

On the issue of “public interest” along the value chain of the ecosystem

1. From a GAC’s member perspective

In many Internet governance and standards organizations, technical barriers are beneficial: in the IETF they contribute to meritocratic evaluation of proposals; in technology development processes they ensure the quality of contributions; in technical policy making they are a reality check and ensure operational efficacy. In each of these, technical barriers contribute to quality control. But when engaging with public policy makers, technical barriers preclude effective engagement and dialogue, and may foster distrust.

Currently, the mechanisms for evaluating this phenomenon as an outcome are poorly understood. An illustration is the current relationship between the GAC, the Board, and some of its joint working groups (operating principles, by-laws, PDP). The Board has placed the GAC in a box and their engagement through joint WGs is confounded by technical barriers that are not aligned with the types of outcomes policy makers base their decisions based on. The result is a body that has a fundamental regulatory role, but that both denies that role in favor of a poorly articulated (underspecified in academic vernacular) model of multi-stakeholderism and that has unintentionally alienated those policy agents in government that could best help them develop this role.

Consider the canonical constituencies within the multi-stakeholder model:

- industry actor’s value proposition is the creation of private goods and thus introducing mechanisms to protect the distribution of these private goods is key
- government’s value proposition is the provision of public goods, those that benefit their constituents and that are often too costly or have too risky a return on investment to be provisioned privately
- civil society’s value proposition is the provision of social goods, those that improve and enrich a society or constituencies’ quality of life, but do not have immediate return to the producer

Infrastructure is known to be an input to each of these goods provisioning processes: the Internet as an infrastructure (independently of its inherent technical complexity) has undeniably contributed to each of them. A critical requirement for infrastructure management is that particularistic interests distort the much generalized function of infrastructure, narrowing its functionality, thus limiting the range of beneficial outcomes above (Frischmann). To protect this quality, an infrastructure (self-)regulatory body, such as that to which ICANN should aspire, must take direction from particularistic constituents while preserving the general character of the infrastructure.

2. From a Regulatory perspective

If we want to break new ground with our report, ATRT2 has to recognize that the question of public vs. private interest is a false dichotomy. Public and private interests are ideal types created for academic reference, while real systems benefit from comparison with these ideal

types, they often require the analyst to relax the criteria at each end of the spectrum to meaningfully describe, and more importantly explain, how interests are structured within that system and attendant management organizations. **Internet governance organizations are especially challenged because many of these organizations are characterized by private actors, pursuing private interests, yet whose collaboration and coordination lead to infrastructure resource management regimes that directly and indirectly create substantial public goods.** ATRT2 would benefit from incorporating this kind of analysis into its existing processes. The outcome would be to place ICANN's various bodies on a continuum between public and private interest and position the different layers as per AoC 9.1 sub-paragraphs along this continuum (A. Sen, The Idea of Justice)

Despite the common connotations in general, but especially in the Internet community, regulation is not always bad. When functioning properly regulation creates order, thereby reducing participants' risk proposition and transaction costs. In the case of ICANN, good (self-) regulation should reduce the risk involved in coordinating DNS resources and will reduce the transaction costs of those engaging with the DNS system: these market benefits are in and of themselves a public good! Embracing the role of regulation is, unsurprisingly to me at least, a necessary component to meeting the requirements of part 9.1 of the AOC.

As a regulatory body, ICANN must, to fulfill Article 9.1, identify a process, such as outlined in the one pager proposed, through which it can enforce policy on those very actors that imbue it with legitimacy through the bottom up policy process. In other successful governance arrangements, this requires explicitly standing up the conflicting interests rather than continuously reinventing itself in the hopes of finding idealized common position. In the language of organizational behavior, ICANN must, like many other organizations, embrace the notion of constructive conflict.

3. From and organizational effectiveness perspective

For any outsider (not only Governments) it is one particular difficulty to understand ICANN organizational philosophy. While recognizing that the multi-stakeholder bottom-up policy development process is not a common practice in private organizations, a BCG Study in 2008 articulated quite clearly what different responsibilities and challenges the Board of ICANN faces in plain terms.

