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Sent: Monday, January 08, 2018 10:48 AM
To: iot@icann.org; aloup@usc.edu
Subject: [EXTERNAL] [IOT] Thoughts on comments regarding challenges to Consensus Policy

Dear members of the IRP IOT:

In an earlier email today, I promised to send along some thoughts on public comments we received regarding challenges to Consensus Policies.

Here are my thoughts, made in my role as a participant, not as team lead.

Also, I paraphrase the comments in places for ease of reading but urge you to read the comments themselves as submitted.

Rewriting consensus policy:

1. GNSO - NCSG ([See page 6 of their comments, which says, among other things:](https://urldefense.proofpoint.com/v2/url?u=https-3A_forum.icann.org_lists_comments-2Dirp-2Dsupp-2Dprocedures-2D28nov16_pdfLoCFUVHjfN.pdf&d=DwIFAg&c=FmY1u3PJp6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=kbiQDH54980u4nTPfwdloDLY6-6F24x0ArAvhdeDvvc&m=w_K4Ja2Q9uzHl6pIVhifpSeISWxQIx7sZcm_n1FO0ik&s=uJB4N0FXdgQvgal6pIIPD89E31PPK4wdiAo4n-B8bkE&e=):</p></div><div data-bbox=)

We've stepped into the IRP as a Constitutional Court without adequate consideration of the limitation of their powers. Like appellate courts in countries, the IRP should only be judging what and what is not consistent with ICANN Bylaws. The hard work of rewriting those sections of the Consensus Policy that were invalidated below to the communities that created the rules in the first place.

Accordingly, the IRP Panels should send invalidated portions of Consensus Policies back to the ICANN Board which should send it back to the Supporting Organization that created them. Such must be the rules written into the IRP Supplementary Procedures "Standard of Review" (Section 11).

My view: I think the intent of this comment is consistent with the limited IRP Panel authority spelled out in Bylaw 4.3(o)(iii) - specifically, whether ICANN action or inaction violates articles or bylaws. Thus no change to the draft procedures seems needed based on this comment.

2. Fletcher, Heald & Hildreth comments (https://urldefense.proofpoint.com/v2/url?u=https-3A_forum.icann.org_lists_comments-2Dirp-2Dsupp-2Dprocedures-2D28nov16_pdfAkzQ0N4xz2.pdf&d=DwIFAg&c=FmY1u3PJp6wrcrwl3mSVzgfkbPSS6sJms7

[xcl4I5cM&r=kbiQDH54980u4nTPfwdloDLY6-6F24x0ArAvhdeDvvc&m=w_K4Ja2Q9uzHI6pIVhifpSeISWxQIx7sZcm_n1FO0ik&s=5ACzQP8UqwE-myWLSZZ2mFUduFudGuu1vYOuy2EwYMc&e=\)](https://www.icann.org/en/about/governance/consultation/consensus-policy-challenge/comments/2014/04/01/01-14-en.html#comment-1434):

See pages 5 - 9 of their comments on these points:

- a. On notice, page 6 - 7 - Their comment (essentially to provide actual notice to the SOs, their constituent bodies, and the ICANN community that developed the consensus policy under challenge) seems reasonable insofar as the SOs go, along the lines of Notice that we have discussed already - we would look to Sidley for language and they can consider suggested text from this comment.
- b. On mandatory right of intervention (pages 7-8) - This also seems reasonable along the lines of intervention we have discussed already, but in my opinion the intervention option should be given to SO(s) (chairs) involved, not beyond that (the comment asks that those whose interests are represented in or affected by the consensus policy also be able to intervene). Beyond that, the comment goes on at page 7 to make four specific suggestions: (1) SO Council involved can participate in selecting IRP panelists; (2) these 'parties' can submit 'friend of the IRP' briefs; (3) these 'parties' can participate in hearings; and (4) the 'parties' should have similar response length-rights to claimants. In my view the role in selecting panelists would be unworkable and the others should be up to the panel's discretion.
- c. On limits on panel action on overturning consensus policy (pages 8-9):
 - i. On this one, I think the four numbered recommendations on page 8 should not be accepted. Those are, roughly, for the IRP panel to (1) identify specific portions of the Consensus Policy that it found violative; (2) indicate what portions of the Consensus Policy are not violative; (3) remand the Consensus Policy to the ICANN Board for review with the SO Council involved; and (4) indicate whether the Panel recommends that the Consensus Policy should be suspended pending Board and Supporting Organization review/rewriting.

While recommendation #1 is close, even it seems too much - the panel has authority to determine whether a covered action or inaction is or is not a violation of articles or bylaws. The panel can certainly give its reasons and those reasons may throw doubt on a consensus policy in whole or in part. But it is up to ICANN and parties responsible for consensus policies to decide what happens next. In my opinion the panel should stick within bylaw 4.3(o)(iii) - declare whether an action or inaction violated the articles or bylaws. Whether such action or inaction imperils the policy altogether can be sorted by ICANN and the community in the usual course. In other words, the consequences of the panel's findings should be up to ICANN and the community, not the panel.

Best regards,

David