

# SUMMARY OF PUBLIC FORUM ON GNSO IMPROVEMENTS

## ORGANIZED BY THE

## BOARD GOVERNANCE COMMITTEE'S GNSO REVIEW WORKING GROUP

The ICANN Board Governance Committee (BGC) created a working group, comprising current and former Board members, to manage the GNSO improvement process. The purpose of the "BGC GNSO Review Working Group" (hereinafter "BGC WG") is to consider the work that has been 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. The Board has asked the BGC WG to recommend to the BGC a comprehensive proposal to improve the effectiveness of the GNSO, including its policy activities, structure, operations and communications.

### BACKGROUND

On 19 June 2007, the BGC WG posted a preliminary report presenting its initial thinking on the questions under review, for discussion with the BGC and the Community at the ICANN San Juan Meeting and for public comment via the ICANN website, see <http://www.icann.org/announcements/announcement-19jun07.htm>. A Public Forum to discuss this preliminary report was held on 25 June 2007 during the ICANN Meeting in San Juan. The discussion was focused, comprehensive and constructive. It used as the starting point the preliminary report and its areas of emerging agreement, potential recommendations, and questions as the basis for determining how best to improve the GNSO's inclusiveness and representativeness, without sacrificing its effectiveness or efficiency.

The Public Forum suggested there was broad support for certain, but not all, changes discussed in the preliminary report:

- Both constituency operations and restructuring can benefit from improvements, but changes in operations should precede changes in the structure. Changes to the constituency structure should await the outcome of the review of other ICANN structures that are now under way, or due to begin soon.
- Formalizing a working group model as the focal point for policy development could enhance the policy development process by making it more inclusive and representative and – ultimately – more effective and efficient.
- 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.

## **KEY POINTS**

The Public Forum was organized into three main parts, drawn from the five sections of the preliminary report: (i) Working Groups, (ii) the Policy Development Process and (iii) the Constituency Structure and GNSO Council.

The subject of working groups was chosen first because of the importance of that question to the topics that would follow. Roberto Gaetano, Chair of the BGC WG, opened the Forum by noting that working groups are at the core of building consensus. If they can work, then it could be possible to develop consensus policies without the need for a complicated, constituency-based voting system. As a result, making the policy development process more inclusive and using working groups as the key element may be even more important than restructuring the Council. He noted that the Council has taken on a more legislative function, with the result of much focus now on the voting power of various blocs and constituencies. This raises questions about whether voting is really necessary to bring forward consensus policies, and whether it is better to see the GNSO return to a more strategic, managerial role. The real question is not the controversial LSE recommendations on changing the voting system but “how to make working groups work.”

### Working Groups

Rita Rodin, a member of the BGC WG, introduced discussion on working groups by describing the challenge as trying to balance two critical elements: eliciting broad international participation in the process of policy development, and achieving a high quality of output and efficiency. She noted that under the ICANN Bylaws registries and registrars are bound to implement consensus policies, and that the current structure has had its ups and down. So the questions are should the GNSO move to a working group model and, if so, what models can we draw from in designing the right principles to can tell people what is expected, and to how help achieve the goals.

Michael Palage spoke favorably of GNSO working groups that have been used, and of getting away from a voting model. If someone disagrees with the majority view, they can submit a minority statement. This gets the GNSO away from a legislative approach, and the BGC WG’s comments point us in the right direction. Philip Sheppard, however, expressed caution that working groups are a good development, but only insofar as they are “appropriate.” It is good to get away from weighted voting, but the decision whether to use a task force or working group should depend on the policy question at issue, with flexibility for the GNSO to decide what is appropriate.

Jeff Neuman asked what is the difference between a task force and a working group, and it was explained that constituencies have voting rights on task forces while working groups are open to anyone and work by building consensus. He suggested that the IETF is a good model for that group, but that in ICANN registries and registrars are contractually bound to implement consensus polices, so the situation is more complex. It

could be a problem that in a working group those that are passionate about a subject can recruit more people to join, and lead to bias towards one position.

