
BEIJING – Policy vs. Implementation

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DAVID OLIVE:

Good morning and welcome. I appreciate everyone's joining our session today on policy development and policy implementation at ICANN. We, of course, tried to encourage more interest and we put it in terms of "policy versus development "and we tried to seat our panelists if they were in favor of the one side or the other side, but we weren't able to do that, so they're all in the middle here to talk about this important topic.

My name is David Olive. I'm vice president of policy development support at ICANN, and I'm very pleased to be here to introduce and welcome this group.

The panel will be moderated by the vice chair of the ICANN board, Bruce Tonkin.

We will have a presentation by Marika Konings, our senior policy director, on some of the staff papers and comments received so far. We had public comment on a paper -- a draft paper on this concept. And then we'll have comments from our panel discussion.

In a blog to attract interest and to promote this session, I entitled "Without Effective Implementation, a Policy Is Just an Idea." Again, part of our policy and implementation theme.

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The rules for formal policy development at ICANN are well-defined by the bylaws, but the processes and procedures around policy implementation are maybe not so clear.

And although many believe it is not possible to have a bright line as to what is policy or implementation, there seems to be plenty of room to clarify existing activities and to better define the roles of the different stakeholders involved in the process, and that's why we have a wonderful group of people to comment on this.

Our panel members include Don Blumenthal from the Security and Stability Advisory Committee, Evan Leibovitch of the At-Large Advisory Committee, Chuck Gomes of the GNSO registry stakeholder group, Avri Doria from the GNSO noncommercial stakeholder group, Steve DelBianco of the GNSO business constituency, Brian Winterfeldt of the GNSO intellectual property constituency, James Bladel, the GNSO registrar stakeholder group, and Aparna Sridhar of Google.

We also asked other members of our supporting organizations and advisory committees to be part of this. Some have made comments. And we're happy to have this cross-section of views.

Without further ado, I'll turn it over to our chair, Bruce Tonkin.

Bruce, the floor is yours.

BRUCE TONKIN:

Thank you, David. I thought I'd just start with setting a bit of context, particularly based on some of the things the board was hearing yesterday.

So firstly, what is the policy role within ICANN?

ICANN has three supporting organizations responsible for policy. That's the Address Supporting Organization, the Country Code Names Supporting Organization, and the GNSO, Generic Name Supporting Organization.

And this is just a quote from the bylaws, just as an example.

So the GNSO is responsible for developing and recommending substantive policies relating to generic top-level domains.

So so far, so good. That sounds easy.

But ICANN also has multiple approaches to identifying policy issues, reviewing existing policies, creating policy proposals, and providing policy advice.

We have advisory committees -- ALAC, SSAC, GAC, root server -- RSSAC. I'll just sort of abbreviate. I'm assuming people know these acronyms.

We have -- within the Affirmation of Commitments, we actually have a policy review team as part of that process and it reviews the WHOIS policy on a regular cycle.

And then we have expert groups that get formed.

So we have the implementation recommendation team. I think that was looking at implementation of the policy relating to rights protection in new gTLDs. And we've just recently formed a gTLD directory services expert group.

I think the common theme, having been on the board for a few years, is that when each of these groups produces a report, they all see no reason why the outputs can't just be approved by the board and implemented. And there's always a huge tension when they find that actually the board has gone and asked the GNSO which -- if we go back one slide -- is actually responsible for the policies.

But each of these groups generally produce their report. They themselves go through an extensive process. Most of these go through public comments on their reports. And they each think that they have implemented a multistakeholder process and therefore what they say is policy.

Then we have implementation approaches.

ICANN -- just like we have multiple approaches for policy development, we have multiple approaches for implementation.

We have groups that look at identifying implementation issues. We have groups that review implementations. We have groups that create policy implementation proposals, and some that provide implementation advice.

This actually has pretty much the same set of members as the previous set, but has a few additional ones.

We have fast-track teams like we did for IDNs. We have stakeholder teams. There was a team of people that were put together to create a trademark clearinghouse straw man. We have a trademark clearinghouse mailing list that has people involved in implementing the protocols between the registries and the trademark clearinghouse.

We have staff teams -- obviously quite a substantial team -- that their main implementation book, if you like, is the applicant guidebook.

And then we have external consultants.

So as you see, we're getting more and more complex as we move from policy to implementation.

So what are the tensions here?

Well, who is responsible for making decisions relating to implementation and who signs off?

Certainly the faster process is that the staff look at a policy, they produce an implementation proposal, it goes out for public comment, and if it's a substantive item it goes for board approval.

An example of this would -- in simple terms was protection of Red Cross names at the top level.

Really didn't involve any of the advisory committees or supporting organizations other than the Governmental Advisory Committee saying that they wanted to protect Red Cross names, and the board approved basically reserving those names at the top level in the applicant guidebook.

So that's -- that was a relatively fast implementation that probably happened in weeks.

Then a slower implementation is that we have GNSO working groups that look at an issue. They present something for GNSO Council approval. That eventually goes to the board for approval.

It still then goes back to staff to refine it.

An example would be the gTLD transfers policy.

Each time we've made an adjustment to the implementation of that policy, the adjustment to that implementation has actually gone through a full GNSO process.

So it's kind of the other extreme. There's -- virtually nothing has been implemented in transfers without going through this full process.

And then there's many variations in between these two scenarios.

So the sort of tensions that we're starting to see is that certainly the GNSO wants to be consulted on implementation of policies. There's debates on when something is policy and needs to go through the GNSO and when something is implementation.

There's debates on when -- I think we've repeated this slide, but the key differences for many, I think, between when they look at something as policy versus implementation in the current sort of terminology we use at ICANN, is that the perception is if something has to go to the GNSO for policy work, it will take a long time, and so that creates tension because people have produced a report, spent a lot of time on it, probably several months, and they think it's ready to be approved by the board, but then the board says, "Oh, we think this is policy," it goes to the GNSO, and the perception is that it could be there for years, you know, using one extreme.

And although the reality is that the GNSO on many other -- on many topics has worked a lot more quickly.

And then there's a perception that there's a bias, so that if there's not a unanimous consent from all the stakeholders in the GNSO and some stakeholders have one view and other stakeholders have a different view, then it comes down to a vote, and that creates its own tensions, because people think, "I don't want to put it into the GNSO because I think I won't get the outcome I'm seeking because, you know, they won't all agree with me and I'll be outvoted." So that's a tension as well that is pushing people to say, "Let's not go through the GNSO, let's use some other process."

Oops.

So I guess, you know, coming to the discussion now is certainly we need to provide some more clarity on the process that takes into account both policy and implementation. I think that's the message we've been hearing loud and clear yesterday, particularly, and even the previous weekend, in that they're not really separate things, they're one and the same. And, you know, certainly we need to work through from high-level policy through to detailed implementation, and we need to involve all the different groups in that process.

We also need to balance the speed of implementation with true multistakeholder input, and this is another source of tension, because there are business interests where they want to launch new gTLDs and therefore they want to implement quickly, and then there are others that say, "Look, we want to be thoroughly consulted before you make each decision."

And then what do we do when there's a different sort of opinion on implementation? Which is often the case at ICANN.

So we have something that in principle sounds reasonable. You know, that they should be -- we should protect the legal rights of others. I don't think anyone disagrees with that as a policy.

But then when it gets into the implementation, there's a lot -- a lot of disagreement as to how that should be done.

So I'll hand over to Marika to talk about what the staff has done so far on this topic.

MARIKA KONINGS:

Thanks.

Good morning, everyone. My name is Marika Konings. I'm a senior policy director with ICANN and team leader for the GNSO.

So just very briefly focusing a few slides on the staff discussion paper that has been a basis for this discussion, I think one of the reasons why we're here today looking further into this topic. I want to be very brief because I think the real objective of this panel, of this session is really to hear from all of you and the panel on these topics.

So basically the staff paper really tried to kick off this discussion based on many of the discussions that had been going on in the community on this topic, partly inspired by some of the new gTLD related discussions. But I do want to emphasize that the objective is -- of the paper is really to be forward-looking. It's not about the current discussions or past discussions. It's really about trying to look ahead and develop a longer-term approach to dealing with these issues.

I think as we've seen as well, there are, you know, different variations in PDP processes, with very detailed descriptions on how things need to be done, who needs to be consulted at what point in time, but on the implementation side, there's less guidance. And I think as Bruce has explained, there are many different approaches that have been taken over the past.

