



The GNSO Intellectual Property Constituency (“IPC”) appreciates this opportunity to provide input on the draft Issues List concerning how to evolve ICANN’s multistakeholder model (“MSM”). The IPC understands that the Issues List is an integral part of the Draft ICANN Strategic Plan for Fiscal Years 2021-2025. The IPC acknowledges and values the remarks of ICANN Board Chair Cherine Chalaby in opening ICANN 63, encouraging the community to seize the 2021-2025 Strategic Plan as an opportunity to address challenges arising from the trends identified throughout 2018, including financial pressures and market uncertainties, Internet fragmentation, security threats, and new technologies.

Initially, the IPC notes its continued concern with ICANN’s approach to stakeholder representation within the GNSO, and particularly on GNSO Council and in certain bodies where GNSO stakeholder representation is prescribed and limited. The IPC is responsible for bringing forward the views and interests of owners of intellectual property worldwide, including those with trademark, copyright, and related intellectual property rights, within ICANN. The IPC represents interests that underpin the functioning of the DNS and which protect Internet users around the world. Despite having this role, the author, inventor and consumer interests that the IPC represents continue to be marginalized through the stakeholder representation structure of the GNSO Council, which presents an unnecessary and artificial barrier to the organic evolution of the MSM. We call on ICANN to revisit its approach to the GNSO “House” and non-commercial / commercial stakeholders groups structures and to consider a more appropriate system of representation for the vital interests represented by the IPC and others investing and innovating in the private sector, protecting consumers, and serving on the front lines of ensuring a secure and stable DNS for users. . This change is particularly vital as many members of the community wear many hats and their interests are becoming more and more cross-sectorial. The notion of “houses” may, in fact, be outmoded.

The IPC also notes its ongoing concern with ICANN’s inconsistent approach to ensuring the success of the MSM with respect to policy development and implementation. Specifically, the IPC continues to have significant concerns with ICANN’s approach to implementation of policy recommendations from the Privacy and Proxy Services Accreditation Issues Working Group (PPSAI). Implementation of these recommendations has been indefinitely delayed by top-down ICANN staff decisions, despite being a GNSO Council and ICANN Board adopted bottom-up multistakeholder consensus policy. The IPC strongly believes that PPSAI Implementation Review Team’s work should resume, particularly with EPDP Phase 1 being complete. ICANN’s decision not to expeditiously implement this consensus policy is actively undermining ICANN’s reputation and credibility, and, more importantly, that of the MSM itself. The IPC calls on ICANN to fully implement this and other adopted but not yet implemented multistakeholder policies, consistent with ICANN’s core responsibilities to its stakeholders and the global Internet community.

Building on the above, the IPC offers three specific examples to illustrate how various identified issues hamper the effectiveness of the MSM.

EXAMPLE 1: Phase 1 of the Expedited PDP (EPDP) on the Temporary Specification for gTLD Registration Data Policy Recommendations for ICANN Board Consideration

This example provides insight into the following issues identified on the Issues List:

