POLICY VERSUS IMPLEMENTATION – DRAFT FRAMEWORK

Executive Summary:
- Mainly as a result of discussions stemming from implementation related issues of the new gTLD program, there is increased focus on which topics call for policy and which call for implementation work, including which processes should be used, at what time and how diverging opinions should be acted upon.
- In order to facilitate these discussions, ICANN has developed a draft framework (see annex) for community discussion that identifies a number of steps and criteria that might facilitate dealing with similar questions in the future.
- This paper, in addition to the draft framework, identifies a number of questions that the community may want to consider further in this context, as well as a couple of suggested improvements that could be considered in the short term.
- This paper and the draft framework are largely inspired by the experiences in the gTLD space, but the framework, or parts of it, might also be useful or applicable in other areas.
- While developing a bright-line rule as to what is policy or implementation may not be possible, the hope is that by developing clear processes and identifying clear roles and responsibilities for the different stakeholders, it will become easier to deal with these issues going forward and allow for broad participation and involvement.

Introduction

There are multiple kinds of "policy" within the ICANN world. There are formal policies developed through the policy development processes as set forth in the Bylaws. There are operational policies generally not subject to a PDP or considered implementation, such as the Conflicts of Interest Policy, but for which public comment is sought and considered (see ATRT Rec 6 Paper for further details). Finally, there are general practices that are sometimes referred to as "little p" policies or more accurately "procedures", such as the 30-day public comment requirement for Bylaw changes. Within this category again there are a variety of considerations. There could be established practices, for example, on topics that although within scope of a policy development process (PDP) have not resulted in a formal recommendation to the Board that could serve as authoritative "Policy." In some of those instances, for example vertical integration or registrar accreditation procedures, ICANN identified a path forward and if a policy recommendation on these topics were to later arise through a PDP, ICANN would then consider how that policy might impact or require change to established practice(s) (resulting in "Policy").

One area that is ripe for further discussion within the ICANN community is identifying the proper process to follow when there are changes to policy recommendations that have already been adopted by the Board, or to the proposals related to the implementation of approved policy recommendations. Questions have been raised about when those issues need to be vetted using a new PDP and when it would suffice to use public comment to vet a proposed change for public comment and for the Board and/or staff to act on that based on the comment received. Such questions arose, for example, during the evolution of the applicant guidebook for the New gTLD Program, and also during the negotiation of key contracts such as the .com and .net registry agreements regarding the impact of potential incorporation of a "thick" Whois registry model.

Another, associated issue is when resolution of a new issue should be supported by a consensus of

the ICANN community, and when an issue arising from the implementation of a policy may be effectuated by the ICANN Board or ICANN Staff upon taking a range of advice even if there is no consensus within the ICANN community.

In order to better deal with the issues outlined in this paper, ICANN Staff has outlined a number of proposed principles to serve as a basis for this discussion as well as developed a proposed framework which can be found in the annex to this paper.

Proposed Principles

A proposed list of principles to guide these discussions could be:

1. ICANN coordinates policy development that is reasonably and appropriately related to the technical functions of the allocation and assignment of domain names, IP addresses, and protocol port and parameter numbers, and the operation and evolution of the DNS Root name server system.

   Where a policy will have a material impact on multiple Internet stakeholders, the ICANN Board seeks to determine whether there is a consensus amongst those Internet stakeholders before approving the policy. The determination of whether a consensus is present should consider the perspectives of all Supporting Organizations (SOs) and Advisory Committees (ACs) that have weighed in on the issue, not just the one where the policy originated.

2. ICANN has supporting organizations with specific responsibilities for areas of ICANN's policy development, including:

   Generic Names Supporting Organization (GNSO) - responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

   Country Code Names Supporting Organization (ccNSO) - responsible developing and recommending to the Board global policies relating to country-code top-level domains.

   Address Supporting Organization (ASO) - responsible for advising the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

   These supporting organizations have processes to determine whether consensus has been reached as applicable to their respective SO on a proposed policy before providing a report to the Board.

   The Bylaws also recognize the important roles of advisory committees in the policy processes, including:

   Governmental Advisory Committee (GAC) - considers and provides advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

   Security and Stbility Advisory Committee (SSAC) - advises the ICANN community and Board

on matters relating to the security and integrity of the Internet's naming and address allocation systems. In addition, SSAC makes policy recommendations to the ICANN community and Board.

At Large Advisory Committee (ALAC) - considers and provides advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate.

Root Server System Advisory Committee (RSSAC) - advises the Board about the operation of the root name servers of the domain name system.

3. Policies might apply to certain operational activities (as addressed in the ATRT Rec 6 Paper), or they might apply to Internet stakeholders such as gTLD registries and accredited gTLD registrars.