As a result, that means as well that it's not always clear or transparent for the community what can be expected and what the roles are of the different groups in the process.

Again, the focus of the staff paper wasn't to try to develop a bright line between what is policy or what is implementation, as I think we most agree that that's a probably impossible task. But it's really trying to focus on how can we set clear processes and bring in predictability into these discussions so everyone knows what to expect and what the different steps are of the process.

So the paper itself, we actually tried to outline a draft framework for dealing with these kind of discussions, and I think one thing I need to say as well is that although you'll see here as well a large number of GNSO representatives -- and I think a lot of examples used as well come from the GNSO -- but the intention again is do we have it as a broad framework that may apply to other parts of the community where policies are developed or where advice is being given.

So one of the questions you'll see coming, as well, from the panel is how do we deal with that? Is it possible to have one kind of framework or do we need to have different kinds of frameworks or parts of frameworks that apply to the policy development processes? So what we did in the

paper is actually try to outline a broad framework with different steps and identify, as well, where we believe there needs to be further discussion or clarification that may be helpful.

So we identified a number of criteria and a number of principles, overarching principles, that we believe may underpin this discussion. And again, the paper is for discussion so it's really intended to serve as a starting point and get your input on whether we're on the right track with this.

This paper also identifies a number of questions, several of which you'll see coming back today in the panel discussion. And we also included a number of short-term suggestions for improvements. For example, request supporting organizations and advisory committees to define or detail how they provide advice when that's being requested by the board.

Also suggest that the board may look at how they request for advice and what kind of time frames they give. Suggest that staff may include a rationale whenever they suggest implementation guidance or steps for implementation.

Suggest some elements that -- again, for consideration and for further discussion.

As I said, the real focus, I think, of the discussion today as well as the staff paper is really to try to come to a stage where we have really clear processes in place and predictability and transparency about what happens when policy moves to implementation, but also focus on what needs to happen in the policy development stage of discussions.

I think as Bruce said, we've seen many different ranges there where, you know, looking, for example, at the GNSO, we've had PDPs that basically prescribed how consensus policies would need to be written, but on the other hand, we have also policy development processes on the other side of the spectrum -- for example, the new gTLD program -- where there are principles that really left a large -- big room for interpretation or different ideas of what could be done to meet those principles.

So as I said, we did try to outline a number of steps in the process. We did look -- because for example, in the new gTLD applicant guidebook, there was a proposed process on how to deal with possible changes, so we did look to that and got some inspiration from there on some of the proposed steps that may be considered as part of an overall framework.

So we detailed those in the paper.

But at the same time highlighted, as well, where there are current gaps or where there currently is no clear process in place and where further discussion may be needed or required in order to get that clarity and transparency and predictability on what everyone can expect when it comes to policy as well as implementation-related discussions.

So as we really recognize that this is a topic for community discussion and this was also recognized by Fadi, our CEO, we put the discussion paper out for public comment to really encourage some feedback from the community whether the discussion paper was a good starting point, did we miss anything, whether there are any other elements that need to be considered, you know, what should be the next steps in this process.

And as a result, we did get really good feedback. We got 10 different contributions. As I said before, it does seem to be a topic that's really high on the agenda of GNSO contributors, because we've got -- most of the comments came from GNSO participants, but it doesn't take away that there's a large interest, as well, from other parts of the community in this discussion. Even though not all SOs and ACs were able to participate here, several expressed interest in this topic and indicated that they're really interested in continuing following this debate and being involved in follow-up discussions.

So I think most of the comments really welcomed the paper, recognized the importance of this topic, and agreed that, you know, the framework really should be about looking forward, looking ahead, which doesn't take away that some of the recent discussions or recent topics that have been implicated in the policy-versus-implementation debate may serve as case studies or examples that may be used as a guiding principle on how to work on such a framework, but again, really looking ahead and trying to ensure that there's a predictable process in place, and clarify, as well, the role of the different stakeholder groups and look at, you know, principles that should underpin such a system such as fairness, notice, and due process. I think those were some of the elements that came back in several of the contributions.

Several of the comments also pointed out that we shouldn't only be looking at the implementation side of things, but really need to try to focus as well on the policy development aspect. How can we make sure that a sufficient level of detail is included in there that will help facilitate implementation? Or if there are specific questions that are not resolved as part of the policy development process, that those are identified or a

process already identified as part of the policy development debate on how that needs to be done or developed as part of the implementation discussion.

Some suggested that we need to look at some of the existing mechanisms -- and I think Bruce already gave quite a few that have been used in the past -- which may serve as an example or a basis for a potential framework, or look at current practices that we have been using.

I think we have had different models for doing some of the implementation-related discussions, and I think all of us will recognize some had good, some had bad elements but maybe there can be a combination on looking at those and having best practices coming out of those.

But overall -- and I think it's, as well -- seeing the broad interests here on the panel and all of you here, there is really a broad support to continue this dialogue and we're really looking forward to hearing your suggestions on how to move forward and bring this to the -- to the next level of, you know, concrete steps on addressing some of these questions and working towards common solutions.

And I think that's all for me. Thank you.

BRUCE TONKIN:

Thank you, Marika.

So I believe you've got a slide with questions, is that right?

So we have several questions that we're asking the panelists to address. What we might do is just very quickly go through the questions and then I'll just get each panel member to talk to them.

So the first one is: What is your perspective on the main priority with regard to the discussion?

So the next question.

Do you believe the overall framework could be created for all policy implementation activities within ICANN or should specific models be created for each supporting organization?

Next one.

One of the questions is how to deal with instances where no consensus can be reached on key issues or when competing advice is received from the different supporting organizations or advisory committees, and should additional mechanisms be developed that would force cross-community engagement and decision-making or should alternative approaches be explored?

Next one.

What should be the next step in addressing this issue? Should there be a cross-community working group? In other words, form another committee.

What is your view on this approach? Are there certain elements that would need a cross-community approach while others should have been addressed within each supporting organizations or advisory committee?

Next question.

That's it. Excellent.

So those are the questions. And at this point, I will just move from -- from left to right, starting with Steve DelBianco.

STEVE DeIBIANCO:

Thanks, Bruce.

The first thing I'd say, there's four things for the BC in terms of priorities.

The first is, all of you ought to read the document, if you haven't already. You'll see that staff has reflected a lot of descriptive work on what has actually happened in our world but also a little bit normative, looking ahead. And to my delight, they used about 15 examples in the document.

Number two, the BC says a priority is to design a framework that will work for the long term, not just solve immediate problems. The examples are helpful, but that's not the only thing we're trying to solve.

Number three, we think it's not sensible to try to find a bright line between policy and implementation. It's really a fuzzy distinction and the BC is going to make it even fuzzier, because our comments suggested that the staff's test in there was whether something imposed new obligations on contract parties and the BC says it should be material new obligations on community members, not just contract parties. And community members is -- includes registrants, end users, law enforcement, ISPs, and even certificate authorities and browser

manufacturers, right, Chuck? Those are also people that could be impacted in a material way.

In our comments, we took our test -- we ate our own cooking here and applied our test of material new obligations to a recent example, which was the straw man solutions, the three of the four that were there, and our -- our conclusion wasn't predetermined but it was great for us to walk through the exercise in our comments. Where we said there were no new material obligations, in 1, 2, and 4, we felt therefore they satisfied the implementation.

To close then, I'd say the value of this new framework will be judged not by whether it's predictable -- a word that Marika used -- it won't even be used by whether it's elegant, but it will only be judged by the world on its outcomes in real cases. Did our framework generate the right result. Because as they say, the proof in the pudding is in the eating, and if our rivals at the U.N. or government stakeholders can't stomach our pudding, it won't help much to say we had a great recipe.

BRUCE TONKIN:

Thank you, Steve.

Avri?

AVRI DORIA:

Thank you.

First of all, I think one of the main perspectives -- and I think it's all well and good to say that the past is the past and we should always be

looking forward. Part of looking forward is indeed coping with some of the issues that the past has opened.

So I'm really very uncomfortable and I think my community is very uncomfortable by any solution that says, you know, everything that happened in the past is now fair and decided and we're only going on in terms of looking at how we're going to deal with the future.

I'm not saying that was necessarily said, but that does concern us every time we hear, "It's the future we need to worry about."

I think in many ways, when we look at the issue, we have to understand that policy very often comes up even in the act of interpreting the policy while doing the implementation.

One of the things that we noticed in a lot of the cases is that we start out doing the policy and there is a very strong implementation component.

