

ICANN70 | Virtual Community Forum - At-Large Policy Session: ICANN Multistakeholder Model: New legislation and regulations, Challenges and Opportunities
Tuesday, March 23, 2021 – 10:30 to 12:00 EST

MICHELLE DESMYTER: Hello, and welcome to the At-Large Policy Session 2: Reimagining ICANN's Role; Responding to National Pressure. My name is Michelle DeSmyter, and I am the remote participation manager for today's session.

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With this, I will hand the floor over to Hadia Elminiawi. Please begin.

HADIA ELMINIAWI:

Thank you, and welcome, all, to At-Large's second policy session at ICANN70: Reimagining CANN's Role; Responding to National Pressure. We are happy to have with us today Bertrand de La Chapelle (Executive Director and co-founder of the Internet & Jurisdiction Policy Network), Keith Drazek, (Vice-President of Policy and Government Relations at Verisign), and Avri Doria (ICANN Board Director).

Most of the current national legislation was initially built for the industrial world and not so much for the digital world. Nations worldwide are now starting to realize the need for new regulation to govern the digital world. Governments are now trying to regain control over the digital sphere currently dominated by some companies, some of which are acting as nation-states.

So many governments around the world are facing the question: "Do we have the power to govern the digital sphere? Or will we give the responsibility to the global companies to control the infrastructure?" The response to this question is seen in the rise of nationalization and regional legislation and regulations for the Internet unique identifiers and the technical community.

These legislations and regulation might have an impact on how ICANN operates. So in this session, we shall try to explore potential impact of national legislation/regulation on the unique identifiers, how ICANN can be agile and innovative in addressing the increase in national

legislation and regulation and, finally, ALAC's role in ensuring that the voices of those impacted globally are heard.

So I would like to start by posing those questions to our speakers. We start with the impact of national legislation and regulation on the unique identifiers. My question goes to Bertrand. Do you see any potential impact of new regulations on the unique identifiers?

BERTRAND DE LA CHAPELLE: Thank you very much. First of all, I have to apologize because of a question of conflicts. I will not be able to stay as long as I would have wished.

I want to make the connection with the question that you mentioned at the beginning regarding the role of governments and the exercise of national sovereignty over the Internet. It's not only a matter of will or a matter of power. It's a matter of really finding how the exercise of sovereignty functions in the digital environment. People who know me in the environment of ICANN know that I'm famous for insisting on the dimension of nuance. The debate is not whether there is a complete regaining of control or a complete handing over of responsibility to the private sector. This is a little bit of a caricature of description of the landscape, although there are trends in that regard.

What is interesting is that, at the moment, you're witnessing in this environment a sort of Faustian bargain on both sides because, on the one hand, if I look, for instance, at content regulation, governments are increasingly interesting a certain number of companies to actually

conduct the activity of doing content regulation on large platforms. And even the European Court of Justice went as far with the right to be forgotten as to interesting, basically, [a] private American company with a responsibility of balancing the right to privacy in application of European laws—notably the rules of data protection and the right to access information.

So, on the one hand, yes, it looks like the governments are giving the responsibility to the companies.

At the same time, on the other hand, because the companies are developing terms of service and having a significant role in setting norms that apply globally, they're now subject to the core decisions of every single country. And sometimes one court decision in one country established a global jurisprudence that actually impacts their role of terms of service.

So the question of the unique identifiers is only one part of the general picture. Yes, it is absolutely true that there is an increasing recognition that governments have sovereign rights applicable to what happens in their country.

But what is the most important is to understand that sovereignty in the digital age is not exercised and should not be exercised as the same way as in the traditional physical space, particularly because decisions that are taken at the national level can have, because of the transborder nature of the Internet, an impact on other countries. And if you look at international law, normally the relationship between states is the

principle of non-interference in internal affairs of another state. So, when a government is exercising sovereignty legitimately on its own territory, it needs to take into account the impact that it can have on other territories, but in this case, also on the overarching functioning of the international system of the Internet, which we all depend upon.

I want to take one example to finish, which is that it is not only the regulation on unique identifiers. It is also regulation or the application of laws on the use of the identifiers themselves. As you mentioned, I'm the Executive Director of the Internet & Jurisdiction Policy Network. In one of the programs that we run and facilitate, the whole question of whether it is appropriate to act at the DNS level to address problems of abuse on the Internet has been extensively discussed. And the answer is, overall, it is not the right [tool] to act at the level of the DNS, but there are cases where a significant threshold of abuse has been met, and it makes sense to use this level.

The question is—it's not completely solved at the moment—how far can one country actually have an impact on technical operators that are located in another country? I don't think that the issue is settled today, but the fundamental notion is that, if we continue the tug of war and the battle between governments and companies, we risk ending up in a situation that is similar to what happened in the 30 Year War, where, as long as one side is thinking that it can continue to win or that it will win in the end, the battles will continue and the problems will become even harder to solve, and there's no other solution to actually understand that those issues are something that needs to be solved

jointly because it is a common problem—how do we [collect and really] address abuses?

In the case of ICANN, I think the relationship between the different constituencies—that includes ALAC but that includes the GAC as well—is one of the main questions that we need to understand and to make [a vote on] because, if there is no more relationship and feeling of joint concern or joint responsibility, I'm afraid this is not going to be something that can be addressed positively.

