Phase II of Public Comments Process Enhancements
Comments by the Intellectual Property Constituency (IPC)

Introduction

The purpose of this consultation is to discuss the implementation of 3 particular ATRT recommendations ((#15, 16, and 17) that affect the way ICANN publishes and manages Public Comments. To successfully implement these recommendations, it is important to clarify the intentions behind them. There are three main objectives that have been raised with regards to the public comment process:

1. Expand the number of parties that participate in the public comment process.
2. Improve the process of submitting comments
3. Increase the usefulness of the public consultations in the policy development process

So it is in the context of these objectives, and based on extensive experience with the existing public comment process, that the IPC submits the following comments.

Stratification

The ATRT recommendations, adopted by the Board of ICANN, call for the stratification of public consultations. The initial recommendation by staff was a set of categories which are tied closely to the internal processes of ICANN which are unlikely to be useful as a means of categorizations for various interested parties. In general, affinities exist for issues, not process or organizational ownership. Therefore it makes sense to establish a list of categories based on topics of interest. These categories should be broad enough so as to mitigate the need for constant updates to the categories. Therefore a combination of broader and more specific categories would make the most sense. A set of categories requires further study but might include:

- Intellectual Property
- Top Level Domains
- Second Level Domains
- Transparency & Accountability
- ccTLDs
- DNS Security and Stability
- Privacy
- Organizational Review & Improvements
- Community Participation
- Development
- Finances

The European Commission (EC) has adopted a similar set of categories on which public consultations can be filtered. The current list of categories created by the EC can be found here:

http://ec.europa.eu/yourvoice/consultations/links/index_en.htm

This combination of broad and specific categories could provide a good model for ICANN in terms of stratification of public consultations. Given a combination of specific and general, it is likely that the majority of consultations will fall under more than one category so creating a system of tags to facilitate multiple categories is also essential.

Notification

Another innovation that ICANN might borrow from the EC is a system of notifications that allow interested parties to "subscribe" to one or more categories of interest so they would be notified when a consultation in a particular category is launched and perhaps about to be closed. While not specifically part of the recommendations by the ATRT, a notification system is a natural byproduct of stratification that might serve the objective of broadening the population of potential contributors. Currently, interested parties must periodically check the ICANN website to see if there are new consultations of interest which is only likely with individuals and organizations directly involved in ICANN on a regular basis. In fact, many in the close knit ICANN community missed the publication of this very consultation! Imagine the frustration of those whose participation in ICANN issues is more periodic.

The notification process of the EC is a byproduct of the registration system they have implemented which is also being considered as part of this process. Whether registration is mandatory or voluntary, one of the benefits of implementing a registration system could be the identification of particular interests by a broader community and notification when consultations of interest are posted. This would allow for a more periodic participation by businesses, organizations and individuals who do not follow ICANN activities on a day to day basis.

Prioritization

One of the more controversial recommendations by the ATRT calls for the ICANN staff to "prioritize" public consultations so that interested parties can identify the relative importance of individual consultations. The challenge, of course, is that prioritization will necessarily be subjective assessments by staff which will not ring true to all parties. Understandably, ICANN staff are reticent to be put in a position to declare the relative importance of individual consultations and expose themselves to criticisms by those whose priorities are not reflected in the process. In lieu of prioritization, the staff have attempted to address this issue during Phase I of the Public Comments Improvement Process by including some prose describing the interested parties and the "next steps" associated with a particular consultation. Of course, any attempt to provide additional context for a public consultation is helpful and the staff are to be lauded for implementing this system but it might be limited in facilitating the

greater goals of increased and more efficient participation because it does not represent information on which consultations can be filtered.

Given the resistance to associate a simplified prioritization (i.e. Low, Medium, and High) to individual consultations, it might make sense to come up with a separate set of categories that at least begin to suggest objective measures of priority. One potential measure of prioritization is *where* a particular consultation fits within the policy development process. Such a filter field might be called "phase" which might have values such as:

- Issue Identification
- Policy Development
- Conflict Resolution
- Policy Implementation

While not comprehensive, the list above suggests where in the policy process a consultation falls. In that context interested parties might decide to participate early or late in the process, depending on their level of interest or intimacy with the issue under consideration. For example, an interested party with a greater intimacy with ICANN processes and internet issues generally might want to become involved sooner when brainstorming occurs while another party might want the ability to comment and critique suggested solutions that might have adverse effects.

Another possibility to placing various consultations in context is to help interested parties understand where a particular consultation falls on the critical path of a particular policy development process. If staff were able to maintain a kind of Gantt chart[1] of the various policy development processes that are in place (a lot of the underlying work for the data is already being done) and could reflect which public comment requests were 'critical path' for a larger process (as opposed to something smaller happening in parallel) that could be a powerful tool. Many would be interested in being able to check in on the Gantt chart as well to have an idea where things stand, what's outstanding, what's behind, how that's affecting the schedule.

