different deliverables over the next 6 months. Many of these deadlines seem unrealistic for a group of 21 volunteers supported by a handful of staff. At a minimum, the GNSO would have to give up any policy development role for the next year in order to carry out all the Working Group's recommendations. The only practical route is to set priorities and move toward implementation in a phased and measured manner.

On the policy side, IPC has serious concerns about the prematurity of some of the Working Group's recommendations, especially those in Chapter 5 of the Report, dealing with restructuring of the GNSO council and its role. We will discuss some of our substantive concerns below. At this point, we would simply point out that the report fails to take into

account several developments that are changing the landscape within which the GNSO council functions, and that may render today's recommendations obsolete. We will mention two.

First, the imminent opening of new gTLDs is likely to have dramatic and unpredictable impacts on existing constituencies. The prospect that there will be hundreds of new members of the gTLD registries constituency, and that many of them may be current or potential members of other existing constituencies, while not inevitable, is certainly realistic. The report does not take this into account.

Second, reviews of other parts of the ICANN structure are currently underway, and may result in changes that could have a significant impact on the GNSO Council. To give but one example, the current role of the Nominating Committee in selecting three members of the GNSO council is under study. It is quite possible that, by the time the Nominating Committee review is concluded, it will be decided that these three slots should be filled in some other way; that the number of slots should be greater or lesser than three; or that the slots should be abolished altogether.

In short, to restructure the GNSO council now is akin to replacing the engines of an aircraft while it is in flight. IPC suggests that, in a prudent phased implementation plan, GNSO council restructuring should be deferred so that it can be carried out in coordination with the results of other ongoing reviews of ICANN structures, and in light of the changes that occur as the result of launching of new gTLDs.

### **Comments on Chapter 3: Working Groups**

The IPC agrees that a working group model should be available to the GNSO in its policy development role, that it should be considered in most cases, and that it should be followed whenever appropriate. We agree that the track record of Working Groups has been mixed, and that many of the guidelines set forth in this chapter should be followed in order to improve that track record. We also agree that the selection of a well-trained, experienced and respected chair and vice chair, and the support of capable and energetic staff, are essential ingredients for a working group's success.

However, we do not agree that the working group model should be followed "for all future policy development work," as the report recommends. Task forces and other methods of work have also made significant contributions to GNSO policy development. While no doubt ICANN has much to learn from the experience of organizations such as W3C, IETF and the RIRs, that appear to rely upon the working group model exclusively, it must also be recognized that the GNSO is different from these groups, both in terms of the character of the policy issues before it, and the breadth and diversity of interests that it must take into consideration.

Adopting a rigid format for all GNSO policy development work risks re-creating the same frustrations encountered under the current procedures (see the following section of these comments). The GNSO should at the least retain the various options that are now available for policy development activities.

The Working Group's call to move exclusively to a Working Group model seems to reflect a hostility to voting as a means of decision-making. The IPC does not share that hostility.

Voting has the benefit of applying an objective rule by which to determine when a decision has been made, rather than relying upon the inevitably subjective evaluations of a chair as to whether a working group has achieved “agreement”. We note that the ICANN board itself uses voting to determine which policy recommendations coming from the GNSO will be accepted.

Like democracy itself, voting may be the worst method of making a decision, except that sometimes it is superior to all other methods. This recognition restrains our enthusiasm for abolishing voting in favor of exclusive reliance on the working group process.

#### **Comments on Chapter 4: Policy Development Process**

Five years of experience with the existing GNSO Policy Development Process has provided ample evidence of its serious shortcomings. Time and again, the GNSO has found itself compelled to shoehorn its decision-making processes into the confines of a framework characterized by completely unrealistic timelines, redundant calls for constituencies to produce position statements “for the record,” and unclear boundaries about when it does and does not apply. IPC agrees that the PDP should be revised substantially, partly in order to accommodate the working group model, and partly to provide a more flexible and useful roadmap for the decision-making process. There is also a need for greater clarity about when the PDP applies, and when the GNSO is free to use other methods to develop recommendations on policy questions that come before it.

