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Submitted to: comments-bylaws-amendments-31jul15@icann.org

September 12, 2015

Ms. Marika Konings  
Senior Director, Policy Development Support  
Team Leader for GNSO  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: Proposed ICANN Bylaws Amendments - GNSO Policy & Implementation  
Recommendations

Dear Ms. Konings:

The International Trademark Association (INTA) is pleased to submit the attached comments regarding the Proposed ICANN Bylaws Amendments - GNSO Policy & Implementation Recommendations.

INTA supports implementing these new policies and procedures in order to provide more flexibility and responsiveness to the growing needs of the community. We thank the ICANN Board and the GNSO Policy and Procedures Working Group for their efforts in facilitating these much needed changes.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at 202-261-6588 or at [lschulman@inta.org](mailto:lschulman@inta.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a prominent initial "E" and "S".

Etienne Sanz de Acedo

# INTA Comments to the Proposed ICANN Bylaws Amendments GNSO Policy & Implementation Recommendations

September 12, 2015

The International Trademark Association (INTA) is pleased to provide these comments to the proposed ICANN Bylaw Amendments. These comments include a summary of the proposed amendments and background to aid readers in understanding INTA's position.

## I. Background

During its June 24, 2015 meeting, the Generic Names Supporting Organization (GNSO) Council unanimously adopted the recommendations of the GNSO Policy & Implementation Working Group<sup>1</sup> regarding GNSO policy and implementation. These recommendations include three proposed new GNSO processes, two of which are (1) the GNSO Guidance Process (GGP) and (2) GNSO Expedited Policy Development Process (EPDP).<sup>2</sup> The adoption of these recommendations requires changes to ICANN's Bylaws subject to ICANN Board approval.

The proposed changes will be accompanied by a GGP and EPDP Manual, which will be incorporated into the GNSO Operating Procedures following adoption of the changes. These new processes are meant to provide the GNSO Council with flexibility to address policy issues through formal processes to be used in the following situations:

- GGP: to be used when the GNSO Council intends to provide guidance that is required to be considered by the ICANN Board, but not expected to result in new contractual obligations for contracted parties. Guidance through this process means advice that has a binding force on the ICANN Board to consider the guidance and can only be rejected by a vote of more than 2/3 of the Board. It will typically involve clarification of, or advice on existing gTLD policy recommendations. An example is when the ICANN Board requested input on the .brand registry agreement.
- EPDP: to be used when the GNSO Council intends to develop recommendations that would result in new contractual obligations for contracted parties that meet the criteria for "consensus policies" and the following qualifying criteria:

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<sup>1</sup> The Working Group (WG) was created by the GNSO Council in 2013 to consider the principles that should be considered in GNSO policy and the framework for implementation of such policy. The WG issued an Initial Report for public comment in January 2015. On June 2, 2015, the WG issued its Final Report containing its recommendations, which includes a set of policy and implementation principles and requirements to the GNSO Council: <http://gns0.icann.org/en/drafts/policy-implementation-recommendations-01jun15-en.pdf>.

<sup>2</sup> The third process recommended by the WG is a GNSO Input Process to provide feedback on non-gTLD policies.

1. to address a narrowly defined policy issue that was identified and scoped after the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or
2. to provide new or additional recommendations on a specific policy issue that has been substantially scoped previously such that extensive, pertinent background information already exists or as part of a previous PDP that was not completed.

**II. Summary of Proposed ICANN Bylaws Amendments – GNSO Policy & Implementation Recommendations**

**1. Addition of Language Regarding the Expedited Policy Development Process (EPDP) and GNSO Guidance Process (GGP)**

Amendments to Bylaws Paragraph 9 ( . . . “The voting thresholds described below shall apply to the following GNSO actions:”

	<b>Action</b>	<b>Vote Required</b>
l. <sup>3</sup>	Initiation of an Expedited Policy Development Process (EPDP)	Affirmative vote of a GNSO Supermajority <sup>4</sup>
m.	Approve an EPDP Team Charter	Affirmative vote of a GNSO Supermajority
n.	Approval of EPDP Recommendations	Affirmative vote of a GNSO Supermajority
o.	Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties	Where an ICANN contract provision specifies that a “2/3 vote of the council” demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded
p.	Initiation of a GNSO Guidance Process (GGP)	Affirmative vote of more than 1/3 of each House or more than 2/3 of one House
q.	Rejection of initiation of a GGP requested by the ICANN Board	Affirmative vote of a GNSO Supermajority

<sup>3</sup> These letters refer to the subparagraph lettering in the Bylaws.

