

To: The GNSO Council

From: Philip Corwin & Petter Rindforth, co-chairs of the IGO-INGO Access to Curative Rights PDP Working Group

21 December 2017

REQUEST FOR GUIDANCE FROM THE GNSO COUNCIL

Dear Councilors,

We write as the co-chairs of the IGO-INGO Access to Curative Rights Policy Development Process (PDP) Working Group, to request your guidance on a question that has been raised by several Working Group members regarding the scope of authority of Working Group chairs. We specifically request your view as to **whether, under the GNSO Working Group Guidelines, Working Group chairs have the authority and discretion to determine what mechanisms to use to assist them in determining the appropriate level of consensus to be designated to each PDP recommendation under consideration in a Working Group.** Please refer to the information that follows for further background on the matter and the reason why we are consulting you as the manager of the GNSO PDP at this time.

The GNSO Working Group Guidelines (<https://gns0.icann.org/en/council/annex-1-gns0-wg-guidelines-01sep16-en.pdf>) prescribe, in relevant part, that:

- *“It is the role of the Chair to designate which level of consensus is reached and announce this designation to the Working Group. Member(s) of the Working Group should be able to challenge the designation of the Chair as part of the Working Group discussion. However, if disagreement persists, members of the WG may use the process set forth [in the Guidelines] to challenge the designation”;* and
- The recommended mechanism for determining consensus levels is:
 - “i. After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair, or Co-Chairs, make an evaluation of the designation and publish it for the group to review.*
 - ii. After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation.*
 - iii. Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group.”*

The Guidelines also allow for the use of polls *“in rare cases”*, such as where *“It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between Consensus and Strong support but Significant Opposition or between Strong support but Significant Opposition and Divergence.”* The Guidelines go on to caution that *“care should be taken in using polls that they do not become votes. A liability with the use of polls is that, in situations where there is Divergence or Strong Opposition, there are often disagreements about the meanings of the poll questions or of the poll results.”*

Finally, and quite relevant to our request of you, the Guidelines state, *“Based upon the WG's needs, the Chair may direct that WG participants do not have to have their name explicitly associated with any Full Consensus or Consensus view/position”*. Based upon that language, and after extensive consultation with staff, we proposed the following mechanism. **We are requesting the Council's guidance at this stage in our Working Group's deliberations as we are preparing to launch a formal Consensus Call for our Final Report, and wish to use an anonymous poll as a mechanism to assist us as the Working Group co-chairs with determining the level of consensus for each proposed final PDP recommendation.** We believe that the GNSO Working Group Guidelines provide Working Group chairs with the flexibility and discretion to determine what tools to deploy to assist with this task, which is solely a chairs' task, and we plan to follow the Guidelines by publishing any initial consensus designation we may make for Working Group deliberation and, if applicable, objection and further discussion. Despite our announcing these steps, and the fact that we had previously used a similar poll for a preliminary, informal consensus call (further described below), a few Working Group members are now challenging our plan to use anonymous polling as an aid for designating initial consensus levels. We have publicly stated that the formal consensus call process to take place after we make those designations will be open and transparent.

The IGO-INGO Access to Curative Rights PDP Working Group has been in operation for almost 3.5 years. An Initial Report was published for public comment in January 2017, and, after review of all input received and resulting modifications to one of its preliminary recommendations, the Working Group has spent the last few months deliberating one remaining issue involving IGO jurisdictional immunity. As we mentioned to you during our ICANN60 update in Abu Dhabi, we had conducted a preliminary consensus call via an online poll in early October 2017 on three options for handling this remaining issue, which was also highlighted for community discussion at ICANN59 as well as ICANN60. Following further Working Group discussion, an additional three options emerged, meaning there are now six options for the Working Group to decide among, in determining its final recommendation (if any) on IGO jurisdictional immunity – specifically, whether there should be a policy for dealing with a situation where a losing domain name registrant brings a court action against an IGO that had won in a preceding Uniform Dispute Resolution Policy (UDRP) or Uniform Rapid Suspension administrative proceeding, and the IGO succeeds in claiming immunity from the jurisdiction of the court. In recent weeks, some Working Group members have announced that they will be changing the positions they provided in the October poll, and some have also claimed that the IGO immunity issue must be considered within the context of broader UDRP matters by the PDP reviewing all Rights Protection Mechanisms, and that our Working Group should therefore issue no recommendation on this matter.

The nature of the Working Group’s discussions on this issue indicated to us, as the Working Group co-chairs, that most of the six options would not achieve clear consensus and it would be very difficult to assess which option was to be assigned the level of “strong support but significant opposition”, or “no consensus/divergence”. In addition, given the protracted duration of this PDP, those Working Group members who remain active on the mailing list also happen to be those who attend calls most regularly; however, in our preliminary poll we saw participation from a reasonably sizable number of members (we had also taken the precaution beforehand of asking ICANN staff to verify with each member that he/she intended to continue to participate in the PDP, and the membership list was updated on the basis of those responses). For these reasons, as well as the fact that the members dominating the email and call discussions are largely associated with a single domain industry sector, we proposed using an anonymous poll to help us determine what the appropriate consensus level might be for each of the six options to be included in the poll.

The only differences between this proposed poll and the one conducted in October 2017 (aside from the addition of three more options) are: (1) where in the October poll respondents had to include their name in their individual response, those names were not published when the results were collated and released; for this new poll we proposed not even collecting names in the first place, so that neither the co-chairs nor staff would know who supports which option; and (2) where in the October poll respondents could support more than one option, for this new poll they will be asked to select only one option to support (although the poll will include the ability to comment on all the options).

A few Working Group members objected to our proposal to use such a poll. Their reasons include alleging that using anonymous polling contravenes the principles of accountability and transparency upon which Working Groups are based, and that in using a poll we as the co-chairs are not following the steps (outlined in the excerpts above) laid out in the Working Group Guidelines for determining consensus.

On the first allegation, we investigated the use of polls by other Working Groups, especially the Next Generation Registration Directory Services (RDS) Working Group. We found that the RDS group had initially used anonymous polls as the Working Group chairs had thought this would encourage participation, but had switched to non-anonymous polling after concerns were raised about poll anonymity that threatened to impede progress on the group’s deliberations. Based on that Working Group’s reasons for using polls, we believe that their situation was based on a specific set of challenges in a context applicable to their work, which is not the same for our Working Group. In addition, the Working Group Guidelines do not forbid the use of polls, as long as these are rare and not treated as votes. This will be only the second time that our Working Group will be using anonymous polling, and we have made it clear that the purpose is not to count numbers but to allow all Working Group members to feel comfortable in providing the co-chairs with as much specific written information as possible, to allow us to make what we are sure will be a fine-line distinction between two or more possible designations of consensus levels.

On the second allegation, we have reviewed the Guidelines in detail with ICANN staff, and believe that our proposed path forward – first in using an anonymous poll as a non-dispositive mechanism to help determine different initial consensus levels, followed by Working Group discussion of all the various initial designated levels – is within the scope of discretion and authority permitted by the Guidelines for Working Group chairs.

As we had hoped to conclude our work and submit a Final Report to the Council by January 2018 but will now not be able to do so given the objections that have been raised, we will greatly appreciate the Council's prompt guidance on our request as described above.

With best regards,

Phil and Petter (co-chairs, IGO-INGO Access to Curative Rights PDP Working Group)