That's a very broad answer for a very broad question.

HADIA ELMINIAWI:

[Thanks, Bertrand,] for that. I like very much what you said—that sovereignty in the digital sphere is actually different than practicing sovereignty in the physical sphere.

Another very important aspect, also, I think, is the need to collectively address abuses and not addressing those problems individually by countries.

Then I'll go to Keith. I ask you, Keith, the same question. Maybe also you can give us examples of potential impact of legislation and regulation on ICANN's operation.

KEITH DRAZEK:

Thank you very much, Hadia. And thanks to you all for inviting us here to contribute to this discussion. I think it's a very interesting one. I

should note that the broad question that you've posed is something that Bertrand has been thinking about for many, many years—in excess of a debate. And I should commend the Internet & Jurisdiction Project and Policy Network that Bertrand runs with an excellent team. It's a group that has been tackling, with the support of the broader community, some of these questions and these issues and, I think, really producing some tangible outputs. So just a shout-out to Bertrand and the work that I&JP has been doing specifically on this issue, really, as you get into some of the specific details of what it means to deal with unique identifiers in a circumstance and environment where there are jurisdictional pressures and certain expectations of what can and should be done at various levels of the Internet stack.

So let me just pause and say I'm Keith Drazek. I work for Verisign. I'm really here today, though, as a member of the ICANN community as a long-time (20-year-plus) contributor to the multi-stakeholder model and bringing my recent experience from being the GNSO Chair. I'm currently the Chair of the EPDP Phase 2A Working Group. So I'd like to bring some more, I think, community-based and really focused experience on the question.

Hadia, if I could, I'd like to just tee up ... I think, on the question of, "Are we talking about governments or are we talking about companies?" I really do think there's a middle ground there, and that is the multi-stakeholder engagement, the multi-stakeholder model. I think ICANN has a very important role to play here in this conversation as it relates

to the unique identifiers and specifically talking about naming (domain names) and numbering (IP addresses) which are within ICANN's remit.

I think that there are some specific examples that we can look to, both in the past and looking forward, as to where ICANN and the ICANN community, generally, need to engage to do a better job of predicting and anticipating potential collisions or potential challenges to the global nature of our policy development. I'll specifically talk about gTLDs in the domain name space right now because, as we know, the ccTLDs are generally focused within a certain jurisdiction under their national law. So when I speak today, it will be primarily focused on the gTLD side of things.

So I think we as an ICANN community clearly have learned from and have been impacted by the advent of GDPR in the European Union. Clearly, this regulation, now enforced, is something that has been coming for quite some time and should not have been a surprise to any of us. But I think there's a recognition that we in the ICANN community—to include ICANN Org and the Board over the course of time—probably could have done a better job of anticipating and planning for what was going to become very disruptive as it relates to registration data specifically and access and publication of registration data. So I think that we have an opportunity and an obligation as the members of the ICANN community to do a better job moving forward as it relates to anticipating, predicting, and doing some advanced work if we know that something is coming.

There are some other examples of that. Hadia, you asked for some other examples. I think, while, in the European Union, the NIS2-proposed directive is not final, obviously, I think it's very directionally significant for the work of the ICANN community. It is clearly not intended to replace GDPR but rather augment GDPR. But there are provisions in Article 23, for example, that impact directly the work that we're doing today in the ICANN community related to registration data directory services or what used to be known as WHOIS. It actually could potentially impact the work that the EPDP Phase 2 is working on today down the road. So I think that there are important recognitions there and that we as a community need to do a better job of anticipating those.

There are other examples, though. In the United States, there are data protection and privacy protection legislations at the state level—California being the leader at this time—where it is very similar to the requirements under GDPR. I know that's a very broad statement, but I think there are parallels.

So I think the key takeaway here is that we're not simply looking at legislation or regulation within just a handful of jurisdictions. We have the potential for scores and scores of different types of legislation and regulation that could impact our ability in the ICANN multi-stakeholder system to be able to develop global policies that would apply to all gTLDs, for example.

So I think, just to wrap up my initial comments, the ICANN community has a very, very important role to play as we address this and address

these challenges moving ahead. I think it's critically important that the GAC and members of the GAC, government representatives engaging in the ICANN space, are able to contribute and bring to the community's attention things that may impact our policy development work. I think it's very important for ICANN Org to be engaged where appropriate to understand and to help inform the community as to potential challenges that may be coming, specifically where the impact ICANN's role with the unique identifiers.

We as a community, broadly, have a role to play. There is a tremendous amount of expertise in the ICANN community today, and we need to develop that and encourage that. I think there's a real need for the community to have an interface with the Board, with ICANN Org, and with members of the GAC to be able to identify and work through some of these challenges before they become a problem.

I'll give one example. About a year ago, there was some discussion about repurposing the Cross-Community Engagement Group on Internet Governance (formerly the CCWG on Internet Governance) or carving out some aspect of that group and its charter to be able to serve as this community interface to be able to have a venue to talk about these challenges [in] these potential conflicts between national regulation, legislation, and ICANN's role and remit. I would like us to revisit that, at least, and, if not that structure, then to identify another.

So I'll stop there. I'm happy to take any questions, but I know that Bertrand is having to leave and Avri is up next, I'm assuming. Thank you.