- **ISSUE 1: Timing of decision-making: Our processes take too long** – Phase 1 of the EPDP failed to address the critical, time-sensitive issue of access to WHOIS data for the purposes of law and legal rights enforcement. We incorporate the IPC’s comments on the policy recommendations of Phase 1 of the GNSO Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data.¹
- **ISSUE 3: Culture** – There is a culture that has evolved in ICANN that undervalues contributions from business-related interests unless those interests are directly connected to the domain industry. ICANN’s public interest and global remit must ensure a culture of true inclusion. This means inclusion of the various facets of commercial and non commercial interests that are affected by the policies enacted around the DNS. While ICANN’s remit is narrow, its impact is broad and that broad view has become obscured in the siloed and polarized atmosphere of the GNSO. The spirit of compromise, particularly, in the EPDP has devolved to a point where there is very little compromise. Those coming to the table with closed minds, particularly in terms of interpretation of newly enacted laws, stifle the process before it even starts. It affects the ability to honestly negotiate.
- **ISSUE 7: Representativeness** – One of the most controversial aspects of the EPDP arose long before substantive work began, in the charter drafting process. The GNSO Council wasted significant time debating the equitable representation of the GNSO Community on the EPDP Team. The GNSO Council ultimately decided to mirror the completely ineffective and inequitable structure of the GNSO Council in the EPDP Team membership, with the result being that the Intellectual Property Constituency, the Business Constituency, and the Internet Service Providers and Connectivity Providers Constituency were under-represented when compared to all other groups in the GNSO. This ultimately affected the outcome of EPDP Phase 1, with priority issues for these community groups being sidetracked and delayed. The structure of the GNSO Council was not intended to inform representativeness in policy development. Reliance on the Council structure has the “knock-on” effect of setting and codifying relative levels of influence and importance for the concerns of different stakeholder types.
- **ISSUE 9: Consensus** – The IPC still struggles to understand how the outcome of EPDP Phase 1 can be considered to be “consensus” when the positions of several groups were not adequately taken into account due to underrepresentation in the EPDP Team membership. Among other things, it should be clear that informal discussions by e-mail among PDP members can never be considered consensus calls. Similarly, attempts by PDP members to “call consensus” prematurely and always in favor of their own positions need to be actively discouraged. The solution to these is the same – PDP leadership needs to be more proactive in setting consensus call and in rebuffing attempts to call consensus prematurely.

¹ https://www.ipconstituency.org/assets/ipc-position-papers/2019/2019_04April_17%20IPC%20Public%20Comment%20EPDP%20Phase%201%20Final%20Report.pdf.

- **ISSUE 17: Volunteer burnout** – The IPC finds it increasingly difficult to identify community members who are willing and able to sacrifice themselves and their professional work outside of ICANN to intense activities such as the EPDP. It is simply unreasonable to expect volunteers to be able to dedicate hundreds of hours in weekly (or more even more frequent) conference calls at all hours of the day and night. The constant ICANN churn has repelled some of the brightest, creative minds in the space. There has to be a realistic assessment of how community processes work and how work may be better paced and allocated. The continued sense of urgency on every matter leads to burnout.

EXAMPLE 2: The Rights Protection Mechanisms in all gTLDs PDP

This example provides insight into the following issues identified on the Issues List:

- **ISSUE 1: Timing of decision-making** – The IPC believes that this PDP’s processes is taking too long, and that this PDP is failing due to an attrition of knowledgeable, equitable members, so there are limited qualified leaders and PDP members.
- **ISSUE 3: Culture** –
 - Some members of PDP Leadership do not appear to be willing to lead by example, and engage in delay tactics, make personal attacks, encourage or fail to check disruptive behaviour, and fail to enforce the Expected Standards of Behavior. Despite concerns over delay and repetitive discussions, and moreover despite concerns over the co-chairs' failure to timely address disruptive behavior (which appears to be a feature of the leadership structure and its practice of acting by unanimity vs consensus, thereby stifling decision-making²) one co-chair showed a somewhat difficult-to-understand reluctance to shift Phase 2 work to the PDP 3.0 model. Such a stance is indicative of possible non-neutrality and of an unwillingness to lead by example e.g., by seeking to keep timelines and discussions on track.
 - Members of PDP intentionally disrupt progress by belabouring arguments and re-opening discussions long ago decided or concluded, making personal attacks, presenting false or irrelevant data or making false or irrelevant claims
 - PDP members and some of the leadership team appear to be afraid to call out bad behaviour for fear of being attacked on social media, threats of litigation, etc.
 - With regard to capture and counterproductive behavior, the IPC suggests that the MSSSI team review the “Simple Sabotage Field Manual” (https://www.cia.gov/news-information/featured-story-archive/2012-featured-story-archive/CleanedUOSSSimpleSabotage_sm.pdf). This document, though prepared long ago and under different circumstances, presciently identifies numerous behaviors that undermine Working Group progress and effectiveness.

² See 10 Mar 2019 ICANN64 Kobe GNSO Working Session Part 4 transcript, available at <https://static.ptbl.co/static/attachments/200788/1552353012.pdf?1552353012>.