4. When a policy applies to ICANN stakeholders - it could be expressed in high level terms such as a principle or high level requirement[1]. For example, the new gTLD policy recommendations approved in June 2008 included:

Principle D: A set of technical criteria must be used for assessing a new gTLD registry applicant to minimize the risk of harming the operational stability, security and global interoperability of the Internet.

A requirement: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.

ICANN staff will typically publish information on a proposed implementation of the principle or requirement - e g., the set of technical criteria, or the algorithm used to determine whether something is confusingly similar. The implementation information is published for public feedback, and the implementation is refined. ICANN may continue to refine the implementation of the requirement over time as more experience is gained - without having to go back to a requirement defined in the policy as recommended, so long as public comment is solicited with regard to those proposed implementation refinements. The community can assess the success of the implementation against the requirement.

In the case of GNSO PDPs, a recent development that originated from the overhaul of the PDP process is to form Implementation Review Teams[2], which consist of members of the working group (WG) that developed the policy recommendations who are tasked to provide input and feedback as necessary to ICANN Staff as they develop the proposed implementation plan. This

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[1] Ideally policy recommendations contain as much detail as possible so that the implementation path is clear. However, experience has learned that this is not always the case. This can be the result of various circumstances, e.g. PDP WGs do not necessarily have the legal and technical expertise to anticipate all the possible information that needs to be provided to ensure a smooth implementation; there is only agreement on the high level principles and the details are punted to the implementation phase.
[2] This new concept of Implementation Review Teams applies to all pending PDPs, but not to PDP's that were conducted under the prior PDP rules.

has provided a more collaborative environment in which Staff can develop the proposed implementation, instead of working in a silo trying to guess in certain cases what was meant with a policy recommendation.

A further example are the proposals under discussion in the context of the Internationalized Domain Name (IDN) ccPDP. The latest draft recommends to:

- Review the proposed policy within five years after implementation or at such time warranted by extraordinary circumstances. In the case such a review results in recommendation to amend the policy, the ccPDP rules as defined in the ICANN Bylaws apply.
- Verify the implementation - It is recommended that the ccNSO monitors and evaluates the planned implementation and the ccNSO Council reviews and approves the final planning, before implementation by staff.
- A Permanent IDN ccTLD Advisory Panel is appointed to assist and provide guidance to ICANN staff and the Board on the interpretation of the overall policy in the event the overall policy does not provide sufficient guidance and/or the impact of the policy is considered to be unreasonable or unfair for a particular class of cases.

5. When a policy applies to a set of Internet stakeholders such as gTLD registry and gTLD registrars, the implementation of the policy is typically achieved through the agreements that ICANN has with those stakeholders. ICANN also manages a contractual compliance function to ensure that the stakeholders are complying with their agreements (including the policies incorporated into those agreements).

Through its contracts ICANN has the ability to add new policies or change policies during the term of a gTLD registry or gTLD registrar agreement. The contractual mechanism to do this is called "Consensus Policies", and there are defined procedures in the Bylaws for developing and approving such policies. The current set of Consensus Policies is available here: http://www.icann.org/en/resources/registrars/consensus-policies.

In order to ensure compliance with a policy requirement, it is beneficial to include implementation details in the policy recommendation(s), and for that implementation guidance to also be part of the consensus policy as incorporated into the relevant contracts and/or agreements. This ensures that ICANN can clearly determine whether the policy is being followed.

For example ICANN has a transfer policy that aims to provide a straightforward procedure for domain name holders to transfer their names from one ICANN-accredited registrar to another. The policy also provides standardized requirements for registrar handling of such transfer requests from domain name holders. Recently, the GNSO Council adopted a new set of recommendations to improve and clarify the transfer policy and at the same time formed an Implementation Review Team to support ICANN Staff in the development of the implementation plan for these recommendations to ensure that the proposed implementation is consistent with the intent of the policy recommendations. Even though the recommendations themselves contain implementation details, it is expected that further questions and issues will arise that will need community input as ICANN Staff starts working on the proposed implementation.

6. Where policies are documented:

Current policy is documented via a range of methods currently, including:
- The ICANN Bylaws
- Registry agreements
- Registrar accreditation agreement (clause 3 encapsulates much of the existing WHOIS policy and is expressed in contractual terms)
- Consensus Policies http://www.icann.org/en/resources/registrars/consensus-policies

One area of improvement may be to clearly separate policies from documents such as the registrar accreditation agreement (RAA), so the community can clearly assess and help evolve current policies, although clearly the RAA and other contracts would need to be aligned with the new policies. For example, the WHOIS Review Team asked for all Whois policies to be consolidated in one place, so that these could be more easily found. If not cross-referenced appropriately, separation could add to confusion. Another improvement may be to clearly separate policies that apply to ICANN (e.g., as relates to the evaluation of new gTLD applicants), from policies that apply to Internet stakeholders such as registries, registrars, and registrants.

