Report of Public Comments

Title:	Policy vs. Implementation

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Section I: General Overview and Next Steps

Mainly as a result of discussions stemming from implementation related issues of the new gTLD program, there is increased focus on which topics call for policy and which call for implementation work, including which processes should be used, at what time and how diverging opinions should be acted upon. In order to facilitate these discussions, ICANN Staff has developed a draft framework for community discussion that identifies a number of steps and criteria that might facilitate dealing with similar questions in the future. The paper [PDF, 195 KB] identifies a number of questions that the community may want to consider further in this context, as well as a couple of suggested improvements that could be considered in the short term. While developing a bright-line rule as to what is policy or implementation may not be possible, the hope is that by developing clear processes and identifying clear roles and responsibilities for the different stakeholders, it will become easier to deal with these issues going forward and allow for broad participation and involvement. In order to facilitate discussions on this topic, a session is being scheduled at the ICANN meeting in Beijing. Input received as a result of this public comment forum is intended to feed into those discussions, which are also intended to identify next steps.

Section II: Contributors

At the time this report was prepared, a total of eleven (11) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Internet Commerce Association	Phil Corwin	ICA
Registrar Stakeholder Group	Michele Neylon	RrSG
FairWinds Partners	Elizabeth Sweezey	FP
Valideus	Brian Beckham	VA
Non-Commercial Stakeholder Group	Avri Doria	NCSG
Intellectual Property Constituency (2x)	Steve Metalitz	IPC

Registries Stakeholder Group	Keith Drazek	RySG
Google	Aparna Sridhar	GO
Business Constituency	Steve Del Bianco	BC

Individuals:

Name	Affiliation (if provided)	Initials
John Curran	Individual	JC

Section III: Summary of Comments

> *General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

Most commenters welcomed the staff paper and highlighted the importance of addressing this issue.

Characteristics of the framework
Several commenters pointed out that any further efforts in this regard should focus on a forward-looking long term framework to deal with implementation related issues instead of focusing on current discussions in relation to the implementation of the new gTLD programme (GO, BC, ICA), although several pointed out that the lessons learned from these recent discussions or initiatives could help inform the development of such a framework (VA, BC, ICA, IPC). Several commenters also highlighted that any framework should be based on principles of 'fairness, notice and due process' (GO, IPC) as well as predictability including clarifying the roles of the different ICANN stakeholders (GO, RySG, RrSG, FP, NCSG, BC). Some pointed out that if policy or implementation decisions would result in new obligations for contracted parties 'ICANN should adopt a rigorous notice and comment process' (GO, IPC). Some suggested that some of the terms used in the paper such as 'materially', 'significantly', 'substantial' would need further definition in order to be used in such a framework (NCSG).

Policy development
Some noted that the creation of new obligations on parties would automatically put a proposal in the policy category (RrSG, BC, ICA), while 'matters in the direct control of ICANN or its contracting parties' would typically fall in the implementation category (RrSG). Some suggested that 'a PDP [Policy Development Process] should be triggered only when a considered analysis of the existing policy recommendation being implemented is judged to be no longer fit for purpose' (VA) or 'for overarching questions which do not require a rapid resolution' (IPC).

One commenter noted that the modification or repeal of adopted policies should only be possible by conducting a new PDP (GO). Others highlight the importance of ensuring that policy recommendations are 'specific and concrete enough' to make affected stakeholders aware of the 'possible implementation parameters' (RySG). Some suggested that in order to be able to provide sufficient detail as part of policy recommendations, the subject-matter experts should be involved in

the PDP (VA, ICA, IPC).

Comments on proposed principles in the staff paper

In relation to the principles outlined in the staff paper, the RySG in its contribution provided some specific feedback on each of these including:

- It is important to obtain and provide early input from/by the ICANN community during the PDP phase, instead of waiting until the implementation phase. Should there be any reopening of issues, 'then the most appropriate action would be to refer it back to the primary body that developed the consensus'.
- A suggested rewording of principle #2 to 'The roles of supporting organizations and advisory committees should be clearly articulated and respected in decision-making processes'.
- Recognizing that in certain cases it would take more time to develop implementation details as part of a PDP instead of doing it afterwards, which should not suggest that everything after adoption of the policy recommendations is implementation, but that 'sometimes policy development is necessarily iterative'.

Questions for discussion in the staff paper

a) *The GNSO PDP process specifically discusses the implementation phase after the PDP recommendations are approved by the Board. Accordingly, should the level of implementation that should be part of the actual PDP be detailed? Should it be mandatory to form a Community Implementation Review Team whose task it is to provide guidance and/or clarification as needed to ICANN Staff as they develop the implementation plan?*
Some noted that ideally policy recommendations should include as much detail as possible, but that in practice this would not always be possible as a result of complexity, timing and diversity of views (RySG, FP) or new policy considerations emerging as part of the implementation discussion (ICA). Others suggested that implementation details are to be addressed as part of the PDP instead of Implementation Review Teams (BC). One commenter noted that any implementation review team should be 'open to a diverse membership and operate in a transparent manner' (ICA).

