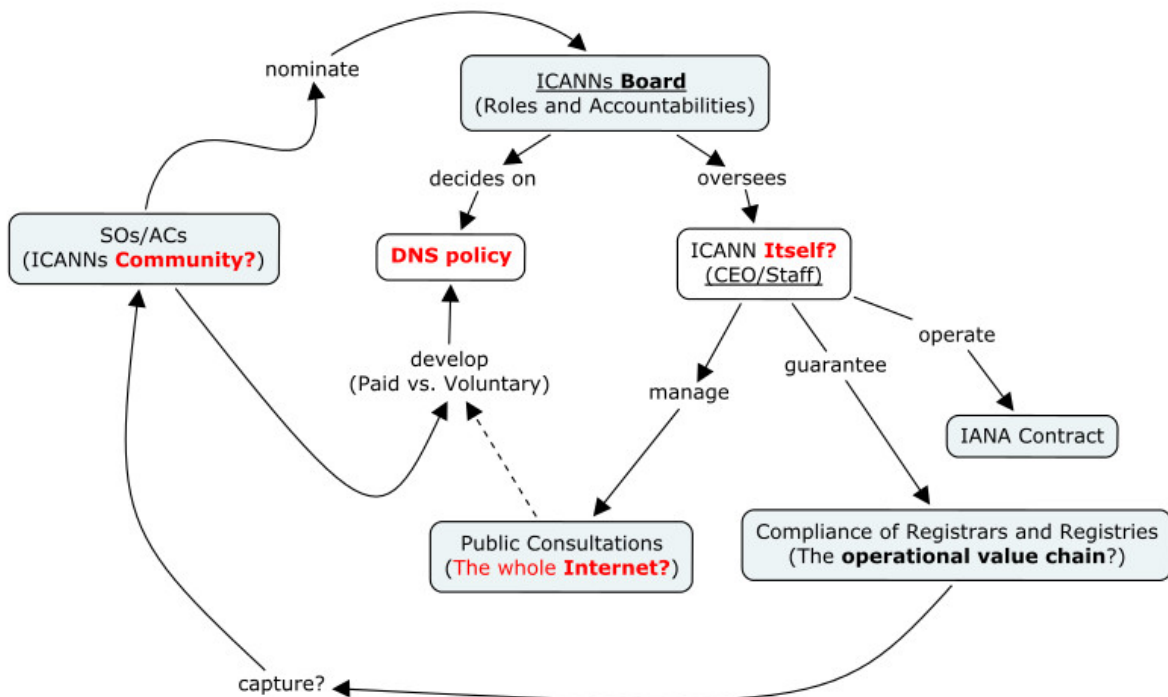


2 Draft «One Pagers» for ATRT2

Both draft ideas focus on the probable lack of clarity of a formal separation between (bottom-up) policy on the one side, and operational and compliance (top-down) issues on the other. the hypothesis behind is that a clearer functional separation between both would allow for better understanding of ICANN Boards two separate roles (DNS policy on the one hand, and ICAAN itself on the other as per BCG 2008 report) and help increase transparency.



1. On the Bottom up policy development process: Proposition is to develop an analytical «**PDP matrix**» to evaluate progress on Recommendation #6 of ATRT1 results presented by David Oliver in LAX2 meeting

Based on 2012 data (51 public comment processes?) «map» issues commented along:

1st axis: the different process levels

- Formal Development Process (bottom-up, community driven)
- Operational Policies (Board driven) with public comment inputs
- «p» Procedures (30-day comment period, -ex. By-Law Changes-)
- Implementation/Practices (=> feedback loops to all of the above)