HADIA ELMINIAWI:

Thank you so much, Keith. Indeed, there is a middle ground governments and companies, and the stakeholder collaboration ensures that governments' and businesses' views are both taken into consideration.

Also, I highlight your suggestion about the Cross-Community Working Group on Internet Governance and how this group should proceed going ahead.

So I now pose the same question to Avri. I ask you, Avri, if you do see any challenges to the consensus-based bottom-up model coming from new regulations. Do you actually see threats coming from this outside world to the multi-stakeholder model?

AVRI DORIA:

Thank you. First of all, I need to say that I very much enjoyed Bertrand bringing in nuance because I think nuance will need to color the whole discussion as we go through. And I do want to echo that, even though Bertrand is gone, what he said about the work that I&J Policy Network is doing and basically looking at that work as providing some real clues as to ways to think about this, ways to put this nuance [in]. I'm sorry he's not here now, but I really did want to get that said.

As was announced at the beginning, I'm a member of the ICANN Board. Of course, it's important to remind you that I don't speak for the Board, especially on issues like these that are far-ranging, where the Board has

many opinions. I'll certainly be giving you one Board member's position, one Board member's opinion, at the moment, but on all of these things, we're constantly [inaudible], we're constantly [probing], we're constantly sharing amongst ourselves with the people in the community, etc. So just to frame where I come from.

The multi-stakeholder model is something that I think of as an adolescent. Perhaps being a parent but now a grandparent, I put the age of our model in adolescence. We're functioning, we're doing, well. We're growing. We're getting better all the time. And we're still learning, and we're still learning how to interact with the world. The world is still learning how to interact with us. So I don't really see it as a threat. "Threat" is not the word I would use, unless I was actually sitting in a [risk] meeting and we were talking about threats. But personally I don't see it as a threat.

I see as certainly a challenge. At ICANN, we speak often that we have a mission and that we have to function within that mission and we have to stay within it. That's important, but we have to remember that, before that, we have a set of laws and regulations that we have to function within. So, very much, I see for us in ICANN, on the inside—whoops, I better slow down. Nobody has told me to yet. But I see very much a situation where we have to continue to perform our mission for stability, security, and resilience within our commitment, within our value, within the law.

And how we do that is one of the problems that the bottom-up multi-stakeholder community is faced with. It's not faced with how do we do

this in a world that has now law, in a world that has no regulation, but how do we do that within it?

And it is also not really our role or in our mission to go out to these [governments] and tell them what they can and can't do. We may have individual opinions about it. There may be preferences that it be more in keeping the maybe preferences. It's like, "Gee, I wish they were using a multi-stakeholder model within the country. Why aren't they doing that?"

It's also not our business to sit and talk about what happens at the layers of the Internet that are looking at content, that are forced into these content things, these content moderation roles.

But it can be my personal hope that, within their corporate social responsibility, they're becoming multi-stakeholder, that they're starting to adopt the model, because the idea that we can all by ourselves maintain a multi-stakeholder model for the world is not practical. We need to maintain it for ourselves. We need to do it to the best of our capabilities so that the community is producing policy that the Org can implement.

When I look at these things, I definitely get concerned about whether these regulations can't be implemented technically, whether the regulations and laws where the policy is difficult to do is difficult to understand. As Keith was mentioning, there isn't just Europe. There isn't just GDPR. There's other regulation.

So when we're dealing with [meeting] the law, how do we do that? How do we try to meet them all? That becomes very much an almost intractable problem. Pick some sort of, "Okay, this is the worst case. So they completely [met them all]." So that becomes a problem for places that aren't that restrictive.

So we certainly have a lot of issues and problems to deal with in terms of how we survive in this world.

One of the things that I look at that we'll probably get into a little bit more is the bidirectionality of our model. We're getting better and better at looking at ourselves, at looking at our stakeholder model, at looking at how we can improve it. But there's also [taking the message] outside. One of the great [promises] I've always seen in At-Large with the multiplicity of ALSes is that you guys also are the stakeholders of your government. You guys are also the ones that can bring this bottom-up model into your own places and can help deal with that. It's not an ICANN issue, but is your nation's issue.

Likewise, with the GAC, I always hope for a bidirectionality, where it's not just them talking to ICANN but it's also them bringing ICANN home with them. Again, that's not ICANN's business. It's each of their individual judgements, but ICANN has to acknowledge—I think we do—that we don't survive in this world isolated, that we aren't just a silo, but that we are a multi-stakeholder engine. We're probably doing more than most to try and understand how this model works to try to improve it, to try and improve the outreach we do with the method, with the issues and such.

So hopefully there's something permeable in that that isn't just regulation coming into us but it's our way of looking at going out to these others who are thinking of legislation and regulation.

I'm not sure if I covered, but that's the way I was looking at it and definitely addressing the word "threat." No, it's not a threat, but it's certainly a fact of life that we have to deal with [inaudible]. Thanks.

HADIA ELMINIAWI:

Thank you, Avri. I would go back to Keith. So we talked about the governments and companies, but what about the community? Do you see any role for the community there? Or is it like not a fight but like a struggle between companies and governments and that's it?