- Chair neutrality (or the lack thereof) is a specific concern that needs to be addressed head-on with regard to certain leadership. Neutrality needs to be specifically emphasized in documenting expectations of Working Group chairs, and reinforced in the charter of all PDPs going forward. When a Chair is not neutral, it is highly corrosive to the process and undermines the legitimacy of the outcomes. This need to be managed throughout the lifecycle of a PDP, with clearly defined roles for the liaison and the Council. It is inappropriate to put the responsibility of managing Chair neutrality on the Working Group members, for several reasons: Since the members are not neutral, nor expected to be, their motives will often be questioned, particularly by groups that may be the beneficiaries of a lack of neutrality. This can then polarize the participants, taking the group off course and further degrading the functioning of the group. Complicating matters in the RPM Working Group, there are three co-chairs that were intentionally picked to represent different interests in order to “cancel out” the potentially biases of the other co-chairs. These co-chairs are frequently acting as non-neutral participants.
- **ISSUE 6: Recruitment** – New members are being recruited to this PDP by interest groups seeking to re-open settled issues and generate dispute. New members are unwilling to skill themselves up by reviewing the long history of rights protection mechanisms in gTLDs. This PDP appears to have a high volume of members, but few members have the necessary expertise or experience to engage meaningfully with matters relevant to the PDP Charter. Having many PDP members is only a good thing when all members are willing to contribute constructively to the PDP’s work; in the RPM PDP, “social loafing” or “free loading” is common. Some members are not participating in the day-to-day policy work, and simply wait to add their “vote” to consensus. This undermines consensus building, since these “participants” have not done any of the work to build consensus, yet could affect the ultimate outcome with their “vote.”
- **ISSUE 7: Representativeness** – The outcomes of this PDP (and others) are easily influenced simply by a recruitment effort on the part of a particular interest group to stack the membership with members holding a particular (often obstructive) view.
- **ISSUE 8: Inclusiveness** – This PDP offers a textbook example of the challenges of inclusiveness in the multi-stakeholder model. The PDP Chairs have expressed on many occasions that they do not feel empowered to stop abusive or disruptive behaviour because they must be inclusive and treat all interventions as valuable. PDP Members are unwilling or unable to raise matters with the Ombudsman or Complaints Officer for fear of retribution by the offending party, and feel they are not supported by PDP Leadership when raising their concerns. There is a tendency to allow all members to “speak their piece” regardless of the quality of that contribution or the likelihood of disruption to the work of the group. The participants need to understand acknowledge and accept (perhaps explicitly through Terms of Participation) from the outset that the Chairs will be taking a firmer hand in this regard, to minimize the likelihood that participants take it personally, feel they are being singled out or even “silenced” (a complaint typically voiced by those who are the least silent...).

- **ISSUE 9: Consensus** – the GNSO Operating Procedures explicitly instruct that consensus is not to be determined numerically, yet the outcomes of this PDP are impacted by large numbers of participants being recruited to support a particular position and to steamroll other views. Among other things, it should be clear that informal discussions by e-mail among PDP members can never be considered consensus calls. Similarly, attempts by PDP members to “call consensus” prematurely and in favor of their own positions need to be actively discouraged. The solution to these is the same – PDP leadership needs to be more proactive in setting consensus call and in rebuffing attempts to call consensus prematurely.
- **ISSUE 10: Precision in scoping work** – The RPM PDP wasted more than one year debating and re-interpreting the Charter Questions which had been adopted by the GNSO Council, but drawn almost entirely from verbatim language from public comments on the Issues Report, without consolidation of related issues, editing of language to make it neutral and non-determinative, or sense checking and error correction. The Charter is structured so that if a proposal was covered by this list of issues in the Attachment to the Charter, then it should be considered by the Working Group and placed for comment in the Interim report. The Charter states: “In public comments to the UDRP Final Issue Report, the RPM Staff Paper and the Preliminary Issue Report for this PDP, various community groups and participants had identified a number of issues that they considered appropriate for review in a PDP. As such, and following its preliminary assessment of the effectiveness of the relevant RPM(s) in each phase of its work, the Working Group should consider the suggestions that have been made to date by the community regarding improvements or modifications to the RPM(s) in question. These community suggestions are attached to this Charter and they are intended to provide a framework and starting point for the PDP Working Group at the appropriate stage in its work, with further modifications, additions and deletions to be determined by consensus of the Working Group.”

