

Comments of Intellectual Property Constituency
July 9, 2011

The Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the Final Report and Recommendations of the Policy Development Process Work Team. See <http://www.icann.org/en/public-comment/pdp-final-report-09jun11-en.htm>.

IPC commends all those who worked on this report. Their hard work has resulted in a very significant and comprehensive document intended to guide the GNSO policy development process going forward.¹ According to Annex E to the report, the work team held a total of 67 meetings. The deadline for public comments on the final report comes more than 30 months after the Work Team's charter was initially approved (which appears to have been in January 2009, see <https://community.icann.org/display/gnsoppsc/3.+PDP-WT+Charter>).

Mindful that these comments come near the end of a very protracted process, IPC offers the following brief questions and observations²:

(1) As noted on page 31 of the report, the average length of a PDP today “varies between 350-550 days.” Will adoption of the new PDP procedures set forth in the final report increase or decrease this duration? Much turns, of course, on how rapidly a PDP working group, once established, accomplishes the substantive task set before it. But some features of the final report create an elaborate apparatus before and after the working group's main period of deliberations; these are likely to make what is already a very protracted and cumbersome process even more unwieldy. At least, some opportunities for streamlining may have been missed. One example is the requirement for a separate drafting and voting process (requiring in at least some cases a supermajority vote) on the working group's charter, even after the PDP on a specific topic has been initiated. Could these steps have been combined? Speed and efficiency are not the only values to be served by a policy development process, of course; but if a process that now takes 1-2 years to complete is changed in a way that does not promise greater efficiency and streamlining, can the result realistically be considered an “improvement”?

(2) What commitments can ICANN make to fully staff and resource the “improved” policy development function? A number of potential bottlenecks in the process, though not highlighted in the flow chart devised by the work team, involve actions by staff: for instance, the preparation by the Staff Manager of a preliminary issues report, and the determination by the General Counsel as to whether the subject matter of the PDP (as gleaned from the issues report) is “within scope” or “out of scope” for purposes of the process. If these steps are fulfilled promptly and in compliance with deadlines set by the GNSO Council, then the process can be efficient. If, however, as too often occurs, deadlines are not met (or sometimes not even clearly set), then a PDP could languish almost indefinitely before it even gets off the ground. Adoption of a revised

¹ We also appreciate that the work team has facilitated review and understanding of its recommendations by adding short titles to each recommendation and by clearly indicating which recommendations affect the ICANN By-laws, the proposed PDP Manual, or both.

² IPC also reserves judgment on some specific recommendations, notably Recommendation 47, which would modify the ICANN By-Laws as to the definition of "GNSO Supermajority". This definition was an intensively negotiated compromise reached during the GNSO “Improvements” restructuring, and any change to it deserves additional scrutiny.

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PDP roadmap must be accompanied by a firm and enforceable commitment from ICANN to dedicate the staff and other resources needed to make the roadmap reasonably expeditious to navigate. Otherwise, the “improved” PDP will not be viable.

(3) By what criteria are the staff to render the evaluations they are required to make in the process? Specifically, what criteria will the ICANN staff manager use to judge whether or not a PDP should be initiated? These criteria should be spelled out, and the staff manager’s recommendation should address each of them. Similarly, the ICANN General Counsel would be required to provide an opinion not only as to whether the PDP is within ICANN's mission, as is presently required, but also as to whether or not the PDP is "within the role of the GNSO". By what criteria would the General Counsel make the latter determination, and would a determination that a proposed PDP is “out of scope” have the same significance no matter which of the two bases it rested upon?

(4) How will the proposed new PDP become operational? In the "Overarching Issues" section of the Final Report, in Item 6, the PDP WT says that the new PDP process will take effect immediately upon adoption. This presumably means adoption by the ICANN Board, but it would seem that the PDP Manual would have to be in place in order for the new PDP to operate properly. Should implementation take effect only after the PDP Manual has been approved by the GNSO Council? And what role should the GNSO Standing Committee on Improvement Implementation play in producing or reviewing the PDP Manual?

(5) When a drafting process extends over thirty months, with an average of more than two meetings per month (and no doubt much work in between meetings), what does that say about its accessibility, and thus its openness to volunteers, as a practical matter? It certainly says that those who led the process and who participated actively were dedicated, conscientious and persevering. It also says, in this case, that of those who were able to attend two-thirds or more of the meetings, four of the five were employed by contracted parties (registries or registrars), and thus were in a professional position to devote that dedication and conscientiousness to this task. Because the assignment was complex, and because it was fulfilled in a comprehensive manner, it makes sense that it took a long time to complete and required a lot of meetings; and it is also worth noting that a number of participants not from contracted parties were also actively involved. However, the question remains whether the process could be adapted so that more volunteers could have made a more meaningful contribution to its fulfillment, without having to devote considerable time over more than two years to the effort.

IPC reiterates its thanks to all those whose hard work contributed to this comprehensive and valuable report.

Respectfully submitted on behalf of the Intellectual Property Constituency by Steve Metalitz, its Vice President