18 June 2007

SUMMARY OF THE DRAFT WORKING DOCUMENT OF THE BOARD GOVERNANCE COMMITTEE'S GNSO REVIEW WORKING GROUP ON GNSO IMPROVEMENTS

PLEASE NOTE: THIS SUMMARY IS NOT A SUBSTITUTE FOR READING THE DRAFT WORKING DOCUMENT BEING POSTED FOR DISCUSSION AND PUBLIC COMMENT*

The "BGC GNSO Review Working Group" (hereinafter "BGC WG") spent the past several weeks considering the work done by the London School of Economics Public Policy Group and others to determine whether, in general, the GNSO has a continuing purpose in the ICANN structure and, if so, whether any change in structure or operations is desirable to improve its effectiveness (as required in the Bylaws). This preliminary working draft presents the BGC WG's initial thinking on the questions under review, for discussion with Community at the upcoming ICANN Meeting in San Juan and for public comment through the ICANN website. *There will be a Public Forum devoted exclusively to GNSO improvements on Monday, 25 June, from 16:00 to 18:00, in the San Geronimo Room.* This working draft does not reach any definitive recommendations or conclusions at this time, for there is not yet agreement among all members of the BGC WG.

The BGC WG has examined carefully several aspects of the GNSO's functioning, with several key objectives in mind. Five of these objectives are:

- Maximizing the ability for all relevant and interested stakeholders to participate in the GNSO's processes;
- Ensuring recommendations are developed on gTLD "consensus policies" for Board review, and that the subject matter of "consensus policies" is clearly defined;
- Maximizing the quality of policy outputs, ensuring that policy work receives adequate support and is informed by expert advice and substantive stakeholder input;
- Supporting Council efforts to prioritise and benchmark GNSO objectives and align resources as appropriate; and
- Ensuring policy development processes are based on thoroughly-researched, well-scoped objectives, and are run in a predictable manner that yields results that can be implemented effectively.

It is clear that the GNSO has a continuing purpose in the ICANN structure, but that changes should be made to improve its inclusiveness and representativeness, while at the same time increasing its effectiveness and efficiency. In some cases, more flexibility will be helpful, while in other aspects more specific guidelines will be necessary.

There is emerging agreement that the constituency structure can benefit from improvements, possibly by the formation of three or four broad new "Stakeholder Groups." Each Stakeholder Group could be composed of existing or new self-forming constituencies. Another new idea that is being explored is formalizing the working group model as the focal point for policy development. This could enhance the policy development process by making it more inclusive and representative and – ultimately – more effective and efficient. These ideas fit well with the belief that the GNSO Council should move away from being a legislative body focused on voting and become a more strategic entity with strengthened management and oversight of the policy development process. These and other possible steps are highlighted below; please refer to the report for a fuller discussion of all points.

1. Constituency Structure

Under the Bylaws, six self-organized "constituencies" are recognized as eligible to elect representatives to the GNSO Council. In addition, any group of individuals or entities may petition the Board for recognition as a new or separate Constituency. There is thus no "magic number" of constituencies that should be represented in the GNSO, and the constituencies created in the late 1990's do not need to remain static. In addition, it has been ICANN's intention, as reflected in the Bylaws, that constituencies be self-forming. This is also important because of the desire to develop policy within the ICANN community in a bottom-up process reflective of the diversity of the community, and conducted in an inclusive, representative manner. At the same time, there is clear recognition of the need for the GNSO to operate more effectively and efficiently.

One possibility for organizing future work is to create three or four broad groups that would serve as the foundation for certain GNSO functions, such as electing representatives to the Council. These could be called "Stakeholder Groups." Each of these groups would be made up of one or more specific constituencies that have been, or will be, self-formed by a distinct stakeholder group.

To provide an example purely for illustrative purposes, one of the three or four broad new Stakeholder Groups might be called the "Commercial Users Stakeholders Group." It could include specific self-formed stakeholder constituency groups, such as "Large Business Constituency," "Small Business Constituency," "Internet Service Providers Constituency" "Trademark and IP Constituency," and any other self-formed constituency made up of commercial users. Or, to provide another example for illustrative purposes, there might be a "Non-Commercial Users Stakeholders Group." This broad grouping could include several self-formed stakeholder groups, such as "Non-Commercial Organization Constituency," "Individuals Constituency," "Academic Institutions Constituency," or other constituencies. There could also be a "Registry Stakeholders Group" and a "Registrar Stakeholders Group," possibly with self-formed constituencies under each category.

One advantage of a new model for organizing stakeholder participation is to remove concern that the addition of new constituencies could create an internal "imbalance" in the current composition of the Council. By creating three or four broad Stakeholder

Groups, the number of constituencies is less important and can change with time. Making it easier to form a new constituency can also address any obstacles people perceive in joining an existing constituency. Overall, this approach can encourage the participation of more people in the GNSO. Many details would still need to be worked out about the precise functioning of the new Stakeholder Groups, including the extent of coordination among constituencies within each Stakeholder Group, and the relationship between the Stakeholder Groups and the Council. Mechanisms would also need to be put in place to avoid the creation of duplicative or overlapping constituencies.