For example, in the new gTLD process, with every one of the policy notions that we came up with, even before they were recommendations, we had staff members taking it back and going and saying, "Okay, if that is the policy, how would we implement it?"

Then they would come back into the room and say, "There are problems with the possible implementation of this. Think about it further."

So we went through a lot of those cycles, and -- eventually. So as time goes on, the sort of weight between what is policy and what is implementation changes.

At the beginning, implementation is just basically an exercise, a proof, a thought -- a thought experiment. At the end, policy is still involved in every one of the implementation decisions, even if it's just a small implementation issue.

So I don't think there needs to be a strong material cause to sort of say, "Is there a policy concern here?" I think there needs to be a constant sort of awareness, very similar to what happened with implementation at the beginning of the process, where with every possible policy implementation, people said, "Yeah, that fits, that doesn't fit."

So, too, with implementation. With every implementation issue, there is a policy view of does it affect the policy at all? Does that not? And in fact, one of the things that has been introduced in the new PDP that we've had for a year but which doesn't affect many of the things that are at issue now is the -- a team was supposed to be constructed at the end of every policy development process that would work alongside the implementers, assisting with interpretation.

Sort of raising the alarm flag when something was crossing from that implementation to policy.

The last thing I would add is one of the things -- and this is something that comes out of an NCSG concern -- is that -- well, when I was reading the document, many times it was defining the terms in that document. I thought that the document was superb, but in many cases there was a definitional issue where I thought a lot needed to be discussed in terms of, for example, what is substantive? What is material? Is something that puts an undue pressure on various freedoms like freedom of expression or association that are implications of these policies -- for

example, whenever I hear "rights of others," I hear "freedom of expression and freedom of association," not "freedom of property."

So in other words, when we're thinking about these, are we looking at all those and whether somebody says that rises to "material," sometimes people would interpret "material" as just being money. "Material" goes way beyond that to the various freedoms.

So I think that that --

Plus the one other concern is, in, for example, the trademark clearinghouse example -- and we'll stop in -- I'll stop in a second -- was that it related "affected stakeholders."

Well, if stakeholders are part of making the policy, to presume that those stakeholders aren't as fully affected as any of the other stakeholders doesn't make sense to us. That basically the stakeholders that made the policy in the first place are the affected stakeholders. Thanks.

BRUCE TONKIN:

Thank you, Avri.

Chuck?

CHUCK GOMES:

Thank you, Bruce, and thanks to everyone who is here this morning.

The registry stakeholder group's highest priority on this issue is to eliminate the assumption that if an issue is considered implementation,

the supporting organization or supporting organizations that developed the policy don't need to be involved.

This week, I've seen over and over again, within the GNSO and involving others, that there's this assumption that if something's implementation, then you don't need to involve the supporting organization, you can just move ahead.

I think that's totally false. And we think that's totally false.

To use Steve's example of the straw man, I mean the question was asked of the GNSO Council, "Is this a policy issue or an implementation issue?" Bad question.

And the assumption -- the assumption was made that if the issue was implementation, then we can just go ahead and move forward on it without consulting with the supporting organization.

The supporting organization has a responsibility to ensure that the policies are implemented according to the recommendations that were approved through a bottom-up multistakeholder process, and the supporting organizations are the crux of the multistakeholder model, and if we compromise that, we're heading down a bad path. Thanks.

BRUCE TONKIN: Thank you, Chuck.

DON BLUMENTHAL: -- talked about some of the comments and we didn't do it.

And for the most part, in our discussions, we don't look into things as to whether they're policy or they're implementation, and I think a lot of people in our group wouldn't even acknowledge that it's an issue, and those of us who are involved in policy implementation in the real world -- I'm with a registry -- it's a welcome respite from having to deal with the issues.

So having said that, that's a lead-up to saying that SSAC's primary approach would be a little bit removed from the fray, and it suggests somewhere along the way what Chuck just suggested. There's -- I'm not sure it's realistic to draw any -- to draw any lines. I think of the main priorities, find mechanisms to make the two sides, if you want to put it that way, work together and not -- so that we don't get bogged down in early discussions, we don't get bogged down in the arguments along the way, and we try to find a way to reach some decisions a lot more efficiently.

BRUCE TONKIN: Thanks, Don. Evan.

EVAN LEIBOVITCH: Thanks, Bruce. Like the SSAC, ALAC doesn't really have the boundaries of whether or not it can deal with policy or implementation. The bylaws say you can talk about anything, so we really don't find ourselves in a position of having to draw that line. Nonetheless, we see it happening, and it does have to be addressed.

It seems at one level that it should be really simple, that policy is the what are you going to do and implementation is the how are you going

to do it. And as you're going along, it seems like if you just keep to a good principle that good policy should anticipate the implementation that needs to come and good implementation has to respect the intention of the policymakers. That seems to be a very simple guideline that would drive things. That hasn't been done well here and we're paying the price for it. And as a result, there's one ALAC member who talked to me this morning and he sort of said, well, it's all come down to well, if you like what's going on, it's implementation. If you don't like what's going on, it's policy. And it's really sort of boiled down to that kind of absurdity. And I'm really hoping through initiatives like this we can sort of get our way past it.

BRUCE TONKIN:

Thanks, Evan. Brian.

BRIAN WINTERFELDT:

Brian Winterfeldt, IPC. I think a lot of people have already made very good points on the panel. I definitely agree with Avri that we want to look forward and look for good frameworks to improve the process for both policy and implementation, but I think we need to look back at the past for valuable lessons and to learn from those experiences that we've had. I do think that, as Marika stated, I do encourage everyone also to read the paper that staff put together. I think it's a really good starting point to really take a deeper dive on these issues. There really is a much more articulated Policy Development Process than the frameworks we have for implementation, and I think we do want to definitely improve them.

Something else I think that we've heard on the panel this morning from Chuck and other people is the idea about implementation, you know, being driven and happening without necessarily going back to the SO that put the policy forward. It seems like there definitely is more thinking that we need to do as a community about what the appropriate consultation is for implementation and how we're going to put frameworks in place that sort of balance the need for having things implemented and pushing things forward while at the same time making sure that all the appropriate stakeholders feel like they've been consulted and they're engaged in the right way.

BRUCE TONKIN:

Thanks, Brian. James.

JAMES BLADEL:

Thanks, Bruce, and I also want to compliment all the previous speakers who took all the good ideas. So that's the benefit, I think, of being at the end of the line.

I ping the registrars on this, on our mailing list, in the hopes of starting a vibrant discussion, and I think our -- our first response was something very along the -- much along the lines of what Evan pointed out which is policy is what you want and implementation is what I want. And I think that that seems to be the kind of overarching -- or undercurrent of definition. But I think we can establish some guidelines, very much along the lines of what Steve was pointing out is that there are stakeholders and users and other members of this community that are impacted by what happens at these meetings that are not present in

these rooms or even aware that these meetings are going on. And if that is the case, then whatever it is you're discussing by default must be policy. If it's something that's more along the lines of what we call, you know, inside industry talk about how a registrar is going to transmit a certain amount of information to a registry or something along those lines, then it's -- then it's clearly a matter for implementation. But if you can register a domain name, build a Web site, build a business, build a community without ever having attended one of these ICANN meetings, then I'd say that you are the beneficiary of those policies and anything that would impugn upon that or create what I think Steve called -- I'm sorry, Steve, I'm going to borrow your term and probably mess it up, it was material obligations or substantial obligations or something like, then yeah, we have to be mindful of those folks and how these things are going to implement them.

I will really very quickly point out that I don't think we should be pursued of an overarching solution within the GNSO or within all the other SOs. I think that as we've seen with the implementation review team of several PDPs a more agile approach that borrows from the folks who came up with the policy in the first place, puts them in staff's hip pocket and says, let's work this out and let's implement this thing in the spirit of the recommendations of the Policy Development Process. That seems to work for the, let's say, less controversial issues that we've used that processed attack. Thanks.

BRUCE TONKIN:

Thanks, James. Aparna.