2nd axis: stakeholders and their degree of participation

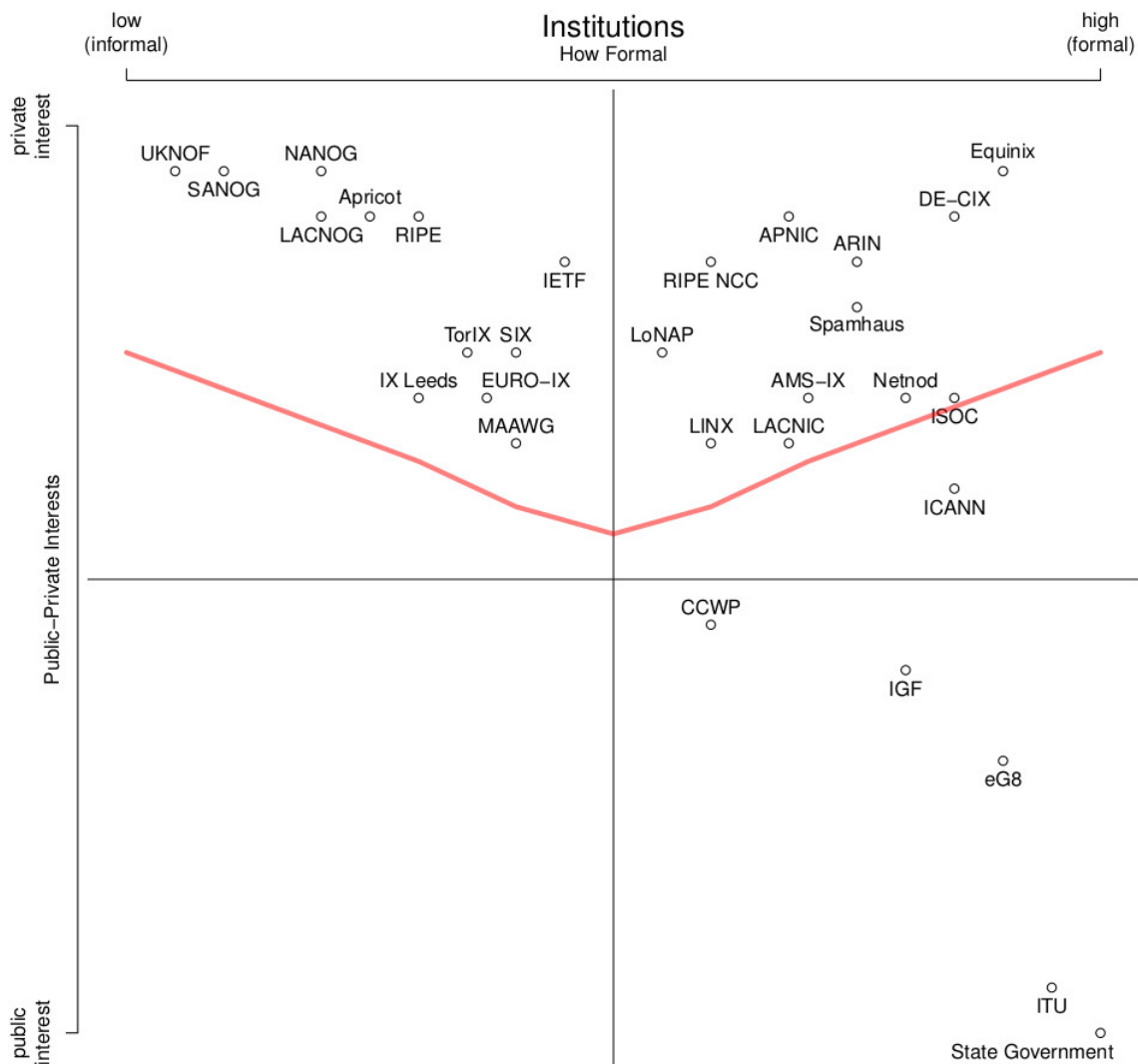
- Initiators (SOs/Board/Operational Staff)
- Value Adders (Other SOs/ACs, Staff, Public)
- Public Commentators (Other than all of the above, how many, how often)
- Advisory Committees

The specific task is to analyze if:

- right classification of policy levels
- metrics on who participates in the public comments
- «lack of transparency?» vs. just confusion because of complex feedback loops in the policy development process
- possible conflicts of interest of the participants in the stream upwards, as well as in future operational compliance issues later downwards (internal accountability issues)

2. On the compliance function (top down): on differentiated levels of (external) accountability along the «Ecosystem Value-Chain», ICANNs values have to be brought into perspective and development in the revision of RA and RAAs taken into account. Output should be a team mapping exercise.

