



COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE GNSO REVIEW

The Intellectual Property Constituency (IPC) appreciates the opportunity to provide comments on the Review of GNSO Draft Report for Public Comment, published by Westlake Governance Limited in May 2015.

In general, we support the specific recommendations, which are generally not novel nor controversial, but have some suggestions for improvement and clarification which we set out in the requested template, as an Annex at the end of this document.

However, we also are highly discouraged that the scope of this review was needlessly limited by Westlake and ICANN Staff, and scant attention paid to the ineffective structure of the GNSO.

I. Scope of Review Is Inadequate.

The current, largely ineffective structure was not the product of multi-stakeholder community mandate, and should be changed in light of current marketplace realities and the planned IANA transition. Our concerns in this regard have not been well documented in the Draft Report, and so we highlight them again now.

A. Brief Background on Last Restructure

The draft report does not reflect appropriate understanding of the genesis of the current GNSO structure. That structure is the result of a top-down process directed by the ICANN Board that would never be tolerated in today's ICANN, and which explicitly aimed to reduce the role of intellectual property and other non-contracted business interests in the ICANN policy process. While a detailed history of the process that led to the current structure may be beyond the scope of these comments, here is the capsule version.

Today's GNSO structure closely resembles a plan crafted by a working group created by the ICANN Board's Governance Committee, and consisting solely of then-current and former ICANN Board members. This Working Group recommended a structure in which the participation and voting power within the GNSO council of non-contracted business interests (including the IP, business, and ISP constituencies) would be slashed, and the role of these constituencies in selecting a member of the ICANN Board entirely eliminated. Notably, although non-contracted business interests were clearly the target of the BGC WG proposal, when it was opened for public comments it was vigorously opposed by a much broader coalition of all non-contracted parties and the At-Large



community, while it was supported by representatives of registrars and registries.

The ICANN Board, at the Paris meeting in June 2008, approved the Working Group report except for the restructuring recommendations, and directed the establishment of an emergency working group to reach consensus on an alternative structure within 30 days. The unmistakable message was that the Board-generated, contracted-party-supported restructure would be imposed on the GNSO unless the emergency working group could develop an alternative. After intensive work over a three-week period (July 4-25, 2008), the emergency working group presented a proposal to the Board, ultimately adopted with minimal changes, which resulted in the current structure. As IPC's representative to this emergency working group stated at the time this proposal was transmitted to the Board (July 25, 2008): "The work product of the group far more closely resembles the Board Governance Committee proposal than it does the Joint Users Group proposal that was before the Board."

The IPC representative's statement went on to address the dangers of the restructuring to ICANN's institutional credibility: "In the circles in which I am constantly urging greater participation in ICANN, the "institutional confidence" in ICANN, to use the current phrase, is lower than it has been for years. Private sector leadership of this experiment – or even a meaningful role for the private sector (other than those whose businesses depend on their contracts with ICANN) -- is widely perceived to be at risk. All the alternative GNSO structural proposals before the Board – including the one submitted today -- are viewed as steps in the wrong direction; all diminish the role of the "non-contracted" private sector. The issue of this diminishment is not going away. At this rate, if the issue does go away, it will be because the independent business community has given up on ICANN and is seeking alternatives. "

B. *IPC Dissatisfaction with Current Structure*

Our fears about the impact of that last GNSO restructuring generally have been realized. While we were able to obtain slight modifications in the BGC Working Group's plan to drastically reduce the role of our constituency in ICANN policy development, the basic structure proposed from the top was imposed on the GNSO. Ever since then, very little truly multistakeholder policy development has occurred in the GNSO, as by design it can only be ineffective – largely a waste of time and energy – because in the end the contracted parties can veto anything they do not like.

Moreover, whether due to bureaucratic inertia or other causes, the ICANN Board and staff have systematically relied on the GNSO restructure to marginalize non-contracted business interests. The Stakeholder Group structure, imposed on our constituencies solely for the purpose of allocating voting seats within the GNSO council, whose limited mandate is to manage the policy development process for generic names issues, has been relied upon in a wide range of other settings. For example, in the appointment of participants to review teams under the Affirmation of Commitments --- in no sense a policy development function itself, though in some instances a possible precursor to it – consideration is given only to nominations submitted on behalf of the Commercial Stakeholder



Group, and never to any nominees intended to represent individual constituencies. As a result of this misapplication of the structure imposed upon the GNSO Council, no representative of the Intellectual Property Constituency has been appointed to any of the four AOC review teams that have completed their work.

That is but one example. Indeed, in this Review as well, it seems the IPC has been marginalized. Of the 40 Interviewees listed in Appendix 3, only one identified with the IPC. This compares to at least 12 current or former ICANN Staff or Board members, 5 NCSG members, 3 from ALAC and 3 from the Registry SG. We strongly suspect this does not correlate to the number of survey responses from IPC members, but we do not have that data because the Draft Report omits it, purposefully, even from the 146 survey respondents who specifically agreed they could be identified and quoted publicly as the author of their feedback. (See Appendix 2, Question 1.) We again call for Staff to publish those 146 survey responses so they can be evaluated independently by those in the community who wish to confirm Westlake and ICANN Staff's general conclusions drawn from them. We note ICANN's mandate in Bylaws, Art. III, Sec. 1 "to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Clearly, the "trust us" responses thus far from Westlake and ICANN Staff – who have argued these responses should not be disclosed -- are by far insufficient to satisfy this requirement of the Bylaws. These 146 respondents agreed their responses would be publicly "shared with the GNSO," so how can ICANN and its paid consultants argue that ICANN is operating "to the maximum extent feasible in an open and transparent manner" while refusing to share those responses with the GNSO?