Another important aspect to improving inclusiveness and representativeness in the constituency structure is reducing barriers to participation in individual constituencies. A barrier for some entities – particularly in developing countries – may be the cost of joining a constituency. The preliminary report considers solutions to this question.

The report also suggests that the Council develop participation rules for all constituencies, with Board supervision only as necessary to establish principles (e.g., openness, transparency and clarity). The criteria for participation in any ICANN constituency should be objective, standardized and clearly stated. Information about each membership application and the decision should be publicly available. There must be a clear avenue for an applicant to appeal a rejection to a neutral third party.

The Council should also develop clear operating procedures for each constituency to ensure that it functions in a representative, open, transparent, and democratic manner. Mailing and discussion lists should be open and publicly archived (with posting rights limited to members). There should be term limits for constituency officers, so as to help attract new members and provide everyone with the chance to participate in leadership positions. There should be a centralized registry of the participants of all constituencies and those involved in any policy development work, which is up-to-date and publicly accessible.

ICANN should provide dedicated staff support for constituencies to assist with standardization, outreach and the internal work of the constituencies, which can lower constituency costs and fees. ICANN could offer each constituency a "toolkit" of in-kind assistance (as opposed to financial aid) that ICANN is prepared to provide on an "as requested" basis. The toolkit could include, for example, assistance with tracking PDP deadlines and summarizing policy debates, supporting websites and mailing lists, scheduling calls and other administrative duties.

The new model described above raises many questions that could usefully be discussed at the Public Forum in San Juan and commented on via email, including:

- Which three or four broad groupings of stakeholders might best balance the objectives of inclusiveness/representation, effectiveness and efficiency?
- Would four broad Stakeholder Groups of "Registries," "Registrars," "Commercial Users" and "Non-Commercial Users" be an appropriate way to balance these objectives and organize elements of the GNSO's work? Why or why not?

- Would creation of a Stakeholder Group for "Non-Commercial Users," possibly including an Individuals Constituency, overlap with the interests represented by the At-Large Advisory Committee (ALAC) and its supporting structures?
- Is there a reason to consider combining registrar and registry interests in the same Stakeholder Group?
- What should be the extent of coordination among constituencies within each Stakeholder Group?
- What would be the roles and responsibilities of these new Stakeholder Groups? What would be their relationship with the Council?
- Are there specific new constituencies that would enhance the inclusiveness and effectives of the GNSO? For example, would the creation of an Individuals Constituency and/or a Domainers Constituency, as some have suggested, be useful?
- Has the amount of payment been a barrier to entry for all constituencies, or for just some constituencies? Has it hindered business entities from joining?
- How much would the cost have to be reduced (e.g., by administrative support from ICANN) in order to encourage more entities from developing countries to participate?
- Would the Stakeholder Groups need funding? If so, would it be provided by the constituencies or ICANN?

2. GNSO Council

Currently, the Council manages the policy development process through the establishment of task forces on specific subjects. Several concerns have emerged with respect to this process. First, the emphasis on voting at both the task force and the Council level has sometimes made it more difficult for GNSO stakeholders to try and develop common positions. On other occasions, it has shifted the emphasis from analyzing policy problems and developing potential solutions to determining the lowest common denominator and collecting the necessary votes to control the outcome. The result can be deadlock or an outcome that does not address the more pressing issues. Second, there is duplication of effort in that differences that emerge in the work of the task forces are then mirrored in the work of the Council, since in both situations the members vote by constituency. Third, the amount of time and energy that the Council has had to devote to task forces, whether in terms of establishing them, overseeing their work, or debating their conclusions, has left insufficient time for the Council to focus on what is perhaps its most important function – setting the overall strategy for policy development by the GNSO. As the Bylaws state, the GNSO Council is supposed to be responsible for "managing" the policy development process of the GNSO. It does not need to conduct policy development itself.

It is important to re-establish the GNSO's primary mission of managing the policy development process, as well as to open up the process of policy formulation. We would like to see the GNSO move away from a model of policy development based on voting, which can encourage division rather than cooperation, and towards a more collaborative, inclusive approach. We note that other policy development organizations, such as the IETF and W3C, have used the concept of "working groups" to facilitate successful policy development, and that the RIRs use open mailing lists to develop their policies.

The preliminary report suggest several ideas to help the Council move from being a legislative body focused on voting towards a more strategic body with strengthened management and oversight of the policy development process. Above all, the Council should work closely to engage in constructive dialogue with other parts of the ICANN community in order to set the strategic vision for policy development for gTLDs and coordinate the policy development process. The Council's most important functions should be guiding the establishment of working groups and monitoring their progress. The Council should ensure each WG has an appropriate charter and timeline, an experienced and neutral Chair, performs adequate outreach and has adequate technical expertise. Once a WG completes its work, the Council would review its conclusions and could prepare a statement informing the Board on how well the WG performed its function.