<sup>4</sup> A “GNSO Supermajority” is defined in the Bylaws as “(a) 2/3 of the Council members of each House, or (b) 3/4 of one House and a majority of the other House.”

r.	Approval of GGP recommendations	Affirmative vote of a GNSO Supermajority
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With respect to these voting thresholds, INTA generally agrees with the voting thresholds identified in the amendments. Specifically, under the current GNSO Council voting structure, the Council can initiate a standard Policy Development Process (PDP) with a greater than 33% vote of both houses or a 2/3 majority of one house. Requiring a supermajority to initiate an EPDP, or adopt a Charter or Recommendations stemming from an EPDP, makes sense in this context, given its expedited nature indicating that the issue is not particularly contentious. If the issue is indeed contentious, it would be difficult to garner the necessary supermajority and the issue would likely be designated for a standard PDP.

Similarly, because the GGP is limited in scope and cannot ultimately affect material changes to a contracted party obligation, INTA expects issues addressed through a GGP to also be relatively uncontroversial, again making the supermajority voting threshold appropriate. The threshold for initiating a GGP of 1/3 majority per house or 2/3 majority of both houses also seems sensible, as it is akin to the initiation of an issue report, which currently requires either a greater than 25% vote of both houses or a simple majority of one house.

**2. Amendments to Bylaws by adding “New Annex A-1 GNSO Expedited Policy Development Process” and “New Annex A-2 GNSO Guidance Process”:**

Please note that New Annex A-1 has been added to describe the EPDP; New Annex A-2 provides the GNSO Guidance Process and it mirrors New Annex A-1. INTA’s comments below apply to both Annexes.

The GNSO Council may invoke the EPDP only in the following circumstances:

1. to address a narrowly defined policy issue that was identified and scoped after the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or
2. to create new or additional recommendations on a specific policy issue that has been substantially scoped previously such that extensive, pertinent background information already exists (such as in an Issue Report for a possible policy development process that was not initiated) or as part of a previous PDP that was not completed.

If there is a conflict between the PDP Manual and this Annex A-1, the provisions of Annex A-1 shall prevail.

## Section 1. Required Elements of a GNSO EPDP

*[Minimum Requirements:]*

- a) Formal initiation of the GNSO EPDP by the GNSO Council, including an EPDP scoping document;
- b) Formation of an EPDP Team or other designated work method;
- c) Initial Report produced by an EPDP Team or other designated work method;
- d) Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e) GNSO Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f) EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g) Board approval of EPDP Recommendation(s).

**INTA Position:** INTA voices its support and agrees with the Section 1 amendment to the Bylaws.

## Section 2. Expedited Policy Development Process Manual

*[Summary:]* The GNSO shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO Policy Development Process Manual (PDP Manual). The EPDP section(s) of the PDP Manual shall contain specific additional guidance on completion of all elements of an EPDP, and that the PDP Manual (and any amendments thereto) are subject to a minimum 21 day public comment period and Board oversight and review.

With respect to the EPDP Manual, INTA agrees with the maintenance of and addition to the GNSO Policy Development Process Manual as proposed.

## Section 3. Initiation of the EPDP

The Council may initiate an EPDP as follows:

*[Summary:]* May only be initiated by an affirmative Supermajority vote of the Council and must be accompanied by an EPDP scoping document, which is expected to include, at a minimum, the following information:

1. Name of Council Member / SG / C;
2. Origin of issue (e.g., previously completed PDP);

3. Scope of the effort (detailed description of issue/question the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP (i.e., how the EPDP will address), including a listing of: (i) a narrowly defined policy issue that was identified and scoped after the ICANN Board's adoption of a GNSO policy recommendation or the implementation of such an adopted recommendation, or (ii) new or additional policy recommendations on a specific GNSO policy issue that had been scoped previously as part of a PDP that was not completed or other similar effort, including relevant supporting information in either case;
5. Opinion of the ICANN General Counsel as to whether the issue proposed for consideration is properly within the scope of ICANN's mission, policy process and the role of the GNSO;
6. Proposed EPDP mechanism (e.g., WG, DT, or individual volunteers);
7. Method of operation, if different from GNSO Working Group Guidelines;
8. Decision-making methodology for EPDP mechanism, if different from GNSO Working Group Guidelines;
9. Target completion date.

The Final Recommendation included the additional requirement of including the opinion of ICANN staff and their rationale as to whether the Council should initiate the EPDP on the issue and also commented that any additional information that can facilitate the work on the EPDP, such as information that should be considered and/or other parties that should be consulted, should be provided as well.