- do we look at Accountability and Transparency at the highest ICANN level only (global public interest principles) vs. operational issues of the implementation at-, and feedbacks from-, lower levels of the value chain (which at some point/interface becomes private, regional and for profit in most cases)?
- how do we bring into perspective of the ATRT» the fact that some powers/resources are delegated to other entities that have DIFFERENT perspectives on the public interest, or that are driven by the profit motive alone



Case Studies

Terms of Reference for Expert assistance

The idea is that the practice for ATRT1 of doing case studies should be continued. They offer a snapshot of practices and situations that are current. In addition to the benefit they offer those doing the current AT review they have a longitudinal value by allowing a comparison of case studies across multiple ATRT reviews allows for logitud

In the case of picking case studies they should come from events that took place during the period intervening between the publication of the previous ATRT report and the creation of the subsequent ATRT. They case studies should be done from the perspective how how they were affected, if they were affected, by the recommendations coming out of the previous ATRT report.

- Where they aware of the recommendations and did they take them into account
- If they did were they helpful or a hindrance
- If they weren't take into account did they show characteristics that were noticed in the previous set of case studies.
- Where do they fall in the continuity of change between the time before the AOC reviews and the current time.
- *other?*

Some candidate processes that occurred between ATRT report in Dec 2010 and April 2013 and would be suitable for case studies include:

- Applicant Support program including the policy creation in the Joint Applicant Support (JAS) Working Group and the implementation of the Support Applicant Review Panel (SARP).
- ICANN Travel policy; policy creation, implementation and administration
- .xxx external review and reconsideration
- IDN ccTLD Policy Development Process
- ASO Global Policy for Post Exhaustion IPv4 Allocation Mechanisms by the IANA
- Cross Community Working Groups; their modalities and success factors as exhibited in some or all of the following:
 - Rec 6 CWG-Morality and Public Order
 - Ad-Hoc ccNSO/GNSO Joint IDN Working Group (JIG)
 - Joint ALAC/GNSO Application support WG (JAS)
 - ccNSO-GAC Liaison Working Group
 - TradeMark Clearinghouse (AIG)
 - Joint DNS Security and Stability Analysis Working Group
 - IDN Variant TLDs Community Project
 - *other?*
- *Other?*

Given the current issue of whistleblowing at ICANN. And given the difficulty even this group might have at delving into it in a fully open and neutral manner, perhaps bring in an outside expert to act as a Special Investigator into the ICANN Whistleblower program and employee morale might be a good use of an outside expert.

The ICANN Whistleblower program is known as the Hotline program. All of the information on this program, except for a [memo](#) seems to be only available on ICANN internal web pages. While the ICANN Board Audit committee seems to have responsibility for reviewing reports of a financial nature, it is unclear what mechanisms are being used for any other reports that might be received by this hotline.

Some of the information that an Outside Expert could research includes:

- Produce a synthesis report on the ICANN hotline process and how it operates as a whistleblower mechanism.
- Do all employees know about hotline. E.g. are there signs up in the cafeteria encouraging employees to use the hotline?
- Do employees think that it is an effective mechanism? Why or why not?
- Do employees feel safe using this mechanism? Why or why not?
- Have any hotline reporting employees been discovered and disciplined (or had coincidental bad performance reviews)?

Other issues that the Outside Expert could research include:

- How many hotline issues are recorded each year?
- What are the categories of employee concern?
- How have these been handled, specifically?
- What dispositions?
- Have any resulted in management changes or the creation of new internal policies?

ATRT-2 – Background Document on gTLD Policy

There seems a fair amount of either confusion or lack of clarity related to the terms:

- Policy vs Implementation
- gTLD Policy Development Process (PDP)
- gTLD policy development (with or without the word “process”)

Policy vs Implementation

The path from a conceptual goal in the gTLD space involves the development of a “Policy” followed by its implementation. The question that is at the core of this topic is whether any specific implementation detail constitutes a *change* in the original policy, or is a *detail* of implementation. In some cases, there is not even a formal policy, but rather a conscious or tacit decision on how to do things at the start of ICANN.