APARNA SRIDHAR:

Thank you. I should just be clear, given the way the question is phrased, that I will be speaking on behalf of Google. We are, I guess, big enough to be constituted a community but I don't think we're formally one in ICANN terms. I think the key concern that we have discussed among our colleagues is regardless of whether we call something policy or implementation what we're looking for is a predictability and a stability and a sense of notice when our obligations are going to change. So, you know, as a lawyer I've spent a lot of time doing work before the administrative agencies, and the analog that we have been talking a lot about internally is the administrative law analog which is to say, if there's a new rule, a new obligation on parties, then we ought to have at a minimum notice of what the rule is and a substantial enough way that you understand what your new obligations are, a lengthy enough time for parties who are affected or think they may be affected to comment, give modifications, explain their concerns, suggest alternative frameworks or ideas, and then finally, what we would also want at the end of the process is a reasoned explanation of how the decision came to be. So, you know, in a particular document you might say well, we looked at this proposal from Google but it's not suitable for X, Y, and Z reasons. Not necessarily that you have to call out every particular stakeholder but just that the principle ideas that have been put forth and either accepted or rejected should be explained. And so I think that probably -- that kind of process ought to apply whether you call it policy or implementation in any circumstance where you're really binding people to new obligations or changing their obligations.

I think the focus on sort of particular issues, while I understand that's important for us to move forward, is not necessarily helpful. I think we want to be creating an evergreen process, a predictable process.

And finally, I know that there has been a fair amount of discussion about oh, it's impossible to ever draw these bright lines, but I want to just caution against throwing up our hands. I think that we can see in a wide variety of other contexts people taking on these challenges. So for example again in the administrative law context, it's true that the sort of tests are a bit vague but they have been interpreted over the course of time in a predictable way that gives parties some information about how they can expect their disputes to be resolved. And I think that's something we should strive for, regardless of whether we call things policy or implementation.

BRUCE TONKIN:

Thank you, Aparna. I think we go to the next question, is that right, Marika? The go button. Okay. We'll start this one in reverse order. And I encourage panelists to be brief, given they've probably already maybe covered some of the material in these follow-up questions, but Aparna, if you'd like to add anything more under this question.

APARNA SRIDHAR:

Sure I'll just be really brief which is to say, I don't think there needs to be an overall framework. I do think that all of the policy or implementation activities ought to sort of adhere to these few principles that I laid out regarding notice and due process.

BRUCE TONKIN: Thank you. James.

JAMES BLADEL: I also do not believe there can be an overarching or overall framework. I think that this is in the spirit of our new approach or our agile methodology that, that once a policy is formed that it immediately moves -- transitions into an implementation mode where the various teams -- and I think this has been the experience with the PDPs recently -- the various teams would then make recommendations with staff and help them implement those recommendations. And I think that is -- that keeps it light, that keeps it quick, and it, you know, starts to get the best of both worlds. What you were discussing as Policy Development being slow and implementation being a little faster, this one tends to optimize both sides of that.

BRUCE TONKIN: Thanks. Brian?

BRIAN WINTERFELDT: Thanks, Bruce. I definitely think that the policy implementation activities do not need to be the same across all SOs, particularly given the fundamental differences between many of the SOs, but I do agree with some of the things that we have already discussed where we want to kind of be balancing swift implementation with making sure that we are consulting and not only the SOs but also the community as well.

BRUCE TONKIN: Evan.

EVAN LEIBOVITCH: Thanks. If you buy into the idea that implementation has to respect the intent of the policy, then that means that the policymakers have to have at least some kind of input into the process. We've seen some really, really good work happening lately between the expert groups, between some of the rapid decision-making things that Fadi has tried to bring in, and I look forward to refining and seeing more of them.

BRUCE TONKIN: Thanks, Evan. Don.

DON BLUMENTHAL: Well, quick answer would be what they said. An overall framework would be nice. It's not practical given the different realities of the different SOs, and I'm not sure you could even come up with a single framework for each individual SO. Issues just vary too much.

BRUCE TONKIN: Thank you. Chuck.

CHUCK GOMES: The registrars answer on this question would be both if possible, so I'm kind of repeating what others have said. Creating an overall framework that works across all SOs and ACs might be a challenge. The first step, I think, has got to be developing a framework for the specific SO, dealing with the parameters that that SO deals with. As you can see, by the

public comments that were submitted and real life examples, this is a really hot issue for the GNSO and the GNSO, I think, is going to have to deal with that and probably start with developing a framework there that hopefully can be used in part at least by other SOs and ACs.

BRUCE TONKIN: Avri.

AVRI DORIA: Thank you. I believe that an overall framework can most definitely be set up. I think the nature of policy and implementation pretty much remains the same across most SOs and most ACs. The issues are different. The characters are different. The players are different. But the relationship between those two, and I believe that we really need to have a general thing that we can all sort of understand and not -- for each thing we're doing find that we have a different set of conditions. So I would actually prefer an overall framework.

BRUCE TONKIN: Steve.

STEVE DeBIANCO: I think a framework overall could work for the definition of whether we've crossed the line, the fuzzy line between policy and implementation. But if we treat the next part of the framework, which is the how is it put back to the SO that would then redo the policy, I think that -- or reinterpret the implementation, I think there's no way we can do that with a single framework. Let me see if I can explain why

in three reasons. There's too wide a range in policy today because some working groups do implementation details as part of their policy and they can handle requests for clarification on the put-back, on the loop-back. But some policies begin as high level. I'll give you an example. The GAC, their principles are very high level and it hasn't proved very productive for us to go back to the GAC and ask them to clarify an earlier high level principle. It's not the way they work. One size won't fit all. The second is that where there's original policy, development was not unanimously supported. Well then when you do a go-back or a put-back to that group, that's a golden opportunity for those who dissented to undo the policy they never liked in the first place and each AC/SO has its own rules for consensus. And third and final reason is to think about situations where the board and/or the GAC took a top-down role on the first policy. An example that I think Chuck brought up was the Olympics and Red Cross.

Now if you later go back and ask the underlying AC and SO for policy advice on implementing a top-down decision, you're just rubbing salt in the wound. And don't expect helpful advice from somebody with salted wounds, right? As Fadi said Monday, let's enable and evolve. But when you evolve, evolution happens differently in different parts of the world. And the same goes here. It's going to have to evolve in the different SOs.

BRUCE TONKIN:

Thanks, Steve. The next question. I want to try a different order. I'll be agile. I'll start with Evan and go around from there.

EVAN LEIBOVITCH:

Actually, I may have been the wrong person to start with this because I find the question a little absurd. The idea of forcing cross community engagement within ICANN itself just seems to be almost a nonsensical question. Why should this be forced? You would think that cross community engagement should be a natural. And it basically boils down to a feeling that I think is pervasive within At-Large and amongst elsewhere that I found and that is the culture of silos is something that needs to be addressed. And it's cultural, it needs to be broken down, and I think it's a fundamental part of the problem of why it's so difficult to engage to get the GAC involved earlier in policy process, to really engage a broader level of the community that goes just beyond, say, the SO that's attacking the policy. I think this needs to be attacked head on, and I think it's core to this. The concept of saying that you need to force community engagement just, to me, indicates the problem right in the question.

BRUCE TONKIN:

Thanks, Evan. I might go Don next, since he's also from another Advisory Committee and that kind of relates to that advice as well.

>>

Agile, yes.

DON BLUMENTHAL:

I'll echo what Evan said to some extent, though not necessarily with absurd. I think cross -- cross group processes are great when they can work. But I've been involved in some where the results were just -- there were no results and the process was ugly. I don't think we can

force cross community activities. But they can work. I think SSAC is a great example of that. Where we don't have specific representatives of ASOs or CC or whatever, we have people from all possible groups. It can work, but I think there has to be a mechanism for fostering it for -- some of them were cultural, get rid of this idea of silos or work to get rid of it, and come up with a group that may be -- maybe the CU group would be a good approach for trying to get representatives together to see if there's a way to make a cross community effort work. But saying you've got to do it is just not -- just not practical.

BRUCE TONKIN: Thank you. Chuck.

CHUCK GOMES: I also would agree with Evan with one qualification, I -- I'm sure you can't force it. If people don't want to cooperate, they won't. But it's not necessarily natural. And I don't think it will be. If there's not a need and interest in a particular SO or AC, you're not going to get meaningful participation and we need to recognize it and accept it. The registries are -- do think that mechanisms should be developed that would assist in this area, and we should look at alternative approaches for dealing with this. But I want to challenge something I heard about silos. I don't think we're ever going to get rid of silos. We have them and we want the different groups to participate. What we have to do is learn how to work together in spite of our silos.

BRUCE TONKIN: Thanks, Chuck. Avri.

AVRI DORIA:

Thank you. I think it's actually not all that hard.