The work proposed here will start the development of a repeatable, standardized impact analysis process and framework that structures the (1) policy making, (2) implementation, and (3) compliance roles of ICANN in such a way as to:

- introduce efficient and efficacious regulatory practices by
- maximizing engagement with government officials through appropriately aligned policy making process and compliance processes, but not exposing them to the details of the more technical implementation challenges
- making the BOARD-GAC working relationship much more easier to Governments as a whole

The process for such an impact analysis would require highlighting particular roles and characterizing their scope in a way that facilitates effective evaluation. It also requires

partitioning the phases of policy development to facilitate the development of standard criteria for evaluating the impact of each:

- **policy making** focuses on constituency engagement, including government officials; this will require breaking down barriers between existing constituencies and actively eliciting constructive conflict
- **implementation** builds on these “requirements” elicited from policy making but is insulated from this process to avoid continuous thrashing---in effect, once consensus is reached, insulating the implementation process from constructive conflict, contributing to process of preserving stability modeled after notions of punctuated equilibrium ;
- **compliance** processes that introduce independent accountability evaluations by the Board at various phases of both processes and that is articulated in terms of meaningful outcomes that contribute to an analysis of the impact of the policy and its implication for various stakeholder groups. It is important that this process is not distorted to interfere with an active implementation after consensus is reached.

Such a process reifies the goals of Article 9 of the AOC: compliance addresses 9.1; the partitioning of interest structures insulates 9.2’s security, stability and resiliency efforts in the implementation process but highlights them for scrutiny as outcomes in the compliance process.

I assume that a possible recommendation for clear structural separation of these tasks within the organization will help draw a clear distinction between ICANNs different roles, while the balance between the work done by volunteers and ICANN staff continues to evolve (as per the BCG report). In any case a great effort has to be done to convince outsiders that the governance structure is not conflicted by those supporting organizations that do the volunteer work, but at the same time place their own nominees on ICANN board. In any case the objective is to help positioning ICANN as a **private sector, “standards plus compliance entity”**, trusted by its stakeholders down the value chain, as well as by Governments.

4. Justification of the requirement for an outside expert/facilitator

- **Whether the work of an Independent Expert on the issue will provide critical benefit to ATRT2 and its recommendations to the ICANN Board.** I personally think that the response to the question if ICANN acts in the public interest are binary (yes/no) or if it should be viewed along the continuum between Governments on the one end, and private for profit members of the community on the other has not been reasonably discussed in ATRT2 so far. A “facilitator” (more than independent expert) with a strict qualitative methodology would be most helpful to get this discussion finally going in Durban at the latest. Furthermore, if accepted in the final recommendations ICANN could very well profit from a standard framework to follow this question up and report regularly on it, instead of waiting for the next review.
- **Relation to the specific mandate of Paragraph 9.1. AoC? Yes!** The single subsections of paragraph clearly identify the Board, as separate from Governments (through the GAC proxy) , and also to the community as a whole, without explicitly accepting that the

public-private motives vary between the different levels (and sometimes within a specific level). In my view the public interest continuum changes at the different levels and ICANN should be able to reflect this differentiated interest in the «public interests» standard in its day to day efforts of accountability and transparency. ATRT2 should be able to put forward to the community a formal qualitative follow-up framework for this question, to see if they are willing to even consider the idea that transparent policy making will create winners and losers and a “regulator” or compliance function (in the broad sense of the word) must be able to sustain legitimacy while facing down those that seek to capture the effort. This is in my view the level of transparency we should aim for.

- **Could the issue be effectively addressed with existing ATRT2 resources?** Yes, both within the time constraints and the budgetary resources available. The proposal is to have a workshop with the expert/facilitator in Durban to get the dialogue going, and include his recommendations for a formal evaluation framework in the draft to public comments in October, to get a reaction from the community before the final report decides if they recommend the methodology for a continuous reporting on the public interest performance of ICANN.
- **How significant do you expect this issue to be in terms of impact on ICANN’s accountability and transparency?** I consider very important that ICANN is able to project an Accountability and Transparency effort beyond the boundaries of its technically sophisticated community, and reaches out to a broader, nontechnical public, that worries less about technical details, but has real considerations about ICANNs legitimacy.
- **Is the issue one that would need to factor into the ATRT2 recommendations or one that would be a stand-alone analysis that, in parallel, is complementary to the ATRT2’s work?** Certainly it should become part of the ATRT2 recommendations, if accepted by the Team and receives positive public comments, since it would guarantee a steady stream of information on this very important issue, instead of waiting to the next Accountability and Transparency review.

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08/06/2013