Once a policy is agreed to by the community and adopted by the Board, it must then be implemented. Until recently, such implementation was often the sole purview of ICANN staff.

For the new gTLD program, the “implementation” took many years and there were extensive consultations with the community as to how the policy should be implemented, since the policy itself was generally quite high-level and did not specify a lot of detail.

Much of the current debate centres around whether a specific implementation is indeed just that, or serves to alter the original policy. There is also an issue of once the implementation has been frozen for a sufficient time, it starts to become indistinguishable from the base policy.

It has become my (admittedly cynical) impression that in many cases, those who want a change see it as purely implementation, and those who are against it see it as a change to the core policy.

In more recent cases, implementation, while still a staff responsibility, includes sanity checks with the policy developers to ensure that the implementation is true to the intent of the policy.

GNSO Policy Development Process (PDP)

The ICANN Bylaws defining the GNSO say:

There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

The GNSO is currently composed of representatives of gTLD Registries, gTLD Registrars, Commercial organization involved in the use of the Internet for commerce, those involved in intellectual property issues, Internet ISPs and organizations and individual domain name holders interested in non-commercial issues, and three members appointed by the ICANN Nominating

Committee (one without a vote on Council). There is no voting representation of governments or Internet users.

This Policy Development Process is specified in some detail in Annex A of the Bylaws which begins with:

The following process shall govern the GNSO policy development process ("PDP") until such time as modifications are recommended to and approved by the ICANN Board of Directors ("Board"). The role of the GNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are not intended to result in a Consensus Policy, the Council may act through other processes.

As noted in the last sentence, this process MUST be followed if the result is to be a Consensus Policy, one which immediately upon adoption by the Board and implementation becomes an integral part of Registrar and Registry agreements. Such policies may cover only limited topics which are explicitly listed in the relative agreement, and generically referred to as topics “within the picket fence”.

Another important characteristic of a PDP-created policy is related to the level of support (or non-support). The concept is related to a “supermajority” vote. Such a vote requires 2/3 of the Board instead of a simple majority. A GNSO supermajority is a more complex calculation due to its two-house voting mechanism, but can be thought of as requiring about 2/3 support. For a PDP adopted by a supermajority of the GNSO, the Board MUST adopt the policy unless a supermajority of the Board believes it would not be in the interest of the ICANN community or ICANN and votes against it. So in effect, it only takes 1/3 of the Board to approve a PDP-created policy and there must be a substantive, demonstrable reason to not approve it.

There is some debate as to whether a PDP-created policy approved by only a majority of the GNSO and the Board has the weight of an enforceable Consensus Policy.

There is no explicit provision within the Bylaws for the Board modifying the result of a GNSO PDP – only adoption or rejection. However, recently there has been some acceptance of the concept of the Board taking other more detailed action.

gTLD policy development (with or without the word “process”)

Based on the last sentence of the introduction to Annex A of the ICANN Bylaws, the formal PDP must be used for Consensus Policy or if the GNSO is attempting to make it very difficult for the Board to overturn the resulting policy. For anything else, the GNSO is free to adopt less formal, less stringent or simply different processes. The resultant policy must still be approved by the GNSO Council, presumably demonstrating community support for the new policy.

Proposal: A Review of the gTLD Policy Development Process (PDP) based on case-studies

If you take an informal survey of people in the ICANN ecosystem, and ask about the health of the gTLD PDP, you will receive answers covering the range from “it is working exactly as it was designed to and should” to “it is VERY broken”.

My personal position is that its ability to address policy development varies based on the type of problem it is addressing.

Issues that may be difficult and important, but there are few ICANN participants who have a large financial stake in the outcome.

The PDP works very well for this class of problem. Dedicated people who have an interest in the subject, and a vested interest in “fixing” the problem or making a process run better get together, investigate and debate the issues, and try to do the best thing for the Internet.

Issues where one group of stakeholders have either significant financial interest in the outcome or a vested interest in seeing either no change or very specific change. Other “interested parties” have no real personal or corporate stake.