As the Council becomes a more strategic and supervisory body, the issue of voting should become less important. There will still be issues upon which the Council may need to vote, such as whether to initiate a policy development process on a certain issue, or whom to elect to the ICANN Board and as GNSO officers. While broad agreement might be able to emerge on more operational questions without voting, that may not always be realistic. As a result, there will still need to be an appropriate mechanism in place for when voting is necessary. Any voting mechanism is of course related to the question of the constituency structure, discussed above and yet to be determined. The voting structure will also be related to the question of how many councilors there will be. If, for example, there were four Stakeholder Groups, and each one elected three members, it would result in 12 councilors. If the NomCom continued to appoint 3 members, then size of the Council would be 15.

Questions for consideration at ICANN's San Juan meeting and for online input include:

- Recognizing the link to the question of constituency structure, what should be the voting structure for a revitalized Council?

- Should weighted voting be eliminated? (If, for example, there were to be four broad new Stakeholder Groups, such as (i) "Commercial Users Stakeholders Group," (ii) Non-Commercial Users Stakeholders Group," (iii) "Registry Stakeholders Group," and (iv) "Registrar Stakeholders Group," what would be the rationale for weighted voting?)

- If weighted voted is eliminated, would it be for all decisions, or just for reviewing WG output on policy development (i.e., a recommendation that the Board might adopt as a "consensus policy")?

- Should there be a voting threshold to determine whether a WG has met its mandate and thus its recommendations should be forwarded to the Board for consideration?

- How many councilors should each Stakeholder Group elect?

- Should the NomCom continue to appoint councilors? If so, how many?

- What process should the Council use to select members for the Board?

3. Working Groups

The Working Group model could become the foundation for consensus policy development work in the GNSO, as well as for other Council activities, constituting an improvement over the current system in which the GNSO Council essentially replicates itself through the task force structure. As discussed above, the current system can lead to inefficiencies and even deadlock. In a more open, inclusive working group setting, participants would be able to analyze and debate problems and potential solutions without feeling that they have to develop or assert a particular, or fixed, "constituency" position.

In order to involve more people in the policy development process, working groups should be open to anyone interested in joining and offering their insights and expertise. This inclusiveness can have significant benefits in terms of being able to develop, and then implement, policies addressing complex or controversial issues. This model can also ensure that all stakeholders have a chance to participate in policy development, even if they do not form a new constituency. While open working groups can offer many benefits in terms of broad participation and support, it is equally important that inclusiveness not compromise effectiveness. A strong, experienced and respected Chair with clear responsibilities and guidelines, appointed by the GNSO, will be a key ingredient of any successful outcome.

Questions for consideration include:
- How would a working group approach be aligned with ICANN's contractual obligations on development of "consensus policies"?
- Are there other models of an organization using consensus-based working groups and decision-making processes that it would be helpful to learn from?
- What kind of operating principles should the GNSO develop for the working groups to promote the development of sound policies and the development of consensus?
- What are the budget implications of moving to a working group model?

4. Policy Development Process (PDP)

The Council should propose updated draft PDP procedures for the Board to approve, which might be able to include greater flexibility on certain aspects. Such a revised PDP could have elements on scoping (including data gathering and public input), policy work (including research and consultations), timelines consistent with the complexity of the tasks (including working group timelines), regular reporting to the Council on milestones, and a final report and public comment period as in the current PDP.

Periodic assessment of the influence of the GNSO, including its policy development work, will be an important component of success and can lead to immediate improvements in the GNSO's ability to make meaningful policy contributions. It would also be helpful for the PDP process to align better with ICANN's strategic plan and operations plan. It is also important to consider how the PDP can align better with ICANN's consensus policies as defined in its contracts with registries and registrars.

Questions for further consideration include:

- What are ways to encourage the PDP process to align better with ICANN's strategic plan and operations plan?

- What are ways to encourage the PDP process to align better with ICANN's consensus policies as defined in its contracts with registries and registrars? Should such consistency also be reflected in the Bylaws?

- How might the GNSO improve the PDP rules?

5. Relationship to Other Parts of ICANN

It is clear that a close and supportive relationship between Staff and GNSO participants is an important component of ensuring that policy development work is consistent with ICANN's priorities and resources. It is also helping to consider ways to improve coordination with, and among, ICANN's other supporting organizations (SOs), the ccNSO and the ASO, and other structures. Consideration might be given, for example, to having a coordination call take place at least a month before each ICANN meeting to discuss the agenda and goals, which could include the Chairs of the three SOs, the Chairs of the GAC and the ALAC, the Chair of ICANN's Board and ICANN's CEO. A more formal process of seeking input from other ICANN organizations on each proposed GNSO policy could also be developed.

6. Conclusions

The BGC WG looks forward to discussing its progress and related questions at the Public Forum and through the public comment process.