KEITH DRAZEK:

Thanks very much, Hadia. Great follow-up question. I think, along the lines of my opening comments, absolutely there's a role for the community—the ICANN community, the multi-stakeholder community—in this endeavor. I mentioned earlier that there is a tremendous amount of expertise in the ICANN community, in ALAC, in other places. I think it's critically important that we encourage and find a way to channel that expertise and that energy and that awareness of what's going on in different regions and different jurisdictions into the conversation within ICANN and specifically, again, looking at it from a gTLD policy development perspective. And I should note that with you today you have two former GNSO Chairs: myself and Avri. Avri was the

GNSO Chair prior to her other service in the community and also now on the Board.

But if we think of it in terms of the policy development work and the impact on gTLD registries and registrars and the contracts that govern our ability to perform the functions that we do, it's a really important discussion. And these are important issues into the community work and the policy development work that takes place. So I just think that we have to find a mechanism or find a way to bring the expertise, to bring the energy, and to bring the understanding and focus to a point where we can coalesce around a common understanding in ICANN that will help inform that policy development work. I know the PDP work in the GNSO isn't the only work that takes place at ICANN, but it is the world that I come from and have spent much of my career on. I think that is it the place where, as we've seen with the EPDP Phase 1/Phase 2 on SSAD/now Phase 2A, talking about legal and natural distinction, the rubber meets the road in terms of some of these challenges.

So I absolutely think that the multi-stakeholder community has a very important role to play.

HADIA ELMINIAWI:

Thank you, Keith. I go back to Avri. How do you see ICANN Board's role in this regard? How can ICANN be sort of innovative in facing the change in the digital sphere?

AVRI DORIA:

Thanks for the question. First of all, I want to go back—forgive me—to what Keith said. When this thing started up, I was also remembering what Steve Crocker said to me when I first joined the Board. He welcomed me to the group as a future member of the Ex-Board-Members Group, basically giving me that knowledge that eventually I will be. So I was actually looking at this makeup. We had two future ex-Board members and two ex-GNSO. So it was really an interesting combination. But, anyhow, that bit of silliness aside.

I think the Board has ... It's actually been a very interesting thing to try and understand the Board's position with because policy does come from the community. Policy recommendations do come from the GNSO. Policy advice comes from the advisories, and every bit of GNSO recommendations are scoured to see how they dealt with the issues brought up in the advice. So let's say there's very much a loop there.

So a lot of the Board's role at that point is just to make sure that the recommendation and the advice took each other into account, took the recommendations in [that pulpit], and to ask questions when we don't understand. That is one of the things we're very good at and getting better at all the time: asking questions when we really don't see the connection, when we don't see the answers that need to be there to respond to certain issues.

I think another part that the Board plays is in asking questions during the policy process, which started with having a liaison and going into group meetings and trying to ask questions that are not so pointed as to put fingers on the scale or produce one decision or another but

basically just to try and make sure that issues that seems to have questions attached to them are indeed addressed and looked at and such. So that's another role.

A third role we play is in interacting with the Org—the whole notion that we get a set of recommendations, that we formalize the ODP process for how to then take those recommendations and see whether they are implementable. What do we have to do to implement them? How do we cost this? How long will it take? Is it practical? Is it impossible? Basically, it's the Board's role to understand that before giving the green light to say, "Yes, go forth and spend a million building this."

So the Board has various kinds of positions.

Also, they're very active in trying to understand what's going on in the world around them between the incredible experts that they have in Org that are constantly bringing up feedback of, "This happened in Org. This happened with Council, with the EC. This is what's happening in Japan. This is what's happening in the U.S. Senate," and constantly bringing those kinds of information so we are looking at, as Steve said, at a picture.

Another thing—this is one I personally look for and try to bring up—is, are we as flexible as we can be when we develop solutions, knowing that things will change, that policies will change, that laws will be enacted that change the constraints?

Dropping back to the other [fields] in the Internet that are [inaudible] one of the things that I've always looked for is how do we evolve? Do we

know how to evolve? Do we know how to evolve without having to go through crises? So there's also those larger questions, and you'll find, if you interview almost all the Board members, carry these kinds of questions into the discussions to try and understand the environment, but always remembering that, even if we think we have a great idea, this is a bottom-up multi-stakeholder process. We can ask the questions. We can try to understand. We can even talk in panels from our individual perspectives to give people, "Okay, these are the kinds of things that may or may not get picked up."

So, basically, we also function as channelers of information, of looking around at, "What silo is not talking to the other silo? Can we help make sure that their questions are being looked at?" etc.

So there's lots of little roles. I definitely see Board service as a service. We're here to try and assist where we can, to try and make sure that things don't get [inaudible], try to make sure we stay out of trouble, and to serve that bottom-up multi-stakeholder process.

HADIA ELMINIAWI:

Thank you, Avri. My question is now to Keith. Do you see collaboration with global organizations as a possible way forward? And, if so, which global organizations would you be thinking of?

KEITH DRAZEK:

Thank you, Hadia, again, for the question. Before I answer the question of what other organizations, which I think is a good one, I would like to

just build on what Avri was describing in terms of the role of the Board and/or Org and the community and all of that. The way I've thought about this is that we need to have, I think, a better engagement structure as the ICANN multi-stakeholder community—all of us together. That includes the Board and ICANN Org and all of us that contribute and participate on a regular basis or even occasionally.

I think that there's a few different components of that. One is that we need to have an early warning system, an early warning that will inform the broader community about possible legislation and/or regulation that could impact the DNS, the unique identifiers, and ICANN's management role for domain names and IP addresses.