Those with a strong financial or other reason for wanting a specific outcome invest a lot of time (ie multiple Working Group members attending regularly) in this type of PDP. Those without personal or corporate success at stake have a hard time devoting sufficient resources to the PDP. The result is either the first group gets exactly what they want, or the end results are a watered down least-common denominator, not really worth the amount of effort that went into the process.

Issues where a lot is at stake, financial, some other form of status or principle - on both sides.

This type of PDP is likely to result in either a deadlock, or a least-common denominator result that will not be acceptable to the larger Internet community or the Board or the GAC.

There are many examples of the first type of PDP, with several Inter-Registrar Transfer Protocol (IRTP) PDPs being good examples.

The best example of the second class of PDP that I am familiar with is one that I ran. The PDP on Post Expiration Domain Name Recovery – a PDP attempting to establish rights for registrants ensuring that they can reasonably renew expiring or expired domain names, rights that originally existed but were eroded by changes in registrar practices. This was a long painful process that

achieved some, but really minimal, registrant rights – far below those that most registrants expected or deserved (based on their historical rights).

An example of the third type is the PDP on Vertical Integration, which stalemated and ended up with the Board deciding on the outcome. The current PDP on protecting Inter-Governmental and International Non-Governmental Organization names is, in my opinion, likely to have one of the results predicted above.

Proposal

I propose that we contract with an external agency to do case studies on a number of PDPs and report on whether the process works well and meets ICANN's needs, or what its weaknesses and failure modes are. To the extent possible, alternatives could be recommended, but I think that this might be too much to achieve given the limited time-line and the fact that an investigative body might not be the best organization to recommend alternatives. Including this as a target also, to some extent, presupposes the conclusions of the investigation and I think that ICANN would be better served with doing this, if needed, in a later stage.

Alan Greenberg, 2013-05-19

Proposal for external review/case study to the ATRT2

ICANN finances

Introduction

ICANN is a private not-for-profit multi-stakeholder organization. One of the fundamental principles for being a multi-stakeholder organization is to be a transparent and accountable organization.

At the moment ICANN as an organization is growing rapidly, partly because of a new management which is aiming for a global outreach and partly because of the new gTLD program. At the same time, ICANN income has grown significantly and with this the complexity of the organization and its finances have also grown.

This changes the scope of ICANN from being an organization with a limited number of fairly fixed TLDs, which might provide growth in the number of second level domain names, to an organization that aims to expand the numbers of its gTLDs. This puts pressure on an organization that is not-for-profit and multi-stakeholder because it expands both its business and its stakeholder groups. This is why it is important to ensure that the organization's finances are managed in an accountable, transparent and non-discriminatory way. A case study like this is best done by external experts, rather than by the ATRT2 group.

The study

This paper proposes that a study be made of ICANN finances, of how ICANN uses its finances, and whether this is done in an accountable, transparent and non-discriminatory way. The case study should take into account the fact that ICANN is operating according to the multi-stakeholder model and the not-for-profit paradigm, and that every year it publishes an operating plan. When an evaluation of transparency is completed, the external experts might also assess the timing of publication of the operating plan to the internet society.

The study could also make an evaluation of whether reporting back to the international internet society has been done in an accountable and transparent way. The reporting should be measured according to the operating plan and the yearly financial statements, and a comparison made with other international not-for-profit organizations.

It is proposed that the study focus on three main questions:

1. Are the finances used in an accountable, transparent and non-discriminatory way?
2. Are the finances used according to the published operating plan?
3. Is the reporting to the international internet society done in an accountable and transparent way?

(JAA-DRAFT 16.5.2013)

Outreach towards Governments (at Minister level)

Problem

In the last years the appropriateness of the current Internet governance model – a multistakeholder driven governance model with ICANN in a leading role – has been questioned by a number of governments who seem to prefer changing the model in a direction which gives ITU a more prominent role because they claim that ICANN lacks accountability and transparency (legitimacy) with respect to the way it plays its role. Or at least this is how the situation seems to be perceived by some politicians. The latest example of this trend was seen at WCIT in Dubai in December 2012. To the extent this perception does not properly reflect realities it may lead to inappropriate political decisions regarding changes in the current Internet governance model with serious negative consequences for innovation, growth and jobs.