Community Guidance and Input

It should be noted that even though policy guidance or policy advice has been requested at times by the ICANN Board, not all SO/ACs have formal procedures in place to deal with such requests. To determine whether there should be formal community wide process put in place, which closely links to the proposed procedure above, has been the topic of discussion of a separate paper on Community input and Advice Processes (see http://www.icann.org/en/news/public-comment/input-advice-function-24sep12-en.htm)

Finally, it is important to recognize that just because recommendations originate from a specific SO, this does not mean that only that SO has an opinion or final say on how its policy recommendations are to be implemented. The multi-stakeholder approach (which solicits input from a much broader set of stakeholders and SOs/ACs) involves soliciting input from the public and other SOs/ACs in discussions and decisions on implementation related issues.

Draft Framework

The draft framework that can be found in the annex to this paper aims to outline a process for dealing with some of the issues that are outlined above. The starting premise would be that a proposed change is treated as an implementation change unless the objective is to create new obligations on certain parties (in which case a PDP may be appropriate. A proposed procedure, modeled on the existing process for changes to the new gTLD Applicant Guidebook, outlines the next steps depending on whether the proposed change is considered an: (i) administrative update, error corrections and clarification; (ii) change involving public consultation; or (iii) other changes as directed by the ICANN Board. Should as a result of public comments received, advice from Implementation Review Teams, SOs and/or ACs indicate that "Policy Guidance" is required, the issue would move to the "Policy Guidance" track. As outlined below, the suggestion is that each SO/AC identifies which processes are to be used for developing formal "Policy Guidance"[3] to the ICANN Board and that the Board clarifies how formal "Policy Guidance" from an SO/AC is to be considered.

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[3] There could also be circumstances in which the ICANN Board would directly ask for "Policy Guidance" from different SO/ACs (see section on Community Guidance and Input).

Some basic steps that could be part of such a "Policy Guidance" process have been included in the proposed framework for further discussion and refinement (Note: some SO/ACs may already have formal processes in place).

Questions for discussion

In addition to the issues outlined above and the proposed framework, there are a number of other questions that could be discussed in this context:

a) The GNSO PDP process specifically discusses the implementation phase after the PDP recommendations are approved by the Board. Accordingly, should the level of implementation that should be part of the actual PDP be detailed? Should it be mandatory to form a Community Implementation Review Team whose task it is to provide guidance and/or clarification as needed to ICANN Staff as they develop the implementation plan?

b) The Policies developed through a PDP have differing levels of detail included within the policy recommendations. For example, the recommendations on the expansion of new gTLDs were very high-level principles that necessitated the creation of a great amount of implementation detail. Alternatively, there are Policies such as the PEDNR recommendations, that include very particular details within the Policy – appearing to some to be implementation and policy in one or IRTP Part B where specific implementation proposals were asked from ICANN Staff which were then approved together with the policy recommendation. What guidance should there be on the level of particularity that PDP recommendations should embody and how/where should that be specified? It should be noted that if very specific implementation guidance is desired as part of the policy recommendations, specific expertise (legal, technical) will be needed by WGs developing such guidance.

c) Particularly when policy recommendations are stated as high-level principles, ICANN may need more community involvement in reaching the implementation details. As part of this work, the Board has begun a process of soliciting "policy advice" – advice on whether specific implementation ideas are in-line with the principles stated in policies. This has been an area of confusion for the community, most recently with the Board request to the GNSO on IOC/Red Cross names. How can such a consultation mechanism, proposed above as a policy Guidance WG, be improved to clarify this advice-seeking role? Certain SO/ACs have mechanisms in place to develop a position on such requests from the Board (e.g. ccNSO), while others like the GNSO do not have a formal mechanism but have developed ad-hoc approaches depending on the request (e.g. STI, IOC/RC discussion group).

d) One of the advisory-seeking mechanisms used recently was the IRT/STI process used in crafting the rights protection mechanism in the New gTLD Program. While some considered this "policy", others considered this implementation of the principle that there must be a process to protect the rights of others when expanding the gTLD space. How could such consultation mechanisms be clarified to better explain the purpose and role and outcomes of the work requested? How can the work of these consultation mechanisms be updated to take into account input from other SO/ACs and the public?

e) There should be recognition of the potential for overlap in responsibilities between an SO/AC and ICANN, such as when an issue can be the subject of a PDP, where it still may be appropriate for