Finally, a suggestion that has surfaced is to tag consultations by constituency as suggestive of who might be interested in the consultation. Obviously, this system is fraught with pitfalls but so long as it is not exclusive, the "best guess" by staff of who might be interested in a particular consultation is probably useful. The ICANN community should be made to understand that an omission from a list of interested parties does not suggest disinterest but that inclusion is simply one more way for various interested parties to have their attention drawn to various consultations. This is a situation where "more is more" in terms of information and stratification given the goal of greater participation by more interested parties.

---

[1] A chart that depicts progress in relation to time, often used in planning and tracking a project. See http://www.answers.com/topic/gantt-chart#ixzz1ZSzeGsgJ

Comment/Reply Cycles

A final recommendation by the ATRT calls for the staff to explore the possibility of a more interactive comment process perhaps through a less structured approach using a Wiki or a more formal reply cycle added to the existing process.

While there is a certain allure to a more interactive format for comments, it is unlikely to provide cogent results for the ICANN staff and Board to use in policy implementation. Most of the wiki style interaction will be dominated by individuals rather than businesses and organizations that require internal review so there would likely be a lack of balance in a wiki driven comment process. It would also be a challenge for staff to decipher how a particular discussion resolved in a set of threaded comments.

The staff recommendation for a fixed reply cycle is an interesting experiment. There is probably some value to experimentation to see how the reply cycle is used. It has been suggested by some that it would be used as a way to file comments very late in the process when there was no longer a time for response. The identification of true "replies" rather than just late comments will be difficult but essential to at least mitigate, if not eliminate, this concern, to the extent it is considered a serious risk. However, there is also a significant risk that adding a reply cycle will mainly serve to delay ICANN's decision-making process, while increasing the quality of debate or contributions only modestly.

Furthermore, the length of a public consultation, and the number of such consultations that are underway simultaneously, dictate the level of participation that can take place. There is a very real difference between comments from individuals, who know what they think and are in a position to express it immediately after reading the document, and comments from entities (such as GNSO constituencies, trade associations, coalitions, governments, or even individual global companies) that must go through a consultation, review and approval process before they are submitted. For those comments in the latter category, the proposed deadlines (especially a 15-day reply comment deadline) are too short. The issue is not about how various comments are evaluated, but rather the importance of ensuring the ICANN not embrace an approach which makes it more difficult for commenting entities to participate. On balance, additional time in the policy-making process might be more productively devoted to lengthening public comment periods rather than creating a separate reply round. As to concurrent consultations, as of July 7, 2010, there were 20 open public comment periods. Public comment deadlines for eight of these were bunched between July 18 and July 26. Similarly, as of March 30, 2010, there were 9 public comment periods with the same deadline: April 1. Obtaining meaningful public input under such circumstances is nearly impossible.

Another aspect of timing is the complexity of the issue on which comments are requested. The timing and length of the comment period should be commensurate with the length and complexity of the topic. A recent example in addition to the budget and operating plan cited in the draft was the ICANN Strategic Plan put out for comment July 29 with a 30 day comment period. Given that the Strategic Plan theoretically sets goals and priorities for ICANN for years to come, one would hope it would carry a longer comment period and include some period of time other than August when it is arguably even more difficult to coordinate comments.

Finally, it would be disruptive and unmanageable to allow the deletion or editing of comments once submitted. The public consultation process is fairly formal and important and it is best that it remain so.

Registration

Registration is a complex topic that was probably not sufficiently addressed by staff or focus group but there are certainly advantages to some system of registration, including notifications. Transparency concerns would suggest that pre-registration is a good idea so as to minimize frivolous comments and raise the level of the debate.

Comment Period

One critical factor in the actual value of the public comment period is the time between the closing of the comment period and when action will be taken on the issue on which public comment was sought. For the most recent draft budget and operating plan, the comment deadline fell a matter of hours before (or perhaps even after, depending on which time zone was used) the meeting of the Board finance committee at which the budget and operating plan was recommended for approval. Apparently there were changes that were never presented to the public. Several members of that committee publicly stated they were unaware of the contents of the public comments before they made their decision. This makes the entire public comment process pointless. Unfortunately, this is not an isolated example. For the public consultation to be more than a matter of form, some sort of minimum time needs to pass between the close of a public consultation and the decisions being made on that subject.

Comment Consideration

A final consideration in attempting for broader, more efficient public consultations has to do with how public comments are summarized and presented to decision-makers. ICANN's practice in this area seems to oscillate between unstated advocacy pieces (underscoring every stray positive statement in comments, sniping defensively at negative comments, and simply ignoring others) and cut-and-paste catalogs that are little more than slightly condensed regurgitations of the comments received. The goal ought to be to concisely summarize the major points raised by commenters and explain why, or why not, a particular recommendation is taken on board. While this is easier said than done, ICANN ought at least to adopt this as its stated practice and do its best to deliver. It is only through the recognition and explicit incorporation or omission of the ideas found in public comments that the process will have any credibility at all. With a stated goal to increase the participation and satisfaction with the public comment process, insuring that interested parties are heard in a very specific way is critical.

Conclusion

Both the ATRT and ICANN Staff are to be commended for taking up the issue of public comment periods as they are the subject of increasing dissatisfaction in the internet community. It's only through better stratification, sufficient notice and time, and substantive feedback that ICANN public consultations can achieve true public participation.