This free-for-all approach is stark contrast to the Scope of this RPM Working Group: “[The RPM] Working Group will be expected to have also considered the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed, including to clarify and unify the policy goals.” Further, more guidance is provided in the Charter’ Objectives and Goals: “In addition to an assessment of the effectiveness of each RPM, the PDP Working Group is expected to consider, at the appropriate stage of its work, the overarching issue as to whether or not all the RPMs collectively fulfill the purposes for which they were created, or whether additional policy recommendations are needed, including to clarify and unify the policy goals. If such additional policy recommendations are needed, the Working Group is expected to develop recommendations to address the specific issues identified.”

With respect to what were the “Policy Objectives” of the RPMs, the Charter states they were: “to provide trademark holders with either preventative or curative protections against cybersquatting and other abusive uses of their legally-recognized trademarks? In other words, have all the RPMs, in the aggregate, been sufficient to meet their objectives or do new or additional mechanisms, or changes to existing RPMs, need to be developed?”

As a result, some Working Group members have utilized this to assert proposals and positions that are out of scope as they do not look at whether an RPM is effective and/or to unify and clarify the RPM's policy goals. The Charter Issues list purportedly set out the scope of work of the PDP. In this instance, lack of clarity, neutrality and fact-checking in the Charter Questions, compounded by the inexperience of many new members, the fact that the unclear and/or pre-determinative charter question language came from the very working group members who were being tasked with re-interpreting it, a lack of trust and a culture of divisiveness and disruptiveness has had a serious impact on the PDP workplan and timeline. The GNSO Council must be held to a higher standard in refining and providing appropriate clarity at the outset to PDP Working Groups in the form of an properly developed charter.

- **ISSUE 11: Accountability** – Each GNSO PDP has a GNSO Council-appointed liaison, whose primary role is to report matters of concern back to the GNSO Council on a regular basis. This person's role is hampered by PDP leaders who cannot agree between themselves on the existence or severity of a problem or obstacle, who are afraid to identify obstacles and challenges because of the impact that this has on their personal reputation in the community, and who are unwilling to speak openly and frankly for fear of retribution from disgruntled PDP members.
- **ISSUE 12: Transparency/ISSUE 13: Costs**– significant delays in the work plan of this PDP due to inadequate Charter Questions, disruptive behaviour, and complaint processes have unquestionably led to a grossly inflated drain on ICANN policy development resources, as has the refusal of some WG members, supported (or at best not challenged by their aligned co-chair(s)) to accept the input of other WG members from a different, and directly relevant, area of interest as to the realistic prospects of gathering the data being sought. As a consequence , tens of thousands of dollars, and hundreds of WG man-hours, have been spent on “data-gathering” surveys which have resulted in de-minimis responses generally and from contracted parties in particular, even though a number of participants in the WG (including those from those contracted parties) had flagged this as an almost-certain outcome from the outset. The community has no means at present to ascertain the actual cost of these delays; the cost of policy support must be ascertainable and published as a motivator for staying on track and reaching consensus. Also related to transparency is the responsibility of PDP Leadership to be transparent and accountable to the GNSO Council, being willing to critically and honestly identify problems and challenges, and raise these in a timely manner with the GNSO Council liaison.
- **ISSUE 17: Volunteer burnout** – The GNSO Council initiated the RPM PDP on 18 February 2016.³ More than three years later, and only the most dedicated members remain, as this PDP has not yet even concluded Phase 1 of its work.

³ <http://gns0.icann.org/en/council/resolutions#20160218-3>.