I think first of all, when -- in one of the SO processes we follow our proper process and we don't reach consensus, I think we're basically handing a bunch of advice to the board to say make a decision and we're giving you all the best thought we had and we're basically leaving it to your processes with the ACs. I think in the cases where we find we have actually come to various opposing sets of recommendations, I think that's a time when we have to look at sort of bringing those parties together and sort of mediating the specific points of disagreement and finding where the commonalities are. And if that stalemates, then again it falls back to the board to sort of say okay, we've heard the best you all have to offer and this is why you're paying us the big bucks and we'll -- we'll make that decision.

So I really don't think it's that difficult. I think cross -- cross community stuff is something we should strive towards but forcing it, you know, I agree with Chuck on silos or silos because they're natural, but we find more and more ways of bridging those through various mechanisms. We have people that bridge them. We have mechanisms that bridge them. So bridging the silos. But to say we're going to eliminate silos, it's not going to happen in our lifetimes.

BRUCE TONKIN:

Steve.

STEVE DeIBIANCO:

Yeah, this question is about consensus and we should probably quote the great Margaret Thatcher, she died on Monday. And she said "To me

consensus seems to be the process of abandoning all beliefs, principles, values and policies so it's something in which no one believes to which no one objects." It's a shame that Margaret Thatcher weren't still alive because we'd put her in a couple of Mikey O'Connor's working groups and I think she would have died a happier woman. Right, Mikey, teacher about consensus? But I think there's no surprise of the difficulties we have. Because you should expect wide divergence of advice when there's a process in which the ends define the middle. When folks with a view need to run to the end of their prospective views knowing that the compromise in the center will be closer to their end the further out they go. We saw it this week a little bit in the Expert Working Group for directory services. It will be tough to manage there. Now the European Parliament -- you were asking about methods that could be used -- the European Parliament, Marika pointed out, has a conciliation process that should help get there. But I read the process. You put equal delegations from the European Parliament plus the member states, they meet for six weeks, and if they can't agree the proposed law is simply dropped. And I guess that is a form of pressure in that there will be no solution if you guys can't come up with one. But that won't always be completely satisfying. There's no forcing factor there. So forcing does happen here. And it often comes from pressure that arises from governments and law enforcement and that made a difference, I think, for sure in the RAA negotiations and the registry agreement. But we're also seeing now in the end game that the carrot is mightier than the stick. Registrars and registries can smell the carrot of the new TLDs and that's making them more agreeable to last-minute conciliations. But I like best the example of the ad grace period and domain tasting, if you guys all remember that. That was my first

experience at ICANN, was that PDP. I was amazed at that as a Consensus Policy within the picket fence change. It seemed to go so well. I don't remember a lot of top-down pressure behind that, and yet, I think that nearly everyone likes the taste of that pudding. So let's find a way to recapture that magic.

BRUCE TONKIN: Thank you, Steve. I'm glad you like the taste of that pudding. I can tell you there were some pressure points applied.

[Laughter]

Aparna.

APARNA SRIDHAR: Thank you. Let me just offer a brief practical solution.

I think there are certain issues that become intractable, and one thing we ought to consider as a very sort of tactical way of getting through those roadblocks is simply delegating the issue in mediation to an expert. You know, bring everyone in a room, bring in a professional mediator whose whole job in life is to take people, find out where common areas of agreement are, push them on what their core competencies are and where they in fact know less than others. Push them on what they can compromise on, what they can't, and use the tools that exist in the real world to get us to practical solutions.

BRUCE TONKIN: Thank you. James.

JAMES BLADEL:

So I think I'm going to be a bit of an extremist, or maybe a contrarian, on this topic or maybe perhaps going back to some of the earlier statements from Evan and Don. I believe this is a consensus-driven model, and if we can't reach consensus or there's conflicting policy advice as described in the consensus -- in that -- in the original question, then that is not an endorsement necessarily but an acknowledgment that the status quo is not sufficiently painful enough to make a policy change, that that -- there's a threshold here that we have to cross in order for -- in order for this industry or this organization to make a material change. And we did not meet it. I think going back to something Aparna said, the experts are here, the experts are in this room. They're at these -- you know, they're in this community. That's why we do this and get on all these airplanes and come to these really fancy hotels, is to talk about these things. And if we can't come to an agreement, I don't think we should force a cross community working group. I don't think that's time for an outside organization or individual to step in and referee that. I think that, you know, we say that according to our model this is -- this didn't pass the test.

Now maybe acknowledging that's still a problem, that maybe it needs to be solved, maybe it needs to be solved elsewhere outside of ICANN, but I think it's important that we stay true to the principle that we have to agree in order to -- in order to proceed. And if we can't agree, then we go back to the European process and it's just dropped. Thanks.

BRUCE TONKIN:

Thanks, James. Brian.

BRIAN WINTERFELDT:

Thanks.

First I want to say I think Aparna's suggestion is a really good and interesting one that I think might be helpful to think about in terms of both looking at Policy Development Process and implementation. I don't want to totally disagree with James, but I do think that, you know, just because we stalemate with a particular group or, you know, within a working group or with an SO doesn't necessarily mean that someone with better skills at helping kind of resolve conflict couldn't bring us to a better, higher place, and sometimes I feel like there is maybe -- I don't know if dysfunction is too much a value-laden word but sometimes, you know, we sort of reach a stalemate and I think we could probably get to a better place with better tools and processes than some of us come to the table with on our own because I think most of us are not mediators and sort of trained on how to kind of deal with conflict resolution in a policy context.

That being said, I do think from an IPC perspective we definitely think different SOs and ACs each sort of come to the table with their own core competencies and in some ways we see them acting as sort of checks and balances within the ICANN community. And so we've seen examples where the GAC and the GNSO weigh in on particular issues and sometimes they involve public policy with a capital P, we hear the GAC talk about. In those instances I think the GAC would absolutely say, you know, if we're looking at the interpretation and application of international laws that they should sort of have the final say or that's sort of their space or their grounds. So I do think it would be very valuable to maybe have mechanisms in place to initiate sort of cross community resolution where the council, the GNSO for example might

feel like the GAC is encroaching on their territory or vice versa. I do think obviously an ideal world the community would sort of hold hands and work really well together and not be siloed. I think in reality we've seen the SOs and ACs can be structured very differently and have very different views and perspectives on what their role is and how their advice should be looked at by the board. And so I think having some procedures in place to facilitate resolution where there is maybe a perceived conflict or encroachment I think would be very valuable.

BRUCE TONKIN:

Next question. Question 4. I'll start with Chuck on this one.

CHUCK GOMES:

The registries believe that the SOs, with the involvement of the ACs, should take the first steps in addressing this issue. And I'll address the GNSO because we're a part of the GNSO.

And I think the GNSO is where this is a hot issue, so there should be a lot of motivation to deal with it.

I think the GNSO in its framework should form a working group to take this framework and begin to develop it, and then, to the extent that other SOs also see this as a relevant issue for them, that would be the time to at least investigate that, and if they are, then take it to a cross-community level with those who are interested.

BRUCE TONKIN:

Avri?

AVRI DORIA:

I think that we should take the framework that the -- that the staff has put on the table and we should create a cross-country -- cross-country? -- cross-community -- cross-country would be fun too -- no, a cross-community working group to see how much further it could be developed and sort of brought to that overall framework, and from there, then each of the SOs and ACs participating in that group can contribute to that and discover where their differences are, where they need specific, you know, modules and modes to deal with things.

But I do think taking the framework and developing it further and discussing it further is a good idea.

BRUCE TONKIN:

Thank you. Steve?

STEVE DeBIANCO:

I think we have an opportunity to apply a few of the ideas, the short-term ideas that are in the framework, and we're going to have an opportunity presented, whether we like it or not, with a few test cases that are going to come up, so looking ahead and not in the past.

We're going to have a test case quickly on the Brand Registry Group, right? The dot brands. If they come up with a modified registry contract, registry agreement, just for the dot brands, I'd like to see where we apply the methods to see, will that be implementation of an existing policy or is it new policy? I think that will be an easy one.

Another would be the closed generics. Let's suppose that the GAC comes back with advice about new safeguards of some high-principled

or vague nature. At that point, let's examine whether that requires just dusting off policy we've already done, like the code of conduct for registries, and finding a way to implement -- do a better implementation step on requiring that applicants do a certain amount of the registry code of conduct exemption process before they would run as a closed generic.

A third one would be singular and plural contention sets. I mean there's no disagreement that the conclusion of that implementation is an unsatisfactory batch of pudding, but there seems to be nothing -- no idea about what to do with it.