I think, since the experience with GDPR, we as the ICANN community have done a better job of that, but I think we need some additional resources and additional work. I guess the question is, who are we looking to to be that early warning system? Is it ICANN Org? Is it those of us in the community? Is it some sort of a group like I mentioned earlier: the Cross-Community Engagement Group on Internet Governance? Is that the right structure, or is it something else? I think that's something we all need to consider to make sure that think about that and discuss that in a multi-stakeholder process, in a bottom-up context.

I think we need to figure out as a community: do we need to be engaged with policy makers and regulators in various jurisdictions to A) understand better what might be coming and then, once we understand what might be underdeveloped, is there an opportunity to

influence based on what we know in the ICANN community as it relates to global policy development and the potential impacts on what we do and on ICANN's global management of the unique identifiers? As it gets into the policy development sphere, it's critical that all parts of the community are engaged in these processes.

I just should note that, with the advent of the EPDP focused on GDPR and replacing the temporary specification, the GNSO Council and the GNSO ensured that other parts of the community outside the GNSO specifically were able to participate in that effort as members. That includes At-Large. It includes GAC. It includes SSAC. I think it's really important that, as we move forward in addressing these issues, we ensure that all parts of the community can contribute to that process. I fully understand that advisory committees have the ability to provide advice to the ICANN Board and that's a critical function in the multi-stakeholder engagement and the Empowered Community, but I think, as we deal with these challenges, it's really important for all members of the community be able to engage and to engage in these conversations.

So, Hadia, I think, to answer your question directly, I've laid out the structure needs to evolve to or develop into within the ICANN community, but if you're asking about groups or associations outside the ICANN community, the Internet Governance Forum (IGF) is certainly one venue or one forum or one group that I think is a really important opportunity. We've been supporters of IGF from its inception, and I think that it's really important for us to continue to engage at the IGF.

I'm sure there are many other associations and different groups that are contributing and could be important inflection points. I did mention Bertrand's group earlier (Internet & Jurisdiction Project) which I think is doing excellent work on the question of jurisdictional conflict and jurisdictional challenges to broader global Internet policies. But I think IGF is something that we all need to take another look at, double down on, and try to identify if that's a good venue in a multi-stakeholder context for us to have further discussions on this.

So I'll hand it back to you, Hadia. Thank you.

HADIA ELMINIAWI:

Thank you, Keith. So you mentioned engaging with policymakers. My question would be, how do we engage with policymakers? And who will engage with the policymakers? And which parts of the community? If it is the whole community who should engage with policymakers, what is the structure through which this will happen or the process through which this could happen?

KEITH DRAZEK:

Thanks, Hadia. If that's a follow-up to me, I think that's a great question and I think it's an unanswered question at this point. Engaging with policymakers and lawmakers and regulators is going to vary depending on the jurisdiction, so I think there's no one-size-fits-all answer. But I do think that ICANN Org has a role. I think the ICANN community, working with ICANN Org, in a transparent way ... I think that's an important

component: the transparency of conversations and the transparency of engagement. That's an important thing to factor in.

But I think, at the end of the day, there's a role for the ICANN organization under the guidance and the under the direction of the Board, but also ICANN Org and the ICANN community, to essentially find a way to work together to, again, have an early warning system, to be able to understand and potentially influence, where appropriate, ongoing discussions around policy development or more specifically regulatory and legislative evolution and to translate that into meaningful, common understanding once we get into the policy development sphere.

So I don't have a good answer, Hadia, for specifically how we would accomplish that, but I think it is something we all as an ICANN community need to discuss. Thanks.

HADIA ELMINIAWI:

Totally agree, Keith. This is something we need to discuss. Before we go back to Avri and Bertrand—thank you for joining us again—I will give the floor to Holly. Holly, please go ahead.

HOLLY RAICHE:

My question goes back to when I first joined ICANN many years ago. I looked at the structure and I said, "My goodness. There is this body that makes decisions, and the rest of us hover around and throw in the odd comment. But are we part of the decision-making process?"

Now, I think some of that has changed, and I have to say that one thing that comes out of COVID is the world having to talk to ourselves; that, instead of having rooms in which all of us meet separately, we're meeting on Zoom and we're meeting together. But I'm wondering if that points towards a way of rethinking how we organize ourselves so that we better listen to ourselves, better bring the messages to ourselves, and better respond.

So it's just to think about, is there is an internal restructure that can address some of the issues that are raised? Avri, Keith, Bertrand, and response?

AVRI DORIA: Can it start with that one?

HOLLY RAICHE: Yes.

AVRI DORIA: Okay. So, certainly, to ask the question in an open sense—is there another structure that may or may not work [better?] Probably. There's never just one answer as been said for several of the questions here. Does this community want to evolve to a different way of [solving]?

First of all, to answer your question, and based on my time here since 2005, I have seen incredible change in terms of the amount of participation, in terms of the structures and how they adjusted doing

things. So I think that there is very much a progress. There is more communication, as Keith said. There's participation by all in the PDPs. When I started here in 2005, they were just done by a task force of the GNSO, and really nobody else's [inaudible] was really asked. There was no inclusion of other groups in the discussions. There was no inclusion or inclusive working group or representative structures within GNSO working groups. It was just the GNSO.