Wendy Seltzer said that, as a participant without a vote, she preferred the working group model. The WHOIS Task Force, for example, tended to stalemate around the likely constellation of votes, which led to holdout problems and lack of progress. The WHOIS Working Group, on the other hand, may not have reached consensus on many points, but it did provide a way for everyone to add suggestions. A working group can provide a slate on which people can argue for positions, with the more persuasive ones having more force going forward to the Council for possible adoption as a consensus policy.

Other speakers echoed differences between ICANN and the IETF. Mark McFadden said he supported the model, but ICANN had to think through its adaptation carefully. He noted that it can be hard to peer inside another organization and adopt its model wholesale, especially the IETF where in the engineering community the protocol or engineering either works or does not. The policy development world is very different. In a working group situation, ICANN will be dependent on the quality of the Chair, which may require creating leadership training options with budgetary implications. Maria Farrell said she and colleagues had been using a working group model for several months, “bootstrapping it on the fly.” She suggested making more explicit what a working group means in ICANN, and taking some but not all ideas from the IETF. Thomas Narten reiterated support for moving away from voting and towards a more inclusive approach, based on his experience with the IETF and the RIRs. It is not, however, a panacea, as some working group efforts have failed or do not deliver. Sometimes there was not really agreement among the participants, and there was never going to be agreement. Other times, it may have been the way the group was set up, or the way it was chaired. Hence there could be lessons in applying the IETF model carefully.

Tony Holmes expressed support for a working group model, but the importance of getting the right balance. Voting arrangements are confrontational because of the last reform process, so it is time to move away from that idea and strive for consensus. A key next step is determining the highest priorities for work.

Milton Mueller noted a philosophical problem with using consensus as the touchstone of ICANN’s policy-making because of underlying conflicts of interest. For example, he said it would be impossible to envision VeriSign sitting down with its peers and agreeing to release the .ORG TLD.

Chuck Gomes supported getting away from weighted voting, as is being done in the Committee on New gTLDs. He pointed out that this process can be time consuming, and the participants are volunteers. So a good chair needs good administrative support and a balance of competing views.

The last speaker on this topic, Bertrand de la Chapelle, commended the Joint Working Group with the ccNSO on IDN as an example of what can be accomplished.

## Policy Development Process

Susan Crawford, a member of the BGC WG, introduced the subject of PDP by noting that it is ICANN's contracts with registries and registrars that give it authority. Under certain circumstances, these parties have agreed to do things that are not specifically mentioned in these contracts through adoption of a "consensus policy." The Bylaws, however, mention the GNSO creating policy without referring to "consensus policies." The Bylaws also contain too much prescriptiveness about the PDP requirements. Both problems could be fixed.

Peter Dengate Thrush asked why should the Board resume power to vote on important policy decision when policy making was vested in the GNSO earlier? Susan Crawford clarified that it has always been that ultimately the Board has to adopt a consensus policy. Philip Sheppard asked why people should volunteer their time for policy development if the Board was to make the ultimate decision. Jeff Neuman explained that the Board has a fiduciary duty to the corporation, and not to the volunteers who want to participate. He also pointed out that at the time the PDP was put in the Bylaws, approval for a registry service was part of it, and 90 days was not overly optimistic. Steve Metalitz took the floor to suggest there be nothing in the Bylaws about the PDP because now it is set in stone. He also commended the idea of fact finding and expert research before delving into production of an issues report.

Michael Palage raised the question whether the Board should decide on consensus because some could try and impede the Board from making the right decision, especially those with a financial interest in the outcome. Elliot Noss too raised concern about the Board trying to determine if there was consensus because of the complexity of certain subjects and the diversity of participants with an interest. It is important to see good, smart decisions, and not necessarily the most popular ones, adopted. Thomas Narten suggested that if the goal is as close to consensus as possible, that usually means multiple levels of serious review, perhaps with initial work done at a working group level, where the rules are looser and the people that have the most interest get together. The next step would be a broader call for comments. Then you might have another review at the GNSO level, where there may or may not be voting. As you go higher up in the system in getting approvals, the bar for blocking something should also get higher. The Board level could look broadly and assess whether the new policy is reasonable and went through the process properly, rather than try to second-guess or redo earlier discussions.