So it's a matter of reimplementing a previous policy on confusingly similar, and it's going to be very frustrating if we throw up our hands and say, "Well, we can't do anything about it."

Look, if cases like this arise, we should apply a few of the staff proposals that fit the situation and test them out. So -- and I will concede, Bruce, in answering your question here, that at the same time we probably should do in parallel a cross-community working group to develop some meat on the bones of that framework of who makes the question -- who answers the question of an implementation item, what's the analysis, who conducts the analysis, and work that down. But I don't think we want to constrain that group to a single recipe. The framework should allow differences between the GAC, ALAC, ccNSO, and GNSO.

BRUCE TONKIN:

Thank you, Steve.

Aparna.

APARNA SRIDHAR: So I'm fairly agnostic as to what the most appropriate next step is. I think one thing is clear that there is a fair amount of interest, and whether we pursue resolution in a formal or informal way kind of doesn't matter as long as we continue to investigate the issue.

BRUCE TONKIN: Thanks. James?

JAMES BLADEL: So I think what's needed here is a cross-community expert working group review team.

[Laughter]

JAMES BLADEL: I was hoping that you guys -- if you didn't laugh at that, I was going to be very, very concerned.

[Laughter]

JAMES BLADEL: But yeah. I think that, you know, we need to take this -- again, going back to the agile model that was mentioned -- where this occurs, not just within, you know, the individual SOs and ACs, but, you know, on an issue-by-issue basis, and take a look at where the -- where the policy was born and look at what sort of issues staff is running into, and match those concerns to those -- to those original experts.

But -- but I would hope that -- we have a pretty good audience here, and I would hope that the folks on the floor really focus on Question 4 as part of their feedback when we get to the Q&A section, because I'm really curious to hear what we have in the room. Thanks.

BRUCE TONKIN: Brian?

BRIAN WINTERFELDT: Great. I think that it would be an excellent idea. I think building on the framework that staff put together would be a great idea. I think a working group to kind of explore these issues and look at the different SOs and ACs and try and identify, you know, where there are challenges kind of inherent in their different structures and the way they're constituted and looking for ways to kind of address those and deal with them so that, you know, feedback can maybe be sought earlier in the process from different parts of the community to kind of facilitate us all working together I think would be really beneficial. And again, as I stated earlier, I think looking for maybe ways to deal with issues where the SOs or ACs feel like they're encroaching on each other's territories I think would also be very valuable to facilitate kind of a constructive way to address those dialogues instead of I think where frustrations I think oftentimes on both sides build up and are not really productive to either the policy development process or implementation.

BRUCE TONKIN: Thanks, Brian. Evan?

EVAN LEIBOVITCH:

I'm going to generally agree with Steve on most of the points he made, and just note that we already have a couple of examples of how to deal with the one-size-does-not-fit-all.

We've had efforts such as the STI that have produced results that have been satisfying. We've had cross-community working groups that deal with things like applicant support on things that have been closer to policy.

So we already have some templates that have worked. They have flaws but they can be refined.

I agree with the idea of the cross-community working group to address this and note that we've already had at least some success with this model.

So I encourage it -- I encourage it to go on.

BRUCE TONKIN:

Thank you, Evan. Don.

DON BLUMENTHAL:

I think the first step would be to use the staff framework and set up a cross-community working group to really do some very high-level examination. And not examination by themselves, but it would require heavy involvement from all of the SOs and ACs to lay out their different approaches, their different issues, so that there could be some broad guidelines on where and when cross- -- well, first, where there are similarities and where there are differences and also where cross-

groups are feasible and where there really isn't -- where they're not worth the effort.

BRUCE TONKIN:

Thank you. Okay. Well, I think that draws us to the end of the questions and the responses from each of the panelists.

So at this point I'd like to throw it open to the audience, if anyone wishes to make a comment or question for any of the panelists, starting with Michele. Michele. Sorry.

MICHELE NEYLON:

Good morning, Bruce. One of these days, I know you'll get my name right and we'll all die of shock and horror.

Michele Neylon, for the record.

I think this is a topic that a lot of us are quite concerned about, and that concern isn't new. I suppose the question that we need to be really concerned about isn't it a case of let's have another working group. There's plenty of them. Evan has pointed out various different mechanisms that exist and can be used.

I suppose the question is much more of a fundamental one. At what point in the process of taking some things -- a concept, be that a policy or whatever it is, at what point do you have the checks that you give it a sanity check to see has this been checked off, is this purely implementation or is this policy?

Because some of the concerns that have been raised by a lot of us over the last few months is where we get the impression that somebody up - - further up the tree has decided that that particular item isn't policy, it is implementation, even though a lot of us may disagree with that, and how do you actually -- you know, what kind of check can you do? Is there some way of gating it and saying yes/no, it fits this, it doesn't fit that, maybe it needs to be sent back.

I mean this kind of idea that running certain things through policy working groups is too slow and the argument, I think, James put is that maybe because it's slow, then, you know, you want it to be done properly.

I'm not too -- I'm not -- I can't offer any suggestions or anything like that, but I suppose my main concern is that building frameworks and everything else is a bit pointless if you don't have the checks in the right place. Thanks.

BRUCE TONKIN:

Chuck, and I think Steve would like to respond.

CHUCK GOMES:

Just want to challenge one assumption that I've heard several people on the panel and now with Michele make, and that is, if you put it into policy, it will be slower than if you put it in implementation, and I'd like to cite one example: The new gTLD program.

The policy development process lasted about a year and a half. We're still working on implementation about five or six years later.

So that doesn't necessarily follow.

What it really depends on is how much implementation direction is provided in the policy, and that was not possible to do in any sort of reasonable time frame with new gTLDs, in my opinion.

STEVE DeBIANCO:

You know, Michele asked about at what point do you do the check, the check is this policy or implementation. And there's two ways to proceed on that.

If there's a working group for a PDP and it's doing its own policy and implementation -- because we've talked about that that working groups are going deeper into implementation -- well, they wouldn't stop and do the check because for them, it's all the same bottom-up multistakeholder process. They're just taking the policy a step or two further. So they don't have to do a check there. But Michele, if staff is drawing up implementation and it's doing so on its own interpretation of policy or it's doing so because a top-down initiative from GAC or GAC advice or board is telling it to implement, well, that's when the check occurs, where staff asks the question, "Does this have a material new obligation on important stakeholders? Is it in keeping with the underlying policy that we were working on?"

And that's where I think we could apply the test. The check, as you call it. And that's what would trigger the put-back process and all the complications that that involves.

BRUCE TONKIN: Thank you. Jonathan.

JONATHAN ZUCK: Yes. Jonathan Zuck from the Association for Competitive Technology and it's going to come as a shock but I want to be a little bit contrarian here.

The very first intervention I ever made at an ICANN meeting was about comparing filling out crossword puzzles with ink versus pencils and the advantages and disadvantages there, and I think if we were looking at ICANN as an organization as a whole, that nothing is absolute, but it falls down a lot more on execution than it does on getting enough input from a number of different kinds of people discussing things in their totality, et cetera.

I think execution is where this organization is its weakest.

And so I look at some of the other examples in which we have to make this distinction between policy and implementation, and if you look in the United States, we have these sort of tricameral system of legislative, executive branch, and judicial branch, and in some ways the GNSO and the other supporting organizations are sort of a legislative branch, the staff represent a kind of an executive branch, and the board represents a kind of a judicial branch.

And the -- you know, when a law is passed in the United States, there's a very little bit of description and then the FTC turns that into a phone book, which is the actual details of the regulation and the implementation, and the courts sort of compare a lot of these things to

overall jurisprudence and whether or not this fits in what we might call public interest, et cetera, in the context of ICANN.

So I want to make a much harsher suggestion.

I think we should actually try to divide this up and let the legislative branch, if you will, of ICANN define policy, and to the extent to which they want to have input into implementation, develop something like a kind of legislative intent language that's a part of that policy implementation process and then hand it over to the staff for implementation.

And sometimes we'll be very happy with the result and other times we'll be very unhappy with the result, but there will, in fact, be a result and it will be a very self-teaching system. If you didn't like the result that you got from not providing enough legislative intent as part of your policy, you'll do it differently the next time. But we'll actually see forward progress in the things we're attempting to accomplish within the organization and it will start to operate like a real organization instead of just a talk shop, which seems to be the perpetual symptom of the organization.

So let's let implementation just be implementation and that will have a dramatic effect on how policy is developed, almost by definition.