So the evolution in that time is really quite amazing, and I think it's important to sort of stand by and say, "It is changing and it is changing constantly."

Now, how these things get done? Again, for this to change, it has to come from the bottom up. There's nothing the Board can do to say, "We are now going to remake the organization in the following manner. We think X. We think Y. Therefore, we're going to do it."

Now, something that did come out, though—I'm not quite sure how it's going to be used yet or what will get done there—is that we had the ATRT3—the ATRT being our bottom-up oversight, a group of people selected by the members of the SO/AC who come together and make a set of recommendations. Now, I know those recommendations don't ever go back to the SOs and ACs for their approval, but still, they are people that were appointed by the SOs and ACs in a manner of their own challenging to basically have set before us a set of recommendations.

Among the recommendations we got this time is the holistic review. Now, we got lots of comments on holistic reviews: “What is this? How would it work? Where would it work? What would it do?” etc. What the Board has basically asked Org to do is to work with the community to set up a pilot one of these while we try to understand exactly how it works, what the the community would want from it, does the community accept it, can it work, what kind of changes?

But many of the questions I hear being asked about—“Could we structure it differently? Could this happen? Could that happen?”—are really not questions that we have another place to answer yet, other than in things that we’re doing now, like the evolution of the multi-stakeholder model or perhaps in that future type of model. I say this when looking at it from the organizational effectiveness point of view: is there a way to be more effective, and how can the community figure that out and work together to figure that out?

So I see it as an open conversation and I see it as the first step along whatever evolutionary path we’re going to take over the next decade. Things won’t change at the drop of a hat, but certainly we have the mechanisms in place to constantly do introspection, to constantly have that bottom-up oversight come with recommendations, but then we have to figure out: can we do it, how can we do it, and how does it work?

So I actually think it’s really quite [helpful] that we have something that does work, that does come to ICANN consensus on things, that comes to consensus in GNSO, that comes to consensus in ALAC. Then eventually we try to bring them together in an ICANN consensus.

And we do have mechanisms. Yes, they can improve. Yes, they should improve. And I would say to expect that, fully, in the unfolding of time, they will evolve and they will improve over time because history, I think, shows us that we do have a positive evolutionary path. Thanks.

HOLLY RAICHE: Thanks.

HADIA ELMINIAWI: Thank you, Avri. So maybe, Bertrand, if you could answer the same question and then Keith because I think Holly posted to all three of you.

HOLLY RAICHE: Yeah. Thanks.

BERTRAND DE LA CHAPELLE: I am a very positive person, and I think Avri is right. Things have been evolving. I remember, when I joined the ICANN environment back in 2006, I was, at the time, in the GAC and sort of Vice Chair of the GAC. I remember participating in one of the GNSO PDP processes, and there was nobody from the GAC participating there. It was really a surprise. By the way, the topic was WHOIS. Just to say.

So the thing is, yes, things have evolved. I remember that one of my first efforts was to create the SO/AC interaction and sessions that would bring the different actors together.

I want to bring something that comes from outside of ICANN. The whole space of this discussing policy issues is littered with silos. There are silos everywhere for very natural reasons because the topics that are being addressed usually were addressed in very nice, segmented, vertical spaces. When I started in the Ministry of Foreign Affairs in 2006, on that topic, there were, what, two ministries that were really interested in this: the Ministry of Industry and the Ministry of Foreign Affairs. Today, you cannot address any digital issue in any government without having the Ministry of Foreign Affairs, the Ministry of Economy, the Ministry of the Interior, the Interior of Justice, the data protection authority, the consumer protection authority. And the list goes on, depending on how they're structured. So at the international level, if we're dealing with data flows, you have the W20, the OECD—all the different structures. The silo approach is what actually prevents any topic from being moved forward because everybody is on its own [inaudible] and everybody is actually defending the mandate of its own sub-element.

I'm sorry to say ICANN has the same kind of problem because there are many silos. I don't know how, in the recent two years, because I've not devoted as much time to ICANN as I used to do recently, it has evolved, but I know that, for sure, one thing that is necessary is that, whenever a topic emerges on the agenda—I picked the last element that Keith was mentioning regarding monitoring what is happening outside of ICANN that might impact ICANN—whether it is an internal topic or something that comes from outside, there is no way we can start the discussions without having all the different constituencies creating and working with one [starter] framing exercise. Again, I don't know if this has

evolved and it is now the case, but if you don't do that—and I mean really involving all the different constituencies—there won't be a major problem because the problems will not be set in an appropriate manner.

The last point is that I must confess that, when I was in one of the positions, I participated in one of the calls that led to the restructuring of the GNSO and the creation of the two houses. If I can give a very frank assessment from the outside, I immediately felt that the main objective of the different entities and the different soon-to-become houses was to make sure one thing: that the other halves could not impose anything on them, period. Nothing was about how can we make it better so that we can solve problems together? I'm caricaturing a little bit, but I can tell you this was the feeling that I had exactly at the moment the proposal was made on the call. And I feel that it has remained a little bit in this way.