Chuck Gomes reiterated that the Board already decides whether consensus policies happen, and that is not changing. The question really is what information does the Board need to make that decision. Also, it is consistent with the Bylaws to have the GNSO be the manager of the process instead of being a policy development/legislative body. But it is also acceptable for the Council to vote, if they want to, on whether they have sufficient consensus on a policy to move it forward to the Board.

## Constituency Structure & GNSO Council

Roberto Gaetano began discussion of this topic by noting that one key issue is the balance of voting power. He said the BGC WG began looking at the problem from the perspective of the LSE idea of forming three large groups, perhaps four. These groups would be formed by the existing constituencies, so it is not a question of abolishing or merging constituencies. It should also be easier to form new constituencies within these broad groups, perhaps one for registrants, working along side non-commercial organizations. Since the initial conception of ICANN, he said, there has been a process for creating new constituencies, but it has never happened. He suggested it might be because it would have altered the voting power of existing constituencies.

One question becomes which groupings make sense, e.g., should registrars and registries be together or separate? Would commercial users be another group? And noncommercial and individual users combine to be a fourth group? The number and kinds of groups are of course open to debate. Another open question is whether there is overlap with the ALAC. These questions would affect also how the Council might be organized, e.g., in terms of composition.

The other key issue relates to participation. Today there is a wide difference among constituencies as to how much they cover their potential membership, how representative they are, how transparent their procedures are, especially with respect to membership. It might be useful, for example, to develop a centralized registry of all participants involved in the ICANN process, and the constituency with which they identify. It will also be helpful for ICANN to provide increased support in terms of staff and resources to support the constituencies doing outreach and their internal work.

Milton Mueller took the floor to say he does not see support for moving away from voting, which encourages people to seek the support of others and build coalitions. Without voting, there is no agreed position for the Board, just a collection of opinions. The idea of combining the NCUC with individual registrants is too complicated to discuss quickly. But generally moving to three or four broad groups would be an improvement, and it can eliminate weighted voting. The groups can just be constituencies, as another layer of structure is unnecessary. The Council voting structure should decide which working groups get formed, who manages that process, and whether the output at to do with the output.

Steve Metalitz said that the premise that ICANN has not added constituencies because that would dilute the voting power of existing constituencies is incorrect because the Board, not the constituencies, are the gatekeepers. So the Board should not blame the constituencies if this has not happened.

Kristina Rosette asked whether the BGC WG intended to give great deference to the revenue-generating registrars and the registries, and effectively group the other constituencies together to pit them against each other internally. She said it should be recognized that this perception is growing exponentially. Roberto Gaetano answered that the report does not say that the four groups would have an equal number of representatives or equal voting weight.

Philip Sheppard said he thought we have gotten to the point where the community may be saying, "No, this is the wrong way to go." Voting has merit because it produces closure. The BGC WG should think in terms of the "public interest" in any structural change, and how it might define that term in its next report. The dynamics are also important in that there are different groups, some affected by the decisions of others making money. There may be common interests, but each has diversity and separate legitimacy. He believes it is unclear how ICANN could look at merging and changing constituencies while the ALAC review is under way.

Wendy Seltzer also spoke about ALAC, indicated that it would be better served if it was part of a stakeholder group in the GNSO working alongside the NCUC where issues often align, and working alongside registries and registrars when interests align there. This is an improvement over simply providing advice. Fewer groups, such the three or four outlined here, would drive towards better consensus, but we must be wary of those would might try and block consensus. All policy should have a sunset period after which it is reevaluated, rather than require a new consensus to change an old policy.