Several commenters noted that it should not be mandatory but recommendable to form a Community Implementation Review Team (RySG, FP, VA), and one commenter noted that depending on the complexity of the policy recommendations, multiple Implementation Review Teams might be necessary (RySG). One commenter suggested reviewing other mechanisms such as the ccNSO Permanent IDN ccTD Advisory Panel which may serve as a model for providing implementation guidance (VA). One commenter suggested to explore whether 'standing "Implementation Oversight Teams" of experts and informed community representatives to provide oversight of staff work on implementation' should be created (IPC).

b) *What guidance should there be on the level of particularity that PDP recommendations should embody and how/where should that be specified? It should be noted that if very specific implementation guidance is desired as part of the policy recommendations, specific expertise (legal, technical) will be needed by WGs developing such guidance.*
One commenter suggested that policy recommendations should include recommendations on how implementation discussions should be managed (FP).

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

d) *One of the advisory-seeking mechanisms used recently was the IRT/STI process used in crafting the rights protection mechanism in the New gTLD Program. While some considered this "policy", others considered this implementation of the principle that there must be a process to protect the rights of others when expanding the gTLD space. How could such consultation mechanisms be clarified to better explain the purpose and role and outcomes of the work requested? How can the work of these consultation mechanisms be updated to take into account input from other SO/ACs and the public?*
One commenter noted that it would be worth reviewing the STI as a possible model, while the IRT 'is a clear example of a model that should not be followed' (ICA).

e) *There should be recognition of the potential for overlap in responsibilities between an SO/AC and ICANN, such as when an issue can be the subject of a PDP, where it still may be appropriate for Staff or the Board to act. In ICANN's multi-stakeholder bottom-up policy development structures, the inability to reach consensus on key issues could produce stalemates that by default preserve the "status quo" instead of enabling badly needed changes. Examples of this might be the vertical integration issue or the changes to the RAA. In addition, there may be instances where competing "policy advice" is given by different SO/AC. How is the Board expected to handle such situations?*
Several commenters pointed out that in the absence of community consensus on policy recommendations, the ICANN Board should not be act 'as long as the status quo would not create any security of stability issues' (JC, RySG, ICA), in those circumstances 'care must be taken to involve the full community before deciding that 'badly needed change' is in order' (RySG).
However, one commenter noted that in the case of adopted policy recommendations, 'the bias should be in favour of implementation even when there is a lack of community consensus on all details of the implementation' but ensuring sufficient opportunity for input and rationale why a certain approach is chosen over another (ICA).
Others noted that in case of lack of consensus 'it becomes incumbent on leadership to weigh whatever options are available in making a decision in fulfilment of a duty to act in what they reasonably believe are the best interests of ICANN' (VA, BC). Some also suggested that a modification to the PDP could be considered to allow for 'cross stakeholder consultations to build

consensus' (RySG) or other mechanisms could be explored that would foster cross-community collaboration (FP).

f) *One distinction to consider between formal "P"olicies and little "p"olicies may be the expected longevity of the policy. For example, formal "P"olicies under the new GNSO PDP can only be modified after implementation by undergoing another formal PDP. This results in the formal "P"olicy becoming everlasting, and long lasting. In contrast, could a little "p"olicy adopted to meet the needs of a specific circumstance (example, the Conficker response) evolve based upon changing circumstances or experience with the effectiveness of the little "p"olicy?*
Some commenters agreed that "p"olicies should be modified or discontinued once the circumstances change (RySG, FP), and one commenter suggested that mechanisms should be found to allow for expedited consultation when creating or modifying "p"olicies (FP).

Possible short-term improvements
Two contributors expressed explicit support for the possible short-term improvements identified in the paper (RySG, FP).

Possible next steps
The RySG and BC note that one of the areas that the GNSO should focus its attention is the development of a process for providing 'Policy Guidance'. The NCSG suggests that 'a full community process is [...] recommended for reviewing the details and mechanisms of any such Framework' and proposes the creation of a cross community working group. The IPC suggests starting with 'a cataloguing of the methods that have been used in the past' to address implementation related issues to determine best practices that may serve as a basis for an overarching framework.

Section IV: Analysis of Comments

> *General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.*

The comments received demonstrate the community wide interest in this topic and indicate support for further discussions with the aim of developing a community wide framework for addressing implementation related issues. These comments as well as the staff paper will be further considered during the session that will be organized on this topic at the ICANN meeting in Beijing (see http://beijing46.icann.org/node/37133) as well as any follow-up discussions that may follow.