EXAMPLE 3: The IGO-INGO Curative Rights PDP Working Group

This example provides insight into the following issues identified on the Issues List:

- **ISSUE 3: Culture** – This PDP Working Group commenced in an air of distrust and lacked meaningful participation from the primary group of stakeholders affected by the policy under development, namely IGOs. This was the direct result of the IGO experience from the Protection of IGO INGO Identifiers in all gTLDs WG, where IGOs did not feel that their voice was adequately considered and struggled to even have their minority statement included in the Final Report. Viewed as an uphill battle from the start, with no meaningful chance of successful consensus, the pursuit of formal GAC Advice was clearly the preferred option to this PDP for IGOs.
- **ISSUE 7: Representativeness** – Even a cursory review of the weekly attendance logs and the email listserv for this WG clearly establishes participation by only a handful of professional domain name registrants. Moreover, certain of those members represented only themselves and their own interests, notwithstanding eleventh-hour efforts to join formal ICANN constituent bodies at prior to the WG consensus call.
- **ISSUE 8: Inclusivity** – Attempts made by the independent Chairs to orderly marshal this WG were met with a Section 3.7 Appeal by one particular disgruntled member calling for inter alia “appointment of a completely neutral and independent Chair.”⁴
- **ISSUE 10: Precision in Scoping** – Wide open charter questions are a problem and Chairs need to be empowered to close them out if a practical solution is not possible. Even when the scope is reasonably clear, as in the IGO-INGO WG, participants will nevertheless attempt to widen the scope. The result within this WG was that an entire recommendation had to be referred by the GNSO Council to a completely separate WG for reconsideration and analysis.
- **ISSUE 14: Trust** – This WG lacked participation from a key stakeholder group, namely IGOs, due to lack of trust—not only a lack of personal trust, but also a lack of trust in the ICANN multistakeholder process. Much of the conflict within this WG derived from the failure to accept a simple fact: In rare circumstances when IGOs bring curative rights cases, it’s because the public is being defrauded, not because the IGO wants to acquire or deprive others of potentially desirable or valuable domain registrations for acronyms.
- **ISSUE 17: Volunteer Burnout** – Again, the attendance records for this WG clearly show that this it suffered from a very low participation rate. Apart from the same handful of professional domain name investors, the modicum of participants from other stakeholder groups averaged less than ten calls per year. A multitude of concurrent policy matters, plus the rather discrete nature of the policy issues in this WG, all contributed to low participation and high drop-off.

⁴ <https://community.icann.org/download/attachments/79429635/GK%20appeal%20document%20-%2011%20Jan%202018.pdf?version=1&modificationDate=1516383660000&api=v2>

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Most importantly, this example provides insight into an additional issue that should be added to the Issues List:

- **PROPOSED NEW ISSUE: Capture and Railroad**ing – No prior WG has ever featured such a scathing minority statement (especially from a former Chair) or strong indictment with respect to capture.⁵ The final recommendations from this WG squarely support these capture allegations.

There are many other examples that could be provided, but for efficiency the IPC prioritises the three above due to the direct impact that these have on the intellectual property community and on consumer protection.

The IPC appreciates this opportunity to provide input on the draft Issues List concerning how to evolve ICANN's MSM. We welcome the opportunity to further engage with ICANN to bring about an improved MSM.

Respectfully Submitted,

Intellectual Property Constituency

⁵ https://gnso.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf

("After four years of effort this WG has utterly failed to provide a policy recommendation that reasonably resolves the central challenge it confronted; that being how to equitably resolve the inherent tension between the right of domain registrants to seek de novo review of the decision of a curative rights process (CRP) in a court of mutual jurisdiction, with the recognized scope of immunity from judicial process enjoyed by IGOs. *Instead, it has produced a policy recommendation that grants excessive favoritism to registrant rights by effectively obliterating any shred of IGO immunity and, in doing so, casts ICANN into a role that is far beyond its proper remit.* It is virtually ensured that this central recommendation will not be adopted ICANN's Board, both on its own lack of merit and after the inevitable receipt of harsh and contrary GAC advice, in the event that GNSO Council elects to send it on to the Board – which, as I explain below, Council should refrain from doing.") (emphasis added).