**INTA Comment:** INTA respectfully disagrees with this proposed requirement. We believe the initiation of an EPDP should be council led and not staff led. While INTA certainly recognizes the expertise and dedication of ICANN staff, certain matters (such as this one), should be left to the community as a whole, and in particular, to the GNSO council.

#### Section 4. Council Deliberation

[*Summary:*] Upon receipt of an EPDP Final Recommendation(s) Report, the Council chair will (i) distribute the report to all Council members; and (ii) call for Council deliberation in accordance with the PDP Manual. Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Art. X, Sec. 3, paras. 9 n-o, as supplemented by the PDP Manual.

**INTA Comment:** INTA agrees with Section 4 regarding Council deliberations.

## Section 5. Preparation of the Board Report

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO Council, a Recommendation(s) Report shall be approved by the GNSO Council for delivery to the ICANN Board.

**INTA Comment:** INTA agrees with Section 5 regarding preparation of the board report.

## Section 6. Board Approval Processes

[*Summary:*] The ICANN Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably no later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the recommendations shall proceed as follows:

- a) Any EPDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than 2/3 of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board is sufficient to determine that such policy is not in the best interests of the ICANN community/ICANN.
- b) If the Board determines that the proposed EPDP Recommendations are not in the best interests of the ICANN community/ICANN, the Board shall submit in a report to the Council (the “Board Statement”) the articulated reasons for its determination.
- c) The Council shall review the Board Statement for discussion with the Board as soon as feasible after receipt of the Board Statement, which shall be discussed with the Board by a method determined by the Board (e.g., by teleconference, e-mail, etc.).
- d) At conclusion of the discussions identified in (c) above, the Council shall meet to affirm or modify its recommendation and communicate that conclusion (the “Supplemental Recommendation” or “SR”) to the Board, including an explanation for the current recommendation. If the Council is able to reach a GNSO Supermajority Vote on the SR, the Board shall adopt the recommendation unless more than 2/3 of the Board determines that such recommendation/policy is not in the interests of the ICANN community/ICANN. For any SR approved by less than a GNSO Supermajority Vote, a majority of the Board is sufficient to determine that the recommendation/policy in the SR is not in the best interest of the ICANN community/ICANN.

**INTA Comment:** As it relates to the Board approval process, INTA believes that the voting record should be made public so that the process is transparent and that the Board should provide its rationale for its decision in the Board Statement. Although the language used in paragraph d above matches that proposed in the Final Report, INTA considers that the word “guidance” as used in this paragraph should be replaced by either “policy” or “recommendation”, as marked-up above. The EPDP results in policy

recommendations, not guidance, and thus any Supplemental Recommendation is also policy. Use of the term “policy” would mirror the existing language of Annex A dealing with the PDP and more properly reflect the true nature of the output of the EPDP.

#### Section 7. Implementation of Approved Policies

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN staff to work with the GNSO Council to create a guidance implementation plan, based upon the guidance recommendations identified in the final EPDP Recommendation(s) Report.

#### Section 8. Maintenance of Records

Throughout the EPDP, from initiation to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments For a, EPDP Discussions, etc.).

#### Section 9. Applicability

The procedures of this Annex A-1 shall be applicable from [date] onwards.

**INTA Comments:** INTA agrees with new Sections 7, 8 and 9 and supports them.

### **3. Amendments to Bylaws by adding “New Annex A-2 GNSO Guidance Process”:**

**INTA Comments:** The proposed New Annex A-2 largely mirrors New Annex A-1 and the comments above apply equally to both.

### **III. INTA General Comments**

INTA commends the GNSO Policy & Implementation Working Group for its diligent and thorough work in developing its valuable improvements to the GNSO policy development and implementation process. Insofar as these recommendations require the amendment of ICANN’s Bylaws, INTA generally agrees with a majority of the amendments proposed. With respect to the Board Approval Process at section 6d, INTA considers that the language should be amended to more properly reflect the fact that any Supplemental Recommendation resulting from an EPDP is a policy recommendation and not mere guidance. Lastly, with respect to the Board approval process, the voting record should be made public, particularly where an EPDP is rejected.

Finally, while this is not a matter for the Bylaws, INTA considers that with respect to the initiation of a GGP or EPDP, the relevant section of the PDP Manual should also indicate that if the Council requests the advice of ICANN staff, then staff shall comply expeditiously.

## **About INTA**

INTA is a 137 year-old global not for profit association with more than 5,700 member organizations from over 190 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.