Comments from the Internet Infrastructure Coalition (i2Coalition)
March 1, 2017

INTRODUCTION:

The i2Coalition's diverse membership represents both large and small Internet infrastructure providers such as web hosting companies, software services providers, data centers, registrars and registries. The i2Coalition has several key goals with ICANN, but chief among them is continuing to build a voice for underrepresented parts of the Internet ecosystem – in particular web hosts, data centers and cloud infrastructure providers – and ensuring that accountability and transparency are paramount. i2Coalition brings unique representation to ICANN as it is made up of companies representing the whole broad ecosystem of Internet infrastructure companies.

The Internet Infrastructure Coalition (i2Coalition) appreciates the opportunity to comment on the **GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process.** Our comment addresses several topics related to this initial report and other activities occurring within ICANN related to IGO-INGO curative rights.

We would like to thank the members of the IGO-INGO Working Group for their diligent work on this important issue. At over 100 pages in length, with more than 200 footnotes, the Initial Report is demonstrative of the level of effort and professionalism embodied within and by the WG. Moreover, such high quality outputs, developed in a bottom-up method reaffirm the effectiveness and legitimacy of the multistakeholder model.

QUALIFIED SUPPORT:

In the Initial Report, the WG has laid out five specific recommendations. The i2Coalition is looking forward to supporting all five of the recommendations at the completion of the PDP process. From our perspective, they largely provide for minor enhancements that enable to IGOs and INGOs to access existing curative rights mechanisms, in particular the UDRP and URS. Such an approach is preferable, when compared to the alternative of developing a completely separate set curative rights mechanism that would only be used by IGOs and INGOs.

We are, however, withholding full support from each recommendation until the completion of the PDP process. This is because we await the input of affected IGOs and INGOs, as well as the GAC and representatives of government. We understand that these are complex issues, and that the input of affected parties is an essential component of the process. We simply want to ensure that the final work product, and final recommendations, lead to implementable policy.

With regards to recommendation 4, which deals with jurisdictional immunity, we appreciate the WG asking for input on which of two options are optimal, and also being open to a third alternative that has yet to be considered. We have no specific comment on either option, but instead suggest that the WG be mindful of the potential impacts on time to resolution and cost to resolution, when determining the optimal approach. Such practical considerations are highly relevant to INGOs, IGOs, and domain registrants who are subject to a UDRP or URS action.

Finally, as merely an editing observation, we note that many hyperlinks within the Initial Report are broken, in particular ones that span multiple lines. The hyperlink to the GNSO's council letter to the ICANN Board is broken on page 65 of the draft report.

http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2015-July/000384.html

ICANN ECOSYSTEM PROCESS CONCERNS:

Separately from our comments on the Initial Report published by the WG, i2Coalition would like to remind ICANN of the critical role that the GNSO plays in terms of developing policy for gTLDs.   The bylaws are unequivocal - the GNSO is *the* policy making body of ICANN for all policy related matters related to gTLDs. Put another way, ICANN's Board, ICANN staff, ICANN legal, and the GAC are *not* policy making elements of ICANN. While this distinction may seem obvious and self-evident, ensuring that the ICANN organization in compliance with its own bylaws is something that we, as the community, must check on continuously. Deviation from the bylaws exposes ICANN to unnecessary legal risks and also jeopardizes the future legitimacy of the multistakeholder model.

The ICANN bylaws were also drafted to limit the power and influence of Governments. The GAC is given an advisory role, and their ability to directly create and put forth policy recommendations for ICANN Board consideration is nil. The GAC's primary mechanism of action is to issue advice to the ICANN Board. This limitation on the GAC to develop and set policy within ICANN is acknowledged and addressed in many areas of the ICANN bylaws

With all of this in mind, we have substantial procedural concerns regarding ICANN Board and ICANN Staff's meetings and small groups that have occurred directly between ICANN and the GAC. While we understand and appreciate that the ICANN Board is legitimately trying to resolve material differences between the GNSO and the GAC concerning IGO-INGO curative rights, the methods utilized to facilitate such resolutions are highly problematic. In particular, the formation of an *informal IGO small group* at ICANN51 (Los Angeles, October 2014), whose membership remains shrouded in secrecy, goes against all of the transparency and accountability commitments made by ICANN, past and present.

Nowhere in the bylaws does the ICANN Board have permission to establish an informal, closed working group, with a hidden membership list and none of the similar transparency mechanisms associated with other ICANN Working Groups, such as a public WIKI page, public mailing list archive, transcripts and recordings of calls, and the ability to join the group as an observer. And yet, this is exactly what ICANN has done – ICANN has worked directly with the GAC (and potentially other unknown participants), in secret, to develop a relatively short 3-page report, which lists no specific authors, drafters, contributors, and provides no rationale for the proposed positions. These policy proposals were not subject to public comment, either.

Comparatively, the GNSO IGO-INGO Curative RPM PDP WG is and always has been a fully open and transparent group operating in according with ICANN norms. This is clearly evident – one can simply google "IGO-INGO Curative Rights Protection Mechanisms PDP" and the first result is a ICANN WIKI page that contains a list of meetings, participants, the working group charter, draft and final documents, members, mailing list archives, and attendance records. In fact, members of the GAC participate (and other SO/ACs) in the working group as observers. (It's critical to note, however, that these observers, and other interested GAC members, were repeatedly solicited for participation in the WG. The WG's requests were ignored.)

The stark difference between the transparency and accountability, and ultimately, the legitimacy of each group is undeniable. And yet, based upon past ICANN Board actions, it seems likely that we have a scenario in which, unless the GNSO's final report align precisely with the IGO "Small Group" proposal, the ICANN Board will reject the final recommendations put forth by the GNSO IGO-INGO Curative Rights Working Group.   Such an outcome would set a harrowing precedent and have disastrous impacts for the multistakeholder model. The GAC is supposed to have an advisory role, but now it has been given a hidden working group, in collaboration and support from ICANN staff and ICANN Board members, to develop policy outcomes.

Due to the gross inappropriateness of this IGO small group, ICANN's Board must reject the recommendations put forth by the secret IGO small group and also immediately open for inspection, any and all records related to this secret IGO small group.

We look forward to the material differences between the GNSO and the GAC concerning IGO-INGO curative rights being resolved in the appropriate area, within the PDP working group.