The ICANN GNSO "Business Constituency"

Comments to Accountability and Transparency Review Team (ATRT-2)

Status: FINAL
Version: 2
9-June-2013

Business Constituency Submission

GNSO//CSG//BC

Background

The second Accountability and Transparency Review Team (ATRT), mandated by paragraph 9.1 of the Affirmation of Commitments (AoC), is currently defining its scope and work program. ATRT now seeks input from the Community on a set of questions for consideration.

In this document, the Business Constituency (BC) provides guidance for ATRT in these general areas, mapped generally to the questions posed.

General point about defining the "public interest" for ICANN purposes.

As noted in the opening section of the ATRT question document:

> In the Affirmation of Commitments (Affirmation), ICANN commits to maintain and improve robust mechanisms for public input, accountability and transparency to ensure that the outcomes of its decision-making will reflect the public interest".

When signing the Affirmation in 2009, Lawrence Strickling, Administrator of the U.S. National Telecommunications and Information Administration said, "this framework puts the public interest front and center and it establishes processes for stakeholders around the world to review ICANN's performance."

But until the ICANN community comes together to define what 'public interest' means, we are unable to assess whether our efforts reflect the public interest. Leaving the term 'public interest' undefined leaves the floor open to conflicting and competing interpretations that serve the particular interests of ICANN stakeholders.

The BC has previously recommended a definition for public interest that is limited to the scope of ICANN's mission. Namely, to ensure the availability and integrity of registration and resolution services. But it is not for the BC or the ATRT to define public interest for ICANN. The definition should be derived through a process that is open to the ICANN community and Internet stakeholders – including a prominent role for representatives of governments, which often claim to have unique standing to know what is in the public interest of their citizens.

ICANN management may have already taken steps in this direction, by launching a project under the CEO's "Affirmation of Purpose" objective. Sally Costerton is presently assigned the goal to "Co-create clear, shared definition of the public interest." It is not clear how ICANN management would involve the community and GAC to "co-create" the definition. Therefore the BC suggests that the ATRT explore and recommend a community-wide process and guidelines to define public interest for ICANN purposes.

Questions 12-16 regarding support for ICANN decisions and the Policy Development Process:

Public and community support for ICANN's decisions and policies seems to depend more upon the *outcome*s than on the process used to create and implement policies. Witness the current controversy over so many implementation decisions surrounding the expansion of gTLDs, including rights protection mechanisms, registry contracts, registrar agreements, and safeguards. Within the ICANN community and governments there is wide divergence in the degree of support and satisfaction with decisions about implementing policies.

This has come to a head with the present debate over *policy versus implementation*, which can only be settled by having a clear definition of each, and by having clear guidelines as to when the question should be asked and what kind of answer we are looking for.

The policy versus implementation debate has at times been used to obfuscate the real issue and simply attempt to get the outcome wanted by specific individuals or groups. This is a short-term view that does not do justice to the multistakeholder model.

The BC is part of the GNSO. As such, it supports the model of having an SO in charge of defining policy for generic Top Level Domains, with groups such as our constituency able to actively participate. This work of developing policy, which is then managed by the GNSO Council, is crucial to ICANN's function as technical coordinator for the Internet's naming and addressing system. It is crucial to develop policy, but also to implement policy.

If we as a community do not know where one stops and the other begins, we run the risk of mismanaging the policy development process and of not seeing policies implemented in the way they were designed to be by the people who took the time to develop them. The BC therefore suggests that clear guidelines be set-up on what constitutes policy implementation. This is the important step, as there are already extensive rules and procedures on policy development at GNSO level.

In accord with *Affirmation* paragraph 9.1, the ATRT poses questions about whether ICANN decisions are supported by the Internet community, and about the effectiveness of the Policy Development Process. The ATRT seeks specific examples for each of these questions, and the BC suggests that Strawman implementation solutions are a useful example to consider.

The BC proposed that implementation decisions imposing *material new obligations* should be considered policy. Using the BC's recommended distinction of whether "material new obligations" would be created, the BC saw the Strawman solutions 1-4 clearly as sensible and reasonable implementation of previously developed policy to "not infringe the existing legal rights of others".[1]

The BC recommends that ATRT examine how to assess policy development and implementation processes against the AoC charge "to ensure that the outcomes of its decision-making will reflect the public interest".

The BC also reaffirms its commitment to the multistakeholder model and that this work should be done to support of that model, not weaken it.

Questions 9-11 regarding Public Input

These questions delve into participation in and satisfaction with public input process such as comment periods, AC/SO working groups, and evaluation teams.   First, the BC makes a general observation about the volunteer selection process, which has the potential to enhance or impair the effectiveness of public input.

The ATRT is a good example of effective volunteer selection by the respective groups that make up the ICANN Community. However, the BC is concerned at what appears to be a developing trend for top-down decisions on who can participate in volunteer groups.

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[1] http://www.bizconst.org/Positions-Statements/BC%20Comment%20on%20Strawman%20Solution%20FINAL.pdf

Taking the ATRT as an example, the selection process could be tweaked so that it is fully carried out at AC or SO level and does not require final selection by the Chairman of the Board or the Chairman of the GAC. There are reasons rooted within the original AOC text for this to be the case as far as the ATRT goes, and the BC understands that.

However, there are many other volunteer groups where the AoC has no bearing on the way volunteers are chosen, and yet there remains a top down approach with either the Board or ICANN Staff presiding over selections. This tends to lead to situations of under-representation by some groups, and the BC has suffered from this in the past.

We suggest that the ATRT explore whether the volunteer selection process is as inclusive of all ICANN community groups as it should be in order to fulfill the AoC's mandate that ICANN decisions reflect the public interest.

Second, the BC recommends that ATRT examine the degree to which public input – particularly public comments – are considered by ICANN staff and board when making decisions.   The BC generally believes that many of its specific public comment suggestions are inadequately reflected in staff summaries or worse, ignored by ICANN management and the board.

Finally, the BC anticipates that existing and new registry operators will increasingly pursue new registry services as their business models and technologies evolve.   There are already public input mechanisms for the Registry Services Evaluation Process (RSEP), which sometimes leads to amendments to a registry operator's contract.   But public input is not always required for actual amendments to the registry agreement.

The BC recommends that ATRT examine the need for a public input mechanism in this area and check the current implementation against the PDP "*Procedure for use by ICANN in considering requests for consent and related contractual amendments to allow changes in the architecture or operation of a gTLD registry*" from June-2005[2]

These comments were prepared in accordance with the BC Charter.
The BC held member discussions on this issue on May 22 and June 6.
Steve DelBianco and Stéphane Van Gelder were rapporteurs.
The present text was deemed approved on 8-Jun-2013.

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[2] See http://gnso.icann.org/en/issues/registry-services/final-rpt-registry-approval-10july05