COMMENT OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE "GNSO POLICY DEVELOPMENT PROCESS 3.0" DOCUMENT

August 16, 2018

The Intellectual Property Constituency (IPC) appreciates the opportunity to comment on "GNSO Policy Development Process 3.0: How to increase the effectiveness and efficiency of the GNSO Policy Development Process." The IPC applauds the ongoing Council effort to identify and resolve concerns relating to, and improve the functioning of, the consensus-based policy development process central to ICANN governance and decision-making. In the spirit of the suggested improvements, the IPC offers the following comments.

4.1 Working Group Dynamics – Incremental Improvements

#1. Terms of Participation for WG members.

The IPC supports the concept of "Terms of Participation" for Working Group members. It is apparent that the "social contract" implicit in PDP Working Group participation needs to be made explicit. The IPC suggests that the Terms should expressly confirm the commitment of each Working Group participant to the proposed timeline for the Working Group. Basic information regarding the expected timeline, the expected topics, and the timelines for each decision or set of decisions should be provided to the extent possible. This can also help potential WG members decide whether they can keep up with the active work and timelines.

The Terms need to emphasize that PDP participants must look beyond the parochial concerns and positions of their sector or ICANN structure and actively, collaboratively, and constructively seek out solutions that balance the concerns of various sectors and structures. This cannot be left to the Working Group and subgroup chairs alone, especially where some chairs, while meeting their responsibility for being objective, may be strongly identified with a particular viewpoint or constituency. Worse, there may be some chairs who are in fact struggling with or even ignoring their responsibility for being objective. (See IPC responses to Items #6 and 12 below.)

#2. Consider alternatives to open WG model.

The IPC supports this suggestion, with some reservations. This could work, depending on the topic – particularly where the problem to be solved relates to a topic identified by specific groups or sectors rather than a broad issue affecting Internet users in general. Care should be taken not to shut out participants who are not "ICANN insiders." Another danger is that the proportions in the structure of the GNSO Council will also be used to set the proportions for Working Groups, for which they were not intended. This

has the "knock-on" effect of setting and codifying relative levels of influence and importance for the concerns of different stakeholder types.

Again, an important reason to limit participation is to create groups where everyone is pulling their weight and making important contributions to the work of the group. This could include a process where participants who are not active are moved to observer status and, depending on the stage of the group's work, cannot re-enter as a participant. This can be used to combat a problem related to "social loafing" or "free loading" – participants who are not participating but only waiting to add their "vote" to consensus. This makes a mockery of consensus building, since these "participants" have not done any of the work to build consensus, yet could affect the ultimate outcome with their "vote." Further, the notion of "voting" to determine consensus is clearly inconsistent with the GNSO WG Guidelines, which consider consensus to be qualitative rather than quantitative.

#3. Limitations to joining of new members after a certain time.

The IPC supports this suggestion. If this is implemented, it should provide a "pathway to participation" for observers who after a while decide to become active/full members, and who are able to fully commit to the group's Terms of Participation.

This suggestion relates strongly to concerns about "discussed and decided" topics being re-opened, which tends to result in unnecessary extension in the WG timeframe and may even lead to "consensus by exhaustion." This issue overlaps with the issue of inactive participants noted above. It should be clear in the PDP WG Guidelines and the WG charter that re-opening a topic that the WG has formally closed or decided upon must be the result of a majority decision in the WG, and/or recommendation/approval from the GNSO Council.

4.2 WG Leadership – Incremental Improvements

#4. Capture vs. Consensus Playbook.

The IPC supports this suggestion. With regard to capture and counterproductive behavior, the IPC suggests that the Council review the "Simple Sabotage Field Manual" (https://www.cia.gov/news-information/featured-story-archive/2012-featured-story-archive/CleanedUOSSSimpleSabotage_sm.pdf). This document, though prepared long ago and under different circumstances, presciently identifies numerous behaviors that undermine Working Group progress and effectiveness.

Tactics and scripts for moving toward consensus should be laid out. This also suggests that ongoing training, workshops and even "support groups" for WG and subgroup leaders needs to be revisited and refined.

On a related topic, the WG Chairs need to be more empowered to actively manage the mailing lists, adherence to agendas and reining in of off-topic, repetitive or filibustering "interventions" from members. There is a tendency to allow all members to "speak their piece" regardless of the quality of that contribution or the likelihood of disruption to the

work of the group. The participants need to acknowledge and accept (perhaps explicitly through the Terms of Participation?) from the outset that the Chairs will be taking a firmer hand in this regard, to minimize the likelihood that participants take it personally, feel they are being singled out or even "silenced" (usually said by those who are the least silent…).

#5. Active role for and clear description of Council liaison to PDP WGs.