Once the PDP is rewritten along the lines suggested above, and once it has been approved by the Board, IPC supports the proposal to remove its detailed provisions from the ICANN By-Laws, in order to facilitate future modification as circumstances require. Of course, such future modifications should be subject to review by the ICANN Board, and the current PDP text (as well as authoritative interpretations of it made by ICANN’s General Counsel) should be readily accessible to any interested party. We are not sure why the Working Group thought it “does not seem advisable” to take the PDP out of the By-Laws. (p. 23)

#### **Comments on Chapter 5: GNSO Council**

We have already stated why we think it is premature to implement at this time the dramatic restructuring of the Council called for in the report. We also have serious reservations about the merits of many of the Working Group’s proposals in this Chapter.

Nowhere in the Working Group’s report do we find any hard evidence that the GNSO Council is underinclusive, inefficient or ineffective due to its current structure. For this reason, we find the Working Group’s recommendations for a dramatic overhaul of the current structure to be ill-conceived. In fact, the IPC submits that if staff support were significantly increased, the PDP realistically restructured, and a strengthened Working Group model used as a preferred methodology for conducting GNSO work, many of the problems identified by the Working Group’s report would be resolved. We certainly believe that such a phased approach should be tried, rather than forging ahead with a sweeping restructuring that could have devastating consequences on each constituency and on the GNSO Council itself, both of which depend upon the recruitment and active participation of informed, engaged volunteers.

In the model proposed by the Working Group, instead of making decisions or recommending policy changes to the ICANN board, the role of the GNSO Council would be reduced to managing a policy development process carried out by others. “Guiding the establishment of working groups and monitoring their progress,” “ensur[ing] that the working group followed the appropriate procedures,” “verify[ing] the level of agreement in the working group”, “do[ing] little more than assur[ing] itself that the appropriate rules have been followed” – these are tasks more appropriate for a staff or administrative function. It would be unwise and impractical to outsource them to a group of volunteers who are likely to be motivated primarily by the chance to contribute directly to decision-making on important policy issues, not by organizational management tasks.

Similarly, there would seem to be little incentive for people to participate actively in our constituency – or in many other constituencies – under the model proposed by the working group. The constituencies would no longer have any formal role in developing policy, choosing councilors (or Board members), or taking positions. All these roles would devolve either to working groups open to all, or to ill-defined “stakeholder groups” that would subsume the existing constituencies (and any new ones). The continuing role of the constituencies is unclear, and the prospects for attracting active, informed participants would accordingly diminish.

It appears that those organizations and individuals that currently participate in the IPC would find themselves as part of the “commercial registrants” stakeholder group. This label exemplifies a form of tunnel vision in which the role of any interest is recognized only to the extent that it participates in the domain name registration process. This narrow perspective is understandable, but it fundamentally misapprehends why the IPC exists and what range of interests it represents. While IPC member organizations – and the hundreds of thousands of businesses, institutions and individuals of which these organizations are comprised – include many thousands of domain name registrants, these organizations are also concerned about the impact of domain name registration policies on the interests of non-registrants: for example, of trademark owners (both commercial and not-for-profit entities) that seek to preserve the integrity of their marks in cyberspace; of copyright owners seeking to enforce their rights and carry out licensing activities in the online environment; and of consumers who rely upon brands to steer them to safe and reliable products and services from legitimate sources.

IPC was also surprised to see that its decision to participate in cross-constituency events at ICANN meetings is cited, on page 29 of the report, in support of the proposal to “transition .. towards a more formal stakeholder group structure.” This decision was made primarily to facilitate interaction between ICANN board members and members of the three constituencies involved during the hectic schedule of ICANN meetings. It does not reflect any desire to eliminate the constituency as a meaningful forum for participation in ICANN, in favor of submersion in a more amorphous “stakeholder group.”

While IPC views many of the recommendations in Chapter 5 as either premature or ill-advised, or both, we do strongly support the concept of improving the training of GNSO Council members and participants in the policy development process, as spelled out on pages 32-33 of the report. This recommendation should be near the top of the list in a phased implementation strategy.

## **Comments on Chapter 6: Constituency Structure**

This chapter contains many useful recommendations for constituencies as currently constituted, though we question the relevance of some of them if the role of constituencies is to be dramatically downgraded, as Chapter 5 implies.