C. Bylaws Require that Review Must Consider Structure

Section 2 of the Draft Report outlines the history of the GNSO and various reviews of it. However, only a misleading and passing reference to the relevant Bylaws is made at pg. 21, n.3. In fact, the Bylaws, Art. IV, Sec. 4.1.ii, unequivocally require that the goal of any organizational review "shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness." It is baffling that both ICANN Staff and Westlake would overlook this clear requirement of the Bylaws, particularly given both their acknowledgement that each previous review did consider the GNSO's structure, and their knowledge of widespread community dissatisfaction with the GNSO.

Instead, only a quick regurgitation of the past reviews is provided, and the unsupported conclusion at p.24 that "The GNSO structure and purpose are not within the specific scope of the Review." There is further discussion at Sec. 9.7 (p. 116-121), with the opening comment that more than 120 comments on structure were received. These are briefly synopsisized at Sec. 9.7.2, unsurprisingly, as a "general view that the CPH is reasonably effective" and then several other "themes" suggesting that the NCPH is not so effective. The Draft Report contradicts itself at bottom of p. 117 saying "none of [the respondents] offered detailed alternatives", yet at top of p. 120 saying "[w]e heard many suggestions for structural change, largely involving the abolition of the Two-House



structure, or reversion to the voting system that prevailed before the 2011 changes.” Clearly the latter is correct, and the former should be deleted.

Westlake concludes, with very little reasoning but based on its unspecified “professional experience,” that structural review could upset “the carefully-constructed balance of voting powers” and otherwise be a large distraction. However, as discussed above, those voting powers were not in any sense “carefully constructed” by the community. The “emergency” compromise that was reached was most certainly based upon the expectation that the structure of the GNSO would again be reviewed, as explicitly required by the Bylaws, five years hence – after new gTLDs took root. That time is now.

The Draft Report offers no discussion of the implication to ICANN and its Bylaws of ignoring structural issues in this Review. From IPC’s perspective, it illustrates how commercial, non-contracted interests are once again marginalized by ICANN Staff and its paid consultants. ICANN’s Bylaws require that this Review consider whether structural change is desirable. This was a foundational underpinning of the last restructure compromise. The Bylaws do not require anything else of the reviewers whatsoever. These important structural issues should not be marginalized to such a small degree within the Review or the Draft Report. Rather, they should be at the center. Westlake should greater explain its relevant professional experiences, and how they are analogous to the GNSO and to Westlake’s recommendation that there be no formal review of the structure during this Review. The Draft Report should purport to explain how such a limited Review satisfies the clear requirements of the Bylaws.

The drafters expressly “do not consider that the GNSO’s structure is perfect, or that it cannot be improved.” They suggest that “If a full review of the GNSO’s structure was to take place, we would recommend that it should be broader than a review of any single SO and should be underpinned by a more extensive strategic review of the effectiveness of ICANN as a whole.” The IPC fully supports having such a broader review occur now, as critical strategic transition of the IANA functions is under consideration by the community, which consideration specifically includes ICANN’s effectiveness – past, present and future – with respect to accountability mechanisms and policy development.

Indeed, the Draft Report acknowledges at p. 122 that “[t]he biggest risk for the GNSO, if it fails to adapt to its changing environment, is that newcomers perceive it to be less relevant to their needs and develop new mechanisms, outside the GNSO and potentially outside ICANN.” We agree, and wonder how the GNSO can adapt if we do not consider improvements to its structure in light of the changed environment. So, it is critically important that the “broader review” happen now. ICANN and the community cannot accept the bald-faced conclusion of ICANN Staff and its paid consultants that the Bylaws should be ignored as to the scope of this Review. Structural review of the GNSO, mandated by the Bylaws, should not be put off for another five years.



D. Changing Realities Dictate New Structure

The Draft Report, Sec. 9 (p. 107-123), focuses on ICANN’s “Changing Environment.” It is stated at bottom of p. 107 that demographic diversity goals, IDNs, new gTLDs, and the IANA transition each increase the “demand for policies” and “underline the importance of ensuring that a truly representative group is involved in making policy.” Again, we agree. We wonder how the current structure can be deemed a “truly representative group” of internet users, when a very small subset of those users (the Contracted Parties) control 50% and veto voting power within the GNSO structure. That is a severe imbalance that, by design, all but ensures that no significant critical multistakeholder policy development can occur within the GNSO. This has been the reality since imposition of the current structure.

Now more than ever, with some 1200 new gTLDs coming online, the GNSO needs to escape the *de facto* capture of the Contracted Parties. There is now, and will continue to be, dire need for improved policy development efficiency, from the perspective of internet users rather than domain name sellers. It is the users who experience the impact of various sales tactics and profit-maximizing policies of the domain name sales industry. It is ICANN’s role to set the ground rules for that industry (at least, in all operational matters other than price), and it cannot effectively do so when its chief policy development Council is captured by the very parties who have caused the need for, and then must implement, any changed policies.

Thus, the IPC is generally in favor of the many specific recommendations made in the Draft Report, with suggestions for improvement and clarification attached in the following Annex. But we feel these non-controversial recommendations do not go nearly far enough to substantiate the structural review mandated by the Bylaws, or to consider how changed and changing circumstances dictate a new GNSO structure going forward. We urge that a broader review, as suggested in the Draft Report, be conducted forthwith.

Respectfully Submitted,

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ANNEX – PUBLIC INPUT COMMENT TEMPLATE