The IPC supports this recommendation. If possible, the Council liaison should participate in the preparatory WG Chair meetings, as well as at the WG meetings as such. One role of the Council liaison should be to remind all about the schedule and timelines, the expected Standards of Behavior and the consensus building methodology. Where necessary the liaison may need to act as a "referee." In addition, the liaisons should feel free to relay concerns about the effectiveness of the WG to the GNSO Council. Since the GNSO Council is the overall manager of the policy development process, the liaison should be empowered to manage the policy development process and working methods in a particular group.

#6. Document expectations for WG leaders that outlines role & responsibilities as well as minimum skills / expertise required.

The IPC supports this suggestion. There should be a "generic" document that covers these topics for any WG, supplemented by another more specific document keyed to the topics and issues in each new WG.

Chair neutrality (or the lack thereof) is a specific concern that needs to be addressed head-on. Neutrality needs to be specifically emphasized in documenting expectations of Working Group chairs, and reinforced in the charter of all PDPs going forward. When a Chair is not neutral, it is highly corrosive to the process and undermines the legitimacy of the outcomes. This need to be managed throughout the lifecycle of the WG, with clearly defined roles for the Liaison and the Council, and policy Staff as well. It is inappropriate to put the responsibility of managing Chair neutrality on the Working Group members, for several reasons: since the members are not neutral, nor expected to be, their motives will often be questioned, particularly by groups that may be the beneficiaries of a lack of neutrality. This can then polarize the participants, taking the group off course and further degrading the functioning of the group.

4.3 Complexity of Subject Matter – Incremental Improvements

#7. Creation of Cooperative Teams.

The IPC expresses reservations regarding this recommendation. Perhaps the concept of a "Cooperative Team" needs to be better described. As written, the risk with this suggestion is that some WG members may find it easier to be less active and rely upon the support of and reports from Cooperative Teams. Concurrently, it adds to the burden of the most active participants – those who least need "extra work."

#8. PDP Plenary or Model PDP.

These are two rather different suggestions, both of which the IPC supports. The PDP plenary is, in many ways, already in use, at least when the PDP first commences its work. It may also be useful in PDPs that have been active for some time, in order to summarize the work and results to date.

A "model PDP" (along the lines of "model UN"), as well as PDP workshops and other training, onboarding and "capacity building" programs, should be given serious consideration. The development of knowledgeable participants needs to be supported in a comprehensive manner.

4.4 Consensus Building – Incremental Improvements

#9. Provide further guidance for sections 3.6 (Standard Methodology for decision making).

"Ensure there is clarity around how consensus is established and what tools can be used in that regard." This is most certainly needed. Among other things, it should be clear that informal discussions by e-mail among WG members can never be considered consensus calls. Similarly, attempts by WG members to "call consensus" prematurely (and always in favor of their own positions…) need to be actively discouraged. The solution to these is the same – WG leadership needs to be more proactive in setting consensus call and in rebuffing attempts to call consensus prematurely.

As to 3.7 cases: It should be clear that this process cannot be used by a WG member to stop the process and work of the WG. A 3.7 appeal process must proceed in parallel with the WG's regular business and normal meetings. Otherwise, the 3.7 process becomes a form of gaming, and even a method by which dissenting participants can "punish" the rest of the Working Group and stave off consensus that does not favor their positions.

#10. Document positions at the outset.

This recommendation can help define the "playing field" and "goalposts" at each end of the field, providing an express starting point for exploring compromise and consensus. This should include both the positions of WG members and their stakeholder structures, as well as positions or options that are not represented in the WG but which should be put on the table.

This can also be used to identify a minimum dataset of information and data that all WG members need to have to participate effectively. This may become clear where stated positions reflect a lack of knowledge, information or understanding of the subject matter. WG leaders – and staff – should feel free to identify and take action on these concerns at the outset, or else they will fester throughout the work of the group.

4.5 Role of Council as Manager of the PDP – Incremental Improvements

#11. Enforce deadlines and ensure bite-size pieces.

The IPC supports this suggestion. This relates to the larger issue of effective project management and project management tools. The GNSO and ICANN need to look specifically at more formal and better developed set of project management skills and tools. WG leadership is often forced to invent project management tools on an ad hoc basis or to turn to very basic project management tools (like work plans and timelines).

Project Management is really a defined set of skills and approaches. Software development and other business processes often use very well-developed approaches and tools. GNSO WGs are stuck at a kindergarten level in this regard. This is also influenced by an inconsistent level of skill and experience on the part of staff, usually based on their experience prior to ICANN or on picking up skills on a "catch as catch can" basis (since ICANN does not seem to provide training or tools on a consistent basis). A well-developed and consistent "tool kit" (in both the literal sense and the larger sense of shared skills) would be of great assistance to WG leaders, ICANN staff and participants alike.

#12. Notification to Council of changes in work plan.

The IPC supports this recommendation.