So it is not only a matter of structure. Avri is right; there are many processes that can help discuss how it can evolve. But if the spirit is not there, if there's not a desire within the community as a whole, from all the different parts of the community—in the GNSO, in the GAC, in the ALAC—to say, "We have problem in common, and we need to start by putting the thing on the table and look at how this is going to be discussed," you can make all the changes you want in terms of structure. If the spirit of cooperation is not that and the mistrust between the different actors is not reduced, there will not be enough progress. I'm sorry to be a little bit blunt, but it gives a better

perspective when you begin to get outside and you see the same problem replicated in the other environment.

HADIA ELMINIAWI:

Thank you for that, Bertrand. And I will say that it is very true that, when talking today about the digital sphere within governments, you cannot have only one sector talking. All government sectors need to be on board.

I think this is also one way forward for ICANN and part of the evolution that ICANN should be taking: considering how all parties can actually work together on this. This is definitely something necessary for the way forward.

Keith, I quickly give you the floor to answer the same question. Thank you.

KEITH DRAZEK:

Thanks, Hadia. This is a great conversation. Thank you very much. I hope that we do get to get to some Q&A or dialogue here shortly, so I'll try to be brief.

First, I'd like to note that Alan Greenberg in the chat posed, I think, a very interesting question about the timing of ICANN making policy, developing policy, and the alternative of that not doing so creates a vacuum where governments may decide to legislate or regulate. I want to go back to that because I think it's a really interesting question.

But just a few quick observations. I know that Bertrand mentioned the structure of the GNSO, and I saw that Roberto put into chat his experiences with the GNSO review. Just a note for everybody: there is actually an upcoming GNSO review as required by ICANN's bylaws. It was originally scheduled to take place this year in 2021. It may be pushed off a year. I don't know exactly where that stands, but there is yet another review of the GNSO imminent. I think that there's a recognition that the GNSO and the structure of the council is something that is of concern to some. The overall, I think, operation of the GNSO and the GNSO's operating procedures are due for a review.

I think that also applies to this question of silos. I think what Avri and Bertrand have identified is that, historically, ICANN was a very siloed community—extremely siloed—to the point where there was no crossover or overlap between, for example, a registry and a registrar. Going to 2012 with the advent and the introduction or the allowance of vertical integration, we ended up then with registries who are also registrars, and registrars who decided to apply for new gTLD and became registries in their own right. What that started, I think, was a blurring of what used to be a very bright line between registries and registrars. Of course, that goes back to the introduction of competition, going back to 1999 and 2000. There were a lot of good reasons for that structural separation at that time, but over the course of a decade or more, things evolved, as they do and as they should.

We also have now registry operators who are also registrars who have intellectual property interests or who are businesses in their own right

and participate in the Intellectual Property Constituency or the Business Constituency. Further, there are members of the At-Large who also contribute and engage in other groups within the GNSO structure.

So it's just to note that, while we have silos, I think we have a tremendous job, either intentionally or unintentionally, over the last years of breaking down those silos. Some of that does go to what Bertrand mentioned about making sure that the SOs and ACs have better interaction, that the leadership meets on a regular basis.

Bertrand, having just concluded my tenure of GNSO Chair last October, I can assure you that that structure that you helped put in place is still alive and well and that there's good interaction between those leaders and ICANN Org and ICANN Board. I think that's been very, very helpful overall.

But we're not there yet. I think there's still more work to be done as it relates to breaking down the silos and making sure that there's ongoing engagement.

But at the end of the day, ICANN's role is in managing the unique identifiers, domain names, and IP addresses. And where policy work done that has the ability to impact and create new requirements in contracts for gTLD registries and registrars, it's important for the entire community to have a voice and have an opportunity to contribute. I think, just in the last two or three years, we in the GNSO community have ensured that other parts of the community will have a seat at the table, have a voice, and have the opportunity to contribute while the

policy development work is going on and not simply wait to provide advice after the fact. I think that's a really important development that needs to be acknowledged and needs to be seized as an opportunity for the community to come together around these challenges.

So thank you, Hadia. Back to you.

HADIA ELMINIAWI: Thank you, Keith. I would go to Alan. Alan, I'm not sure if your question was answered, so would you like to read it? Or would you like to—

ALAN GREENBERG: I'm not sure I can read ...

HADIA ELMINIAWI: I would read it, or would you like to say it? Just go ahead.

ALAN GREENBERG: I don't have it in front of me, so if you can read it and then I'll elaborate a little bit.

HADIA ELMINIAWI: Okay. So Alan Greenberg is saying, "Keith mentioned we were somewhat taken by surprise by GDPR, and Avri has indicated that we are doing a much better job at monitoring things now. I have to wonder whether we should also be looking at whether it has been our inaction that has led to some legislation and that is where we're more focused

on public interest issues. We could avoid having government make regulations that then impact us.

ALAN GREENBERG:

Thank you, Hadia. Our focus has been at this point due to the issues with GDPR putting in place a much better structure to make sure we're not caught unawares by things happening in other places. That was needed for a whole bunch of reasons. I know I chaired the RDS Review Team, and that was one of our big recommendations: don't get caught again. So we're probably not going to get caught again like that.

But the question is, are we aware of the pressures that are on some of these countries and legislatures to take action where maybe our ability to put policy in place ahead of time would preclude the action of governments. Obviously, we're not all-powerful, but we do have some areas in our remit where, if we were being proactive, maybe there wouldn't be a need for legislation. And I don't think we do a very good job of looking for those. Certainly, parts of our community work on the assumption that we don't want to put more rules in place, and let's cross our fingers and hope governments don't either. But the latter has proven not to be the case.

