

COMMENTS OF INTELLECTUAL PROPERTY CONSTITUENCY

The Intellectual Property Constituency welcomes this chance to comment on the constituency petition and charter for the proposed IDN gTLD constituency. IPC supports the views expressed by the Business and ISP constituencies, see <http://forum.icann.org/lists/idngtld-petition/msg00019.html>, but we wish to spell out our concerns in more detail.

IPC believes that the issues that this constituency is being formed to address are important ones to which ICANN should devote more attention. However, we have questions whether the formation of a new constituency within the GNSO is the best means to advance the stated goals of the petitioners and to provide enhanced focus to these issues within ICANN. In great part, this is because the role of a GNSO constituency, which is quite clearly delineated and easily understood under the current structure, has become almost completely incoherent under the “GNSO Improvements” adopted by the ICANN board. Finally, recognizing that the petitioners are better situated than we are to decide whether their goals are best served by forming a new constituency, we do not oppose its recognition, but strongly oppose locating this constituency within the Commercial Interests Stakeholder Group. We also note some other problematic aspects to the draft charter.

Background

Some context may help here. Everyone understands the purpose and role of a GNSO constituency in the present structure: it is a vehicle for organizing the participation of individuals and entities with a particular perspective on or relationship to ICANN and the issues coming before the GNSO, and it is a means for reflecting that perspective or relationship on the GNSO council. The consequences of the Board recognizing a new constituency are also very clear in the current structure: the new constituency would participate on an equal footing with all the existing constituencies in the business of the GNSO.

GNSO Improvement has changed all this. In the “improved” structure, what a constituency is depends on which constituency you are talking about:

The Registrar Constituency will disappear, for all practical purposes. It will be coextensive with, and have a membership identical to, the Registrar Stakeholder Group.

The Registry Constituency will disappear, for all practical purposes. It will be coextensive with, and have a membership identical to, the Registries Stakeholder Group.

The Non-Commercial Users Constituency will either disappear, for all practical purposes, and become coextensive with and have a membership identical to, the Non-Commercial Stakeholder Group; or it will become one of several entities within that Stakeholder Group, each of which will have some representation on the GNSO Council. This depends on which contending version of the NCSG charter is adopted. In the former case, the “constituency” label would be applied in the future to shifting and evanescent grouplets that will form, dissolve and reform on an ad hoc basis, like bubbles in a fluid.

Although the Intellectual Property Constituency considered whether, in the “improved” GNSO environment, it had any further reason to exist, it has concluded provisionally that it will continue, along with the Business and ISP constituencies, as one of three entities within the Commercial Stakeholders Group. Its role, at least in the short term, will resemble the role it played pre-Improvement.

Thus, when a group petitions to be recognized as a “constituency” of the GNSO, that no longer means what it meant before GNSO Improvement. Because Improvement has interposed an additional layer of “Stakeholder Group” organization between the constituencies and the GNSO council, it is impossible to recognize a constituency that does not fit within the confines of a particular stakeholder group. The result is that it is almost impossible for a petitioner to spell out what kind of constituency he or she wishes to have recognized.

Where Should A New Constituency Be Located?

The petition materials clearly reflect this frustration. IPC agrees with Dr. Subbiah’s observation that “the desire to give voice to these formally under-represented IDN communities ... “ is an approach that “the current Stakeholder structure of the GNSO does not appear to accommodate.” The petition asks for the new constituency to be located within the Commercial Stakeholder Group, which it perceives as more tolerant of diversity than any other Stakeholder Group, but clearly states that it is “open to creative re-positioning.”

Indeed, creativity is called for. But before analyzing where the proposed new constituency would fit in the “improved” structure, it is worth drawing the conclusion that the “improvement” and restructuring of the GNSO Council constitutes a significant roadblock to the recognition of this new constituency. It would have been very easily accommodated under the old structure. We are sure that this is an unintended consequence of GNSO Improvement, but it would not be the first time that such an effort achieved exactly the opposite of what was intended.

While the petition very broadly defines the potential membership of the proposed constituency, it is possible to divide that membership into five categories, as follows:

- (1) Some members of the new constituency would be operators of gTLD registries (or their employees). This is clear from section 1.2(b) of the proposed charter.
- (2) Some members of the new constituency would be accredited registrars (or their employees or agents, e.g., resellers). Again, section 1.2(b) makes this clear.
- (3) Some members of the new constituency would be non-commercial entities (or individual participants) whose activities do not grow out of a contractual relationship with ICANN. One might anticipate that many of the entities involved in the activities listed in sections 1.2(c), (d) and (e) would fit this description. Research, education, community organization, promotion of public interest in policy advocacy, promulgation of human rights and advancement of the interest of hitherto neglected segments of society: commercial entities can and do engage in all these activities, but certainly they are generally more closely associated with non-commercial entities.