#13. Review of Chair(s).

The IPC supports this recommendation. As noted above, there is precious little oversight over chair performance and the WG members can hardly be expected to evaluate and police chairs on members' own initiative. Conversely, this can be used to identify highly effective chairs, to provide constructive criticism in a structured manner and to identify and re-use "good practices" by particular chairs.

The issue of chair neutrality – or the lack thereof – cannot be overemphasized. Although discussed in response to #6 above, the IPC repeats its response in full here:

Chair neutrality (or the lack thereof) is a specific concern that needs to be addressed head-on. Neutrality needs to be specifically emphasized in documenting expectations of Working Group chairs, and reinforced in the charter of all PDPs going forward. When a Chair is not neutral, it is highly corrosive to the process and undermines the legitimacy of the outcomes. This need to be managed throughout the lifecycle of the WG, with clearly defined roles for the Liaison and the Council, and policy Staff as well. It is inappropriate to put the responsibility of managing Chair neutrality on the Working Group members, for several reasons: since the members are not neutral, nor expected to be, their motives will often be questioned, particularly by groups that may be the beneficiaries of a lack of neutrality. This can then polarize the participants, taking the group off course and further degrading the functioning of the group.

Removing a WG Chair is a difficult and uncertain process. While it should never be easy, it should be more clearly defined and should be part of a larger system of Chair review and (if necessary) various levels of private and public "discipline," which would typically precede (and hopefully obviate the need for) the removal of Chair.

The IPC notes that it is even more difficult to remove or replace a Working Group _member_. Review of WG members and their contributions, lack of contributions and negative contributions should also be considered. Among other things, the Council could run an anonymous survey amongst the PDP WG members to obtain feedback on the WG members on a regular basis to facilitate their roles as active and positive members of the PDP. Similarly, there is no process in place that allows a WG to challenge and/or replace their fellow members. This should also be considered.

#14. Make better use of existing flexibility in PDP to allow for data gathering, chartering and termination when it is clear that no consensus can be achieved.

The IPC supports this suggestion, though it needs to be better developed, and separated into different suggestions as needed. An overall improvement in developing data, using metrics, establishing key performance indicators, etc. would be most welcome. Separately, more active and creative management will be helpful; in some cases, the PDP can take on a mindless "momentum" that masks a lack of real progress but which is not being actively managed by the WG leadership or the Council. Such WGs may need to be shaken up, redirected or, in extreme cases, simply put out of their misery.

#15. Independent conflict resolution.

As indicated previously, the IPC supports the suggestion for "Council liaison to be proactive in identifying potential issues / challenges that may need mitigation and Council attention". The Council and/or the liaison should then be able to turn to independent conflict resolution or mediation experts, especially where there is a real or perceived lack of neutrality. A perceived lack of neutrality can even be used by disruptive members to "game" or further disrupt the WG.

Related to this, there needs to be improved processes for conflict resolution; the rules and standards for participation and for violating norms need to be clarified.

#16. Criteria for PDP WG Updates.

The IPC supports this suggestion.

#17. Resource reporting for PDP WGs.

The IPC supports this suggestion, but notes that it must be done in cooperation with ICANN staff.

__Further General Suggestions of the IPC:__

a. The agenda should include time for wrapping up and clearly identifying "Decisions, Action Items, Requests" (DAIRs).

b. Meetings should follow a better defined and articulated time schedule. This can be noted on the agenda. In any event, it should be visible to participants and enforced by the Chairs. Where further time is needed, this should be an express decision of the Chairs.

c. Clarify when (if ever) it is acceptable to vote on how to proceed (e.g., on processes but not recommendations) vs. requiring consensus.

d. For reemphasis: If a topic is divided into separate issues, avoid members going back to earlier decisions to reopen these.

e. For reemphasis: Empower Chairs and GNSO liaison to remove bad actors – those who malign, make things personal, attack WG members in social media, etc.

f. For reemphasis: Confront the issue of questionable Chair neutrality. One specific suggestion – consider limiting when, how and often a Chair may intervene in a "personal capacity" in a non-neutral manner over the life span of the WG. As a corollary, it should be made clear that when a Chair does take a non-neutral position, they must expressly state that they are speaking in their "personal capacity." Anything less leverages the power and position of the Chair to advance a partisan position. To be sure, this needs to be distinguished from the Chair's efforts to build consensus by identifying positions that are "gaining traction" or otherwise appear to be "consensus in the making."

g. Consider defining specific restrictions or other actions with regard to members that are identified by misbehavior, and/or abusive use of policies, etc. This includes participants who have exhibited this behavior in multiple Working Groups – particularly where the WGs are running simultaneously. For such offenders, restrictions could include being restricted from participating in Working Groups for (at least) one year.

Respectfully Submitted,

Intellectual Property Constituency