BRUCE TONKIN:

Thanks, Jonathan.

Steve wants to comment and -- and -- go ahead, Steve.

STEVE DeBIANCO: Yeah. Citing the way the U.S. Government works you knew was going to be hazardous, right? It's a bit like asking someone for driving directions and they start by saying -- well, they wouldn't say this is the right place to begin.

It just -- it -- the analogy probably doesn't work as well as we wish it would. And that's because the executive branch, let's say, the regulators at the Federal Trade Commission, when they implement vaguely worded law, they do so by publishing for public comment -- as Aparna was indicating, they do a lot of publishing of notice. There's an opportunity to comment on that. If they believe it's not in keeping with the underlying law, they go to court and sue over it. And it can be just as messy as the process we're trying to improve upon here.

So there might be something to learn, but we shouldn't think that that model is going to be the real answer.

BRUCE TONKIN: Don, and then Evan, I think.

DON BLUMENTHAL: I have to respond here and just thank you for the plug for my alma mater, the Federal Trade Commission, but I agree with what Steve just said. I really don't think the analogies work.

The system in the U.S. Government isn't as clear-cut as that, and I don't think that within ICANN it's going to be possible to make that kind of distinction: We'll make the decisions and hand it off to staff. There's going to -- always going to be a crossover, a referral back, and to be

honest, I think it doesn't acknowledge the very significant contribution -
- I knew I'd get it out -- that staff makes to some of the initial steps that -
- in the policy process.

BRUCE TONKIN: Evan?

EVAN LEIBOVITCH: Thanks. And I would just add one sort of last dagger to the corpse in suggesting that looking at the current state of sequester and so on, looking at the U.S. legislature as a model of being able to bridge impasses might not be the best example you want to give, as the Canadian on the panel.

[Laughter]

BRUCE TONKIN: And Aparna, did you want to comment?

APARNA SRIDHAR: No. I mean I would agree with that generally. I think the comments we made were more along the lines of there are some useful things to be gained from the notice and comment process, not that we ought to adopt the bicameral sort of tripartite structure that we have in the United States. I think there's lots of evidence that that is a recipe for gridlock.

BRUCE TONKIN: Avri?

AVRI DORIA: Yeah. I think that if we want all of our processes to end in the court in suits, it would be an excellent idea.

[Laughter]

BRUCE TONKIN: I will note that -- I wouldn't say that the board was the judiciary in the model. We have dispute resolution processes, which are more akin to that, I think. They look at whether our policies have been applied.

AVRI DORIA: But we still do have the courts, ultimately.

BRUCE TONKIN: Yeah. And we also have that as well. Thank you.

Mikey.

MIKEY O'CONNOR: Hi, gang. Mikey O'Connor. I'm a member of the ISP constituency but we struggled with this a bit and couldn't come to a view, so these are personal comments.

I took Marika's cool drawing -- I love drawings -- and I redrew it because I thought there was a piece missing.

In that drawing, there are a whole bunch of criteria as to what's policy and what's compliance. There's a big long list. And then there were paths out of that decision based on -- oh, it's going to be a hard one to throw up on the wall, but there were paths coming out of that -- oh, there it is. Cool.

And basically what I inserted into that is, you know, there's this decision tree. I love the idea of a working group, so we do a working group of some sort to figure out that decision tree. And then falling out of that decision tree is what happens next, it's policy or it's compliance, and in Marika's model there are a couple of different degrees of that. But what there wasn't in there was somebody to sort of do a reality check on the decision that was made before the thing went down the path.

And so I stuck one in, but then I was having a really hard time figuring out, "Well, who's that review body and how do we avoid the gridlock trouble, no matter who we pick?"

So this conversation is full of really handy stuff and I just want to pick a few things out of the conversation that I think go into -- I hate pudding, so I'm going to put it into soup instead of pudding because pudding is --

I think one of the things that's coming back is this notion of going back to the framers of the policy when you get stuck.

I kind of like Jonathan's idea, though. I think it's a good idea that when we frame the policy, we put a little energy into implementation guidelines while we do it.

Because, you know, that's right when it's fresh. That's right when we really know the nuance of what's going on.

It's tough coming back to these six, eight, 10 months later and kind of getting back.

So, you know, I -- I'd take Jonathan's thing as sort of a friendly amendment to the go-back because I think it's -- it's a good -- it's a good addition to the pile.

I -- I like -- I find it much easier to imagine cross-community work, cross-silo work happening in working groups. Working groups are better suited to that kind of work. And so I -- I kind of liked Avri's observation that it would be kind of neat to have a framework that was at least similar.

I agree with Chuck that there's value to the silos, but to the extent that we could work out some commonality of process, I think that would help people who were in the process move from silo to silo. They would find familiar methodology when they moved from one place to another.

So I wouldn't throw out the idea of at least trying for some commonality there.

I really liked your idea about professional mediators. I know others didn't, but what that rang for me was a bell that said, you know, "The people in the working group process" -- I'm often a working group chair and the rest of the time I'm a participant, and the best example I have of this is the VI working group which is one that makes everybody break out in a rash.

Part of the problem was that we, the co-chairs, Roberto Gaetano and I, didn't really know what we were doing and we got into some trouble in the middle of that process where if we had had some expert assistant --

I'm not sure that we needed a mediator but we needed some help with that. We could have avoided some of the trap that we fell into.

So I'd offer that as a cool thing.

And then finally, of course, I favor a working group as the next thing in the process. Thanks.

BRUCE TONKIN:

Thank you, Mikey.

So I've noticed we've got about seven minutes and I do want to get a chance for people in the line to make some brief comments, so please go ahead, but the queue will need to stop at that point.

MARK PARTRIDGE:

All right. Hello, I'm Mark Partridge, a member of the IPC. In my day job, I spend a lot of time with alternative dispute resolution processes. Mediation, arbitration, and so forth. And I'd like to support the suggestion that this process at a certain level needs to add in a professional neutral who could help facilitate between the different points of view.

What tends to happen -- and I think we've seen it here -- is impasses grow, positions get hardened, and when positions are hardened, you end up with stalemates rather than advancement.

You end up with more impasse rather than solutions.

A trained facilitator of these kinds of discussions can help the parties get past positions, focus on what the true interests are that they're dealing

with, and then find solutions that will be faster than having things continually going through the process again.

So I urge that to be considered as part of the process. Thank you.

BRUCE TONKIN: Thank you, Mark.

Bertrand?

BERTRAND DE LA CHAPELLE: Bertrand de la Chapelle, ICANN board, but speaking on an individual basis, not as the board.

One thing -- one of the dangers is that this debate becomes a proxy for a debate about the respective roles of the community and the staff, and so we need to transform something which is policy versus implementation into what the reality is that we are dealing with workflows that go from policy to implementation, and what we're talking about is the continuum.

In that regard, I would actually come back to what Jonathan was saying, not because -- I think there was some misinterpretation afterwards. He was not arguing at all for a relationship with the U.S., or whatever else, framework. He was alluding to two different functions in any governance system. One is the legislative and the other one is the executive. It has nothing to do with one specific country. And to add a bit of cultural diversity, this question of the distinction between the legislative responsibility and the role of the administration is very

different in different countries. Particularly between England and France, the debate is very different.

But where the dividing line exists has been, in the case of the French constitutional system, an ongoing discussion, and it's a constantly migrating frontier, which means that the idea of making a clear dividing line is an elusive goal and I think it is something that we should not consider, but rather, consider how the scissors of the respective responsibilities evolve. Because actually at the beginning it's, of course -- if we take the GNSO, for instance, it's mostly within the GNSO process and PDP that it is being developed, and the staff is just support for the policymaking, and then when it goes to the other -- and it's mostly a staff implementation, but it is a sort of progressive exchange of responsibility with tests along the line. Are we still in the closing of the policy framework or do we have sometimes in the implementation to go back to request a clarification?

In this regard, if I take the new gTLD program as an example, one of the biggest challenges is that we thought collectively that the policy was done. The reality is it was not, because what was coming next, the applicant guidebook, was an implementation framework. It was not implementation.

And the reason is that the new gTLD program was not a policy. It was drafting the regime. And there is no commensurate dimension between the whole new gTLD program with a lot of sub-policies and each implementation element required its own policymaking decision and something like, for instance, the add-grace period, which is a very easy-to-define small-scale policy.

So we need to think that when we talk about regimes and larger scale things, it has a lot of back and forth.

