

NCSG Comment on [Policy vs. Implementation – Draft Framework for Discussion](#)

The NCSG welcomes the Draft Framework published on Policy versus Implementation. This has been a pending issue since the release of the ATRT1 report in December 2010. Specifically:

ATRT Recommendation No. 6. The Board should clarify, as soon as possible but no later than June 2011 the distinction between issues that are properly subject to ICANN's policy development processes and those matters that are properly within the executive functions performed by the ICANN staff and Board and, as soon as practicable, develop complementary mechanisms for consultation in appropriate circumstances with the relevant SOs and ACs on administrative and executive issues that will be addressed at Board level.

An earlier report resolving this question was unsatisfying in that it essentially indicated that it was Policy if an Supporting Organization did the work and Implementation if the ICANN Board or ICANN Staff undertook the activity. While there are still vestiges of this simple dichotomy in the current framework, e.g. in the first question asked as part of the framework "Proposed action -- not a result of a policy discussion", the Framework does go much further in its analysis.

As has been the case, especially in the New gTLD program and most recently the Trademark Clearing House debacle, we have seen that there can be disagreement and turmoil when the members of the ICANN community consider implementation actions taken by Staff to be policy actions taken without proper adherence to the Rule of PDP.

While the creation of a Framework is welcome, this Framework needs to undergo a wider more detailed discussion, than can be achieved in a 3-week review period. The report correctly indicates that "developing a bright-line rule as to what is policy or implementation may not be possible." It is also clear that "developing clear processes and identifying clear roles and responsibilities for the different stakeholders" would require a full community process and not a determination made by the ICANN Staff in isolation. A full cross-community process is, therefore, recommended for reviewing the details and mechanisms of any such Framework.

The section on "Questions for Discussion" is welcomed as an introduction to some of the issues that the community needs to discuss in depth before casting a Framework in stone. Experimentation with a framework may also be necessary - some processes like this are often best dealt with by stepwise refinement.

In the specific review of the framework, which overall appears to be reasonably structured, some concerns are immediately apparent:

A. Words like 'clarification' and 'amplification' are used.

- How are these defined?
- How does a framework deal with the fact that things that appear to be clarifications of requirements to one party, often appear to be new requirements to another party.

B. The words 'materially' and 'significantly' are used in the definition of the discriminators in the policy. While these terms may have known definitions within various legal systems, how are these determinations to be made within ICANN's Framework?

C. The word 'substantial' is used repeatedly in the Framework.

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- How is this word defined?
- By whom?
- Who judges that an effect is substantial or more importantly who decides that it is **not** substantial.

D. Under "criteria for activation of a public comment," the questions include "Would the change be seen to create a new precedent?"

- What determines that something may create precedent, or even the appearance of precedent?
- If ICANN's history is any indicator, we can expect that most decisions create a potential precedent to someone who finds such a precedent advantageous.

Policy and Implementation tend to be intertwined from the beginning of the policy development process until the end of the implementation process.

- At the start of the process, implementation is always the topic of the mental experiment. Anyone who participated in the New gTLD policy process in the GNSO would remember the countless reports from the staff that went something like: "if the policy is this, then the implementation would look like that." All along the process of creating the policy, possible implementations were created, studied and used as an impetus to refine and redefine the policy.
- At the end of the process, every implementation decision has a policy implication, or at least can appear to have such an implication. All implementation requires an interpretation of the policy. The interpretation of an implementer may or may not be consistent with the intentions of the policy making body; ICANN policy groups cannot write policy that is so strictly constructed that no interpretational latitude is possible. But since this may allow a policy consideration in an implementation, it must be possible for such interpretations to be caught and reviewed.
- Even some non-specific implementation effects might infringe on policy. For example the First Principle of the New gTLD program was that: "A. New gTLDs must be introduced in an orderly, timely and predictable way." A policy that includes this as its first principle, includes a notion that even reasonable changes to the implementation that might be in-line with specific policies, might run counter to other policy imperatives. It would be important for such extended policy restraints to be recognized in any Framework.

Any Framework that ICANN eventually instantiates for discriminating between Policy and Implementation must be capable of dealing with any conflict in an open and timely manner.

We recommend that a Cross AC/SO Working Group be formed to work further on this excellent beginning.