One justification for the proposed restructuring of the Council is “making it easier to form a new constituency.” The path for recognizing a new GNSO constituency is laid out in the ICANN By-laws. It is a decision made by the Board, not by the GNSO Council. The report cites a single example, dating from 8 years ago, in which a formal petition to establish a new constituency was made. The report explains the apparent lack of demand for a new constituency by noting that “the option of forming a new constituency should not be viewed as an impossible task.” It would be important to know who so views it, and why they do so, before jumping to the conclusion that the current Council structure must be fundamentally altered in order to dispel this “view.” In the same vein, what would be the metric for the effectiveness of “an outreach program to explore the formation of new constituency groups,” as recommended in this chapter? Is it assumed that new constituency groups are needed, and that the outreach program will not be a success unless new constituencies are approved by the Board?

While IPC is pleased to note that the level of staff support for the GNSO Council as a whole has improved markedly in recent years, in both quantitative and qualitative terms, we support the finding that there is much more that staff could do to be of assistance to individual constituencies, in terms of outreach to new members, administrative support, and other assistance. We certainly support the concept of “dedicated staff support for constituencies.”

With respect to “participation rules and operating principles for all constituencies,” we support many features of this recommendation but question others. We do not see the value of the proposed new “GNSO-discussion list.” It seems unlikely that participation in GNSO activities is being hampered by the lack of an additional mailing list which constituency members would be expected to monitor and participate in. Perhaps some clarification about the purpose of such an additional list would allay some of our concerns.

## **Comments on Chapter 7: Relationships with Other ICANN Bodies**

IPC strongly support improved communication between the GNSO Council and the Board members elected from the GNSO. We would extend this to cover communications between these Board members and the GNSO constituencies. Historically, the openness and responsiveness of our elected Board members to constituency concerns has been quite variable. We also suggest that liaisons from the ccNSO and the ASO be appointed to the GNSO council, and vice versa, to improve coordination.

## **Further Comments**

As part of the phased implementation process for GNSO improvements, in which issues of the restructuring of the GNSO and its Council should be the subject of further discussions, IPC believes that additional ideas should be considered beyond those contained in the Working Group report, and in previous studies cited in the report. We put forward the following ideas,

which have been proposed by IPC members, for the purpose of stimulating discussion and “outside the box” thinking toward the common goal of a more effective and efficient GNSO.

1. Election of Board members by GNSO Council. The report has remarkably little to say about this important function of the GNSO council. It should be recognized that some (though by no means all) of the controversies surrounding weighted voting and the structure of the council trace back to this election role. At the same time, a candid evaluation of the role of the Nominating Committee in selecting board members should include consideration of reducing its role and restoring to the Supporting Organizations more of the responsibility for populating the Board. In this regard, it is worth considering whether three (rather than two) Board members should be selected by the GNSO council; and whether one of those slots should be reserved for a representative of gTLD registries, one for a representative of accredited registrars, with the third slot rotating among the other constituencies currently recognized.

2. Intellectual Property Advisory Committee. The time may have come to recognize that there are cross-cutting questions involving intellectual property rights that are present not only within the bailiwick of the GNSO, but also within a range of other ICANN activities. One response to this recognition would be to create a formal Intellectual Property Advisory Committee, on a par with the other Advisory Committees in the ICANN structure, to provide input from this perspective on all relevant decisions of the organization. This possibility was discussed but never acted upon during the transition to “ICANN 2.0” several years ago.

3. GNSO Councilors’ Expenses. As noted above, most councilors (and certainly most of those who have represented the IPC on the GNSO council) are volunteers who pay for their travel and other expenses of participation from their own pockets. The current prohibition (By Laws Article X, Section 4.2) on ICANN defraying these expenses for these key volunteers is anachronistic, unrealistic, and unfair, especially in light of the fact that such expenses are routinely reimbursed for many other volunteers within the ICANN structure .

Thank you for considering the views of the IPC. Please let us know if we can answer any questions or provide further details.

Respectfully submitted,

Steve Metalitz, IPC president