The CEO of ICANN has over the last months done a great job travelling around the world explaining how ICANN is really playing its role and that often heard accusations are not based on facts – and apparently with success.

Contacts between ICANN and governments have until now mainly been channelled through GAC. However the fact is that a large number of governments do not prioritise an active participation in GAC and ICANN. We do not know if this is due to a lack of interest in DNS policy or if governments deliberately deselect the ICANN policy model. Out of the 130 members of the GAC only 50-60 governments take part in meetings. Representatives are government officials and involvement of ministers in providing GAC advice to ICANN have been very limited despite the increasing political nature of issues dealt with in GAC and ICANN, i.a. gTLD.

Solution

On the background of the increasing number of critical voices (i.a. in WCIT) regarding the accountability and transparency of ICANN as well as the fact that ministers only to a very limited extent have been involved directly in discussions and considerations about how this can be improved it seems appropriate that ATRT2 addresses ministers responsible for internet issues directly in personal letters asking them to contribute to the work of ATRT2. In such letters ATRT2 could ask ministers to give – from their individual political perspective – their proposals regarding how to improve the accountability and transparency of ICANN as well as GAC's functioning with respect to advising ICANN together with any other relevant input they consider appropriate. So the purpose would be a) to raise awareness at the political level of the important work carried out by ATRT2 and b) to open a window for ministers to directly contribute.

In order to ensure that such letters actually be read and responded to a “peer-to-peer”-letter would be to prefer. This means a letter (sent on behalf of ATRT2) from Minister Stephen Conroy to his colleagues in the rest of the world. If Stephen agrees to this it may be considered in the letter to refer to Stephen's personal commitment to maintaining and improving the multistakeholder model as a well proven effective driver for innovation, growth and jobs while at the same time recognizing the need of constantly investigating ways of enhancing the accountability and transparency of ICANN to support the functioning of this governance model as the best driver for innovation, growth and jobs.

Feed back from ministers to such a letter could be seen as a valuable supplement to input regarding the ATRT2 questionnaire open for comments until 9 June.

To: Accountability and Transparency Review Team 2
From: Brian Cute
Re: Potential engagement of Independent Expert
Date: May 19, 2013

The Accountability and Transparency Review Team 2 (ATRT2) will consider whether it will engage an Independent Expert to assist in its task of assessing ICANN's accountability and transparency under the Affirmation of Commitments (AoC) para. 9.1. ATRT2 has identified "metrics" as an issue that is critical to ICANN and the community to benchmark and measure improvements to accountability and transparency from both a quantitative and qualitative perspective. Other than providing target dates for some of its recommendations, ATRT1 did not offer, suggest or recommend specific metrics for ICANN to implement deferring the task of developing performance measures to the organization.

In its initial interaction with ICANN staff, ATRT2 observed that, to a large degree, development of specific metrics to measure accountability and transparency (and forward going improvements) has not yet occurred. At the first face-to-face meeting in Los Angeles between ATRT2 and ICANN staff, ICANN CEO, Fadi Chehade, made a commitment that metrics would be developed by ICANN to measure progress going forward.

An independent expert could provide a benefit to the ATRT2 and to ICANN in a number of ways: 1) work with ATRT2 to provide a third party assessment of ICANN with respect to accountability and transparency to establish benchmarks to measure against going forward. 2) provide specific guidance to ATRT2 and ICANN concerning the use of metrics specifically tailored to the issue of accountability and transparency; 3) provide tools that ICANN could employ going forward to measure accountability and transparency and more effectively communicate to the community on these issues; 4) provide future audits of ICANN's accountability and transparency.

Organizations that focus on accountability and transparency practices and metrics exist. For example, ICANN worked with One World Trust in 2007 to undertake an independent review of standards of accountability and transparency within ICANN <http://www.icann.org/en/news/announcements/announcement-4-29mar07-en.htm>. Other organizations provide guidance and tools to measure accountability and transparency of organizations. <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1283> Other resources focused on accountability and transparency in both the public and private sector exist as potential points of reference for ATRT2 on this issue.