Finally, one of the problems in the current model is -- as one of the questions was alluding to, is that the advisory committees in the current model -- and especially for the GAC -- chime in at the end of some of the processes and is very difficult to integrate early on.

And I would like to argue that on one of the questions, there is a strong difference regarding what has to be done when there is competing advice or when there is no consensus.

This is not the same at all.

No consensus in the PDP is maybe a situation where the status quo is not improvable. But competing advice may be a weakness in the process itself, because we're now confronted at different stages with very valid consensus positions that just are not compatible.

Which leads to the question of forcing or not forcing.

I believe that the key element is to take into account that multistakeholder processes take longer and that they need to start -- and I insist on the word "to start" -- in an as broad community-wide discussion before anything starts on the policy. Even if it is within a structure, within a silo. Because the moment you put all the actors together at the beginning, they understand what their common problem is instead of spending the time defining what their individual position is before getting together.

And in this regard -- I could say other things but I want to finalize on one thing -- I begin to not understand where the tension is between a cross-community group or a GNSO working group because I've heard several times in the last few days a comment that says, "No, the working groups of the GNSO are completely open." So let's put this question on the side. Make it a group, make it a GNSO, and make it clear that it is open to everybody.

BRUCE TONKIN:

Thanks, Bertrand. Bret.

BRET FAUSETT:

Bret Fausett with Uniregistry. I'll be quick because some of the things that I wanted to talk about have been talked about by the last speakers.

I wanted to provide positive encouragement for ICANN for what I see as implementation under our new CEO. What used to happen was at that one of these meetings the SOs would come up with a policy, staff would take it back during the next meeting cycle, and then two weeks before the following meeting we would see what had come up.

And in between times, they were trying to solve some really hard problems that the SO had not solved. But we would look at the paper. They had advanced it two steps. Our reaction to it would take it back one step. And that was not really productive.

What I see under Fadi is that he's bringing in industry consultations while the implementation is happening.

I see staff working much more collaboratively with us, the community, on the implementation as it's being developed, which I think is going to make this problem go away. When we're working together, the walls between policy and implementation work sort of break down, and we can correct things, we can say, "Yes, you're right, that's a policy decision we didn't solve. Let's try to do this on the fly or take it back to the SO."

So I think this -- I'm -- I wanted to let you know that I really like the way it's working now and I wanted to see it continue to develop that we work collaboratively. Thanks.

BRUCE TONKIN:

Thanks, Bret.

LARS HOFFMANN:

My name is Lars Hoffmann with a question from a remote participant, Michael Graham.

The earlier comment that if policy implementation decisions reach an impasse, the solution might be beyond ICANN's structured ability and thus turned over to some other organization to resolve seems just the sort of failure that would open the door for other international organizations to begin imposing themselves on ICANN operations.

Mediation, real mediation, takes two or more parties that both want to reach a resolution and help each other reach it. So mediation is not a failure of ICANN procedure, but rather another tool we would do well to consider as part of the ICANN process. What are the panel's thoughts on this?

BRUCE TONKIN: Thanks. And I think we probably have had many of the panelists comment on that but I think there seems to be general support for the idea of using mediation at the right point.

Alan.

ALAN GREENBERG: Thank you. I'll be reasonably quick.

I strongly support what both Bret and said Mark partridge said. I think on the intractable problems that must be addressed, we need to come to closure on them and mediation is probably one of the ways, or some form of it.

The straw man proposal, although badly flawed in how it was initiated and carried out and populated, was a good example of someone going into the room and trying to reach closure, trying to bargain between the parties, and I think we have to use that as a model.

I disagree with Avri that -- stalemate is an acceptable answer only if, as in the European Parliament, we're willing to drop it.

If we really need an answer, we don't -- we shouldn't be tossing it up to the board. It violates the whole bottom-up model. We need to find a way of closing the huge gaps that exist sometimes and come into agreement. Thank you.

BRUCE TONKIN: Thanks, Alan. And any final comments from panelists? I think I had Evan and then Don.

EVAN LEIBOVITCH: Hi. I just wanted to answer one comment -- I think it came from Bertrand -- about the difference between a GNSO working group that was open and a cross-community working group, and that having -- having been on two CCWGs, I would say there's a significant difference and that is on the charter, because sometimes the ACs have a different view from the SOs on even what the question is to be asked.

So that is a fundamental difference between a cross-community one and something the GNSO or another SO creates that is made open. It's a significant difference.

BRUCE TONKIN: Yes. Sure. Bertrand.

BERTRAND DE LA CHAPELLE: Just to say: Then if we have to choose, I'm definitely in favor of a cross-community group.

BRUCE TONKIN: Thank you. Don?

DON BLUMENTHAL: Just a couple of very quick points responding to the person that Lars represented.

I'm not sure that you're suggesting that we turn it over -- turn decisions over to an outside organization. It was just engage an organization like a mediator to help us come up with some conclusions where we're having trouble doing it ourselves.

I also wanted to drop back earlier and just modify something I said.

I agree with Chuck, silos are inevitable, and they serve a good purpose. I think maybe the term I should have used to convey what I had in mind was "bunker."

BRUCE TONKIN:

Yeah. It's a different sort of -- thank you.

Chuck.

CHUCK GOMES:

Thanks.

With regard to next steps, I'd like to make a specific suggestion because this certainly is a hot issue for the GNSO.

I would suggest that Jonathan Robinson, who was previously in the room -- I can't see him right now; he may still be here -- as chair of the GNSO Council approach the other SOs and ACs about the possibility of forming a cross-community working group on this topic and whether they -- the key question is would they be willing to participate in that in the near term.

BRUCE TONKIN: Thanks, Chuck. Any other comments?

James?

JAMES BLADEL: So just as the perhaps lone holdout on the idea that outside parties can come and rescue us from our impasses, I would mention that, you know, I think, again, that this is -- this is where the work should and shall happen. And I think that if we can't pass that threshold together, then it's not a step that we want to take as a community. So I know that there was some back-and-forth on that, so I think that --

BRUCE TONKIN: Yeah. James, I think it may be different terminology but I think when people -- at least what I heard on the panel when they're talking about a mediator it's as actually part of our process, not an external agency. So in other words, like a -- if you look at roles in a group, you often have a group and you have a chair of the group.

JAMES BLADEL: Right.

BRUCE TONKIN: But sometimes you also get a facilitator in that group who -- because the chair is often a member, probably from a constituency of some form, and -- at least in most of our models, and a mediator sometimes, when there's impasse can, assist.

So it's just a different tool. That's all. It's not an organizational thing; it's a tool thing. If that makes sense.

JAMES BLADEL: It does. And I'm still not sold.

BRUCE TONKIN: Okay. Fair enough. Any other final remarks?

Yeah. Steve?

AVRI DORIA: Yeah. A couple clarifications, I think.

On the differentiation between a mediator, I don't even think I'm where you were. I think at the end of the process, I --

I don't see bringing it into the policy development process at all.

I merely see after there's been that and you have these issues that come up with the GAC and the GNSO having a completely different interpretation, I believe a mediation is useful at that point.

And it's not binding arbitration. It's both -- in mediation, both parties can still walk away and sort of say, "Nope, that didn't work, you didn't bring us together." So I don't think it as a thing.

In terms of the issue of the stalemate being a good thing, that's not what I'm saying. What I'm saying is the fact that if we are stalemated and the board can then make a decision, that is a good forcing function, and basically we shouldn't stalemate, but if we happen to, that that

seems reasonable. I think the idea of dropping something when we can't reach consensus is a prescription for status quoism where you always win, the status quo always wins, simply by digging in your heels, and I don't think that's a solution either.

BRUCE TONKIN: Okay. Final comment, Steve?

STEVE DeBIANCO: Thanks, Bruce.

What I've heard as something we need to do is in the policy development process, whether it's working group or not, whatever it is, you should do more of the meaty work. The meaty work of implementation. Because as you all know, you can't have any pudding if you don't eat your meat.

AVRI DORIA: Or soup.

BRUCE TONKIN: Or soup. Right-o.

Okay. I'd like to thank all the panelists and the audience for their participation, and I think the staff will have an interesting effort to consolidate all this down, but I think there are a lot of good ideas and at least certainly a recognition that policy and implementation is a continuum and often I think when you get into the implementation, you actually create more policy issues as you go along, and I think that's

really what we've seen with new gTLD program. Even something simple like prioritization. The fact that we chose to put IDNs first, that's a policy decision.

Okay. Thank you all.

[Applause]