- (4) Some members of the new constituency would be commercial entities (including individual entrepreneurs) whose activities do not grow out of a contractual relationship with ICANN. For example, some entities that provide “multi-lingual web information and other Internet services for IDN gTLDs” (section 1.2(b)) may be commercial entities, although it is perhaps equally likely that they will be not-for-profits.
- (5) Finally, some members of the new constituency will be government agencies, officials or employees acting in their official capacities. This is made explicit in several places in the draft charter. See, e.g., Section 9.1 (new constituency to be “inclusive and representative ..of ... governmental entities”), 1.2 (“This Constituency is .. created to provide a formal voice and official representation in the ICANN processes to ... government agencies...”).

To the extent that the members of the new constituency fall into four of these five categories, the constituency’s placement within the Commercial Stakeholder Group would be completely inappropriate. Members falling into category (1) should be placed in the Registry Stakeholder Group. Members falling into category (2) belong in the Registrar Stakeholder Group. Those in category (3) should be in the Non-Commercial Stakeholder Group. Those in category (5) should be outside the GNSO altogether.¹

More significantly, including members from any of these four categories in the Commercial Stakeholder Group would violate the integrity of the classifications set by the Board and make the whole GNSO improvements exercise even more incoherent than it is now. In particular, the proposed GNSO restructuring tries to draw a bright line between entities under contract to ICANN and those that are not.² Representatives of the Registries Constituency (a/k/a Registries Stakeholder Group) have stoutly resisted any suggestion that entities whose sole purpose for existence is to achieve the status of a gTLD registry recognized by ICANN, but which have not yet achieved that goal, may play any role (beyond that of an observer) in their group. Similarly, representatives of the Registrar Constituency (a/k/a Registrar Stakeholder Group) have expressed unalterable opposition to inclusion within their ranks of any business that is not an accredited registrar, even if it depends upon an accredited registrar in order to engage in its business activities (i.e., a reseller of registration services). Even though putative gTLD registries, and resellers, have a strong commonality of interest with the current denizens of these two groups, they must be excluded, we are told, because the presence of even one entity that lacks a signed contract with ICANN would somehow dilute the common perspective of the club. Of course, by exactly the same token, a constituency that numbers among its voting members accredited registrars or recognized gTLD registry operators does not belong in the Commercial Interests Stakeholder Group, or anywhere in the “Users House.”

¹ The vehicle for participation by government officials within ICANN is the Governmental Advisory Committee.

² This certainly was the view of the Working Group on GNSO Council Restructuring, whose report specifically states, for example, that the non-contracted parties house “would be open to membership of all interested parties ... that use or provide services for the Internet, with the obvious exclusion of the contracted parties referenced in 2.a ...”. <http://www.icann.org/en/topics/gnso-improvements/gnso-council-restructuring-report-25jul08.pdf>, at 4.

While the dividing line between the commercial and non-commercial stakeholder groups is necessarily a bit less stark than the one demarcating the contracted from non-contracted parties, the same principle applies. A constituency heavily populated by non-commercial interests does not belong in the Commercial Stakeholder Group.³

Thus, IPC agrees with the BC and ISPC that, before acting upon this petition, the Board must “first consider the wider principle and precedent of constituencies with a membership composition that cuts across the proposed GNSO SG structure.”

Other Issues

Beyond the issues discussed above, and those identified in the BC/ISPC submission, the pending petition also requires scrutiny based on the following issues:

Cross-Participation: The petition clearly contemplates that members who vote and participate in the new constituency will also vote and participate in other constituencies. See section 7.1.1.c of the draft charter, calling for members of the new constituency to provide links to these other constituencies on a social network site. Indeed, someone could serve simultaneously as an officer of another constituency and an officer (other than chair) or GNSO council representative of the new constituency. See section 2.1.2.d (chair of the new constituency may not be officer of another constituency). Whether such high-level cross-participation is allowable under current ICANN by-laws, it is clearly contemplated that it may be outlawed in the near future. See <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>, recommendation 1.13.4.

Financial Dependence on ICANN: The Board should consider whether to extend recognition to a proposed constituency, one of whose primary objectives is to “obtain ... funding from ICANN.” Section 2.4.2.a. It may be worth noting that at the time of their formation, all the existing constituencies were constitutionally required to provide funding to ICANN, not vice versa. While this requirement is no longer formally stated, in fact the members of existing constituencies are required to devote considerable financial and other resources to participation in ICANN activities. See also section 11.2.4, in which members of the new constituency are required to assist in “procuring financing for the IDN gTLDC ... from the Commercial Stakeholder Group and ICANN.” To IPC’s knowledge, the Commercial Stakeholder Group has no plans to provide “financing” to any constituency or other entity, and no constitutional means to raise the money for such financing even if it wished to do so. Once again, it seems more likely that the constituencies within the SG would financially support the activities of the SG, rather than vice versa.

Respectfully submitted,

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³ Dr. Subbiah’s letter states that “the majority of current [sic] and potential members ... are commercial outfits.” Nothing in the materials posted for public comment provides any detail or documentation of this statement. We assume that many, perhaps most, of the entities he is referring to are current or would-be gTLD registry operators, or accredited registrars or their reseller agents.