Staff or the Board to act. In ICANN's multi-stakeholder bottom-up policy development structures, the inability to reach consensus on key issues could produce stalemates that by default preserve the "status quo" instead of enabling badly needed changes. Examples of this might be the vertical integration issue or the changes to the RAA. In addition, there may be instances where competing "policy advice" is given by different SO/AC. How is the Board expected to handle such situations?

f) One distinction to consider between formal "P"olicies and little "p"olicies may be the expected longevity of the policy. For example, formal "P"olicies under the new GNSO PDP can only be modified after implementation by undergoing another formal PDP. This results in the formal "P"olicy becoming everlasting, and long lasting. In contrast, could a little "p"olicy adopted to meet the needs of a specific circumstance (example, the Conficker response) evolve based upon changing circumstances or experience with the effectiveness of the little "p"olicy?

Possible short-term improvements

Some of the possible improvements that could be considered in the short term are:

- SOs/ACs to identify / specify which processes are to be used when "Policy Guidance" is to be provided. For example the ccNSO has documented a procedure – the ccNSO Guideline for a ccNSO Statement or Position Paper - as standard process to provide input and guidance on a specific topic. The ccNSO has also created a working group specifically for the purpose to provide the ICANN Board with a framework of interpretation of the current policy for the delegation and redelegation of ccTLDs. Recommendations to change the current policy are considered to be out of scope of the working group.

- ICANN Staff to provide a rationale as to why something is considered implementation and not policy (if it differs from the implementation guidance as provided in the policy recommendations). A standard set of questions could be developed for this purpose.

- Encourage SO/AC to be as specific as possible with regard to the implementation guidance provided with the policy recommendations or advice.

- SOs/ACs to identify / specify which processes are used to develop a position on whether a proposed action is to be considered policy or implementation.

- ICANN Board to detail their processes for requesting "policy guidance" as well as how to deal with policy advice when received from the different SO/ACs.

Proposed Action
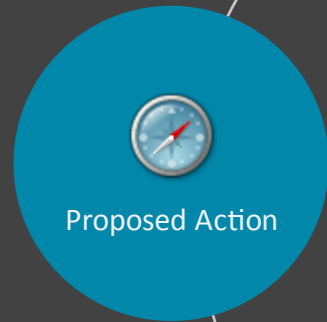
Implementation Change

Proposed action
- not a result of a policy discussion
- does not materially change community proposed approach
- Is in line with the intent of the policy recommendations

A. Administrative Updates, Error Corrections and Clarifications
1. Administrative Updates are changes that do not require stakeholder discussion or Board resolution. Examples of such changes might include updates to references based on changes to an RFC or ISO list, re-ordering or re-organization of sections.
2. Error Corrections will be made if it is determined that erroneous information is included in the policy recommendations or implementation guidance provided.
3. Clarifications are changes made by staff to incorporate material to provide guidance where there are a number of questions or misunderstandings. In most cases, such clarifications will be provided through supplemental resources rather than directly changing the policy. However, if it is determined that the policy recommendations requires clarification, this type of change may be made. Changes of this type should only offer amplification or clarification to existing requirements: they should not impose new requirements.

B. Changes Involving Public Consultation
A determination of whether public comment is required is generally based on whether a proposed change would be a material implementation change, as determined using the following considerations:
1. Would the change have a substantial effect on ICANN?
2. Would the change have a substantial effect on the DNS?
3. Would the change have a substantial effect on registry, registrars, or Internet users generally?
4. Would the change be seen to create a new precedent?
5. Would the change substantially affect the security or stability of the DNS, as defined in the registry agreement?
If required, a public comment period will be opened for at least 30 days. As per usual practice, a summary and analysis of public comment will be posted. In some cases Board consideration will then be required, depending on the materiality of the proposed change.

C. Other Changes as Directed by the Board
These are changes explicitly authorized by a resolution from the ICANN Board of Directors. Examples of such changes might include an update based on approval of a new consensus policy, or other directive.

If public comments received, advice from Implementation Review Team and/or SO/AC indicate Policy Guidance is required, then move to Policy Guidance Process

Policy Guidance

Proposed action
- Creates new obligations on contracted parties
- Materially alters policy recommendation endorsed by SO or AC
- Significantly affects multiple parties / constituencies

Proposed action
- Creates new obligations on contracted parties
- New issue
- Long lasting impact on multiple parties
- Materially alters intent of policy recommendations

Policy Development Process

Proposed action
- Affects limited parties or for limited period;
- New information available or original approach not workable;
- Does not materially change intent of policy

Policy Guidance Working Group

1. SO/AC forms ("Policy Guidance") working group

2. SO / AC consideration of working group recommendation (incl. public comment)

3. Board consideration of working group recommendation as approved by SO / AC