Elliot Noss made three points. First, the GNSO has been an exercise to date in blocking change. The ISPC, the BC and other commercial users should be combined because those two constituencies are effectively one, both representing intellectual property interests, based on their membership, composition, attendance, and participation. As an "ISP guy for many years," he said he was saddened to see ISPs in some cases represented by IP lawyers. Second, he said, the ISPC should be expended to include the tens of thousands of companies that are between the registrants of domain names and the registrars. Third, registry and registrar issues are not the same and they are in very different positions in the distribution chain.

Mark McFadden emphasized that constituencies are not all the same. Some have a direct monetary interest, some have an operational interest, and some have a user interest, etc. We should focus on constituencies self-organizing. He said he didn't like the rest of the proposal. First, inserting a level of stakeholder groups as another layer of management does not solve any problem. Voting is necessary to make decision. We should keep the current structure and think how to make it easier to come up with these new constituencies you identify. Solve that problem and don't layer on a new layer of management inside the organization where you're frankly going to have the same problems.

Tony Holmes said that he is encouraged that the discussion earlier about working groups, which can make things actually happen in the policy development process. He said he is amused when people come along and indicate how to merge constituencies and then give you the reason why they are different and should not be merged. He did not believe a "big bang" approach is the way to fix the GNSO. Rather, immediate improvements in working methods in terms of working groups are helpful, and also a new revolutionary path, within a framework, to develop principles to really make this thing work. ICANN should tackle the things that we can do now and think about the structure later.

Amadeu Abril I Abril said that the constituencies are supposed to represent functions (e.g., VeriSign and MuseDoma), not interests. WE should not multiply political parties within the GNSO, and so we should not have too many levels of intermediation. He said there should not be constituencies, but stakeholders that have functional representation.

Izumi Aizu said he appreciated the inclusion of the individual users into this GNSO's stakeholders' group, but there remain tough questions, especially about ALAC. For the question of consensus and voting, a hybrid model might be possible. The RALOs, for example, in developing internal procedures agreed that we'll try to reach consensus as much as possible consensus and, if not, we can vote.

Mike Rodenbaugh took the floor to say that he is strongly opposed to the notion of merging together the BC, the IPC and the ISPC because other options should be tried first, such as focusing on working groups, modifying the PDP process and trying out ideas like professional facilitators, etc. In addition, GNSO reform should come in conjunction with the reviews of the other SOs and the ALAC. Adding new layers of hierarchy does not seem to be a good idea, and would just further minimize our influence on the process, despite the fact that business users pay the ISP, essentially the bulk of the registration fees that drive the whole process. Combining could also lead our three constituencies to fighting, which is the same reason given earlier for not combining the registries and registrars.

The last speaker, Michael Palage, said he supported the LSE the proposal for a 15 member Council. There are three stakeholder groups: registration authorities, which are the registries and the registrars; business interests; and noncommercial interests. I support a registration authority community because there is already overlapping ownership. I would suggest that the registrars and registries each elect two of the members of the new Council, and together agree on the fifth person. The five business constituency representatives, instead of resulting from a merger of the ISPs, the BC, and the ISPs, would create their own process for selecting these five persons. The five noncommercial members could be elected by the NCUC and the ALAC together. This would not require a new layer of management, but create a new structure that recognizes the autonomy of the existing constituencies. New constituencies could self-form and come forward to join, provisionally, one of these structures. At the end of three years, there would be a determination of whether they were carrying their weight and, if so, they could be recognized formally. In addition, given the ICANN budget derived from gTLD registrants, registrars and registries, what more can ICANN do to expand to global outreach efforts and bring people into the constituencies to help make them more representative.

Robert Gaetano closed the meeting by thanking everyone for their comments. He indicated that the BGC WG would welcome written contributions, including on the questions of improvements to the GNSO-Staff relationship, and the relationship between the GNSO and other ICANN structures.