So the euphoria that, if we don't put rules in place there wouldn't be any, doesn't appear to be holding anymore. This is a very different world than any of us were in ten years ago, and I think we have to adjust to that reality. Thank you. Clearly, the Internet is becoming more important in the world and governments are noticing. Thank you.

HADIA ELMINIAMI: Thank you, Alan. Bertrand, would you like to comment?

BERTRAND DE LA CHAPELLE: Yeah. I have really two very quick comments, one piggybacking on what Keith was saying. One very important thing is communication within the different constituencies or among the different constituencies in an ongoing way during the whole course of the development of things. The most dangerous situation is when something has been developed and then it is being pushed to another group—be it the GAC, be it ALAC, or be it the Board—and the only reaction is to come after the fact. So the progressive and the iterative process is a fundamental element.

But in response to what Alan was mentioning, I want to highlight two very concrete elements. How much attention—it's a question—is, today, given within the ICANN discussions on the two issues of the proposed regulation for access to electronic evidence that is developed by the European Union and that will cover the DNS operators, including in terms of access to information that is contained in with whatever registration there is and, second, the Digital Services Act and the qualification of DNS operators as intermediaries? These are two very concrete events, and I must say that, under GDPR, it was on the horizon for a long period of time and it was not addressed properly because there was a thinking that, if it is not addressed, maybe it will pass and we will not be impacted. Those are two very concrete regulations that

are being discussed right now. I just want to know—I'm sure that there is some attention—if there's sufficient attention.

I've read in the chat the question about lobbying. This is not about lobbying. This is about being really aware of what it means and what is the interpretation. I know, for instance, from discussion with the European Commission—the people who are in charge of the Digital Services Act—that there is a real question in the community of DNS operators of whether the DNS operators fit and what are the actual reliability regimes that are going to be applied to them.

I'll just put that on the table. If it is not sufficiently followed, please do because these are two important examples of things that might impact the DNS community.

HADIA ELMINIAWI:

Thank you, Bertrand, for that question. I will leave Keith and Avri to actually comment on that, but I would like to read a comment from Carlton first. It says the original idea was that the At-Large community had a singular role in monitoring the national space with special focus on end-user interests. The disconnect that most [is] national governments are interested in matters related to the Internet but ICANN was really worried to be seen as having an interest. For example, matters of content and access and privacy and privilege, until recently, were considered electrified third rails and outside the ICANN remit.”

I would also read a question from [Yvan] and then leave the floor to Avri and then Keith. So [Yvan] is saying, “ICANN is notorious for insisting that

it is not a regulator. It is backed by no multi-lateral treaty. [inaudible] of stakeholder engagement within industry-making policy and the government and the public interest serving as advisors is a 180-degree flip in how most multi-lateral activity takes place in other sectors. Is ICANN's structure really sustainable given pressure for actual Internet regulation?"

So I'll start with Avri and Keith and then give the floor to Bertrand.

AVRI DORIA:

Thank you. Thank you for the questions. I'm not sure I have kept them all well in mind. So I wanted to go back to, first of all, something that Bertrand asked. He asked, are we paying sufficient attention to the two points: the Digital Service Act and the requirements for evidence? Again, you weren't here when I said how marvelous some of the work you've done is in terms of dealing of evidence in I&J in terms of opening up those discussions.

We are paying attention. I don't know how about how much attention various ALSes are paying to what their governments are doing within that. That's a question I can't answer. But I know that the organization (the Org) is certainly paying attention to them, is participating in discussions, is bringing back discussion, and such. So, without lobbying, we're certainly discussing and certainly making sure that there's an understanding of what our scope is and what our scope may not be.

Is it sufficient? I would never tell you that we were doing enough. I would never say that it's sufficient until the end of the day when one can look back and said, "Yeah, that time it was sufficient." We're certainly paying attention and a fair amount of attention. So hopefully it will turn out to be sufficient.

You also spoke of silos. We still got them and there's a part of me that sort of says it seems to be almost a human thing to do: to silo ourselves. So what we have to do is a constant effort to pull us out into the public square, which can't be everything. People will go off and do a certain amount and come back. But I think that this is almost an eternal discussion that we can have and perhaps have already been having over time about how much can be done in the public square? Because does that end up being the environment of the loudest voice? Does the softer voice only get to speak when the room is a little smaller? If that's the case, then how do we bring all those things together? Do people know how to talk to each other across silos? That takes education and training because, very often, we don't even understand each other's language. In other places, [the world is dealing with], how do we talk about human rights when you're a technologist? Who knows? Who understands the vocabulary?

So there's a whole lot of things that having some silos and having a big public square built on each other ... But as I say, that's a long conversation I think we've been having.

I'm not sure that there's anything with Alan's question that I needed to answer, but if there is, please tell me.

Jumping to Evan's—there is one in between that I was thinking of until Evan's came through, which knocked it completely out of my mind—question of—oh yeah, I think I found it—of that you're not a regulator, you do not produce regulations, [inaudible]. And indeed we're not a regulator. We're not a regulatory body with treaties and such. We do function in a way that can often be seen as a contractually driven regulatory function. It is a different beast. It's a beast that comes out of the multi-stakeholder model. If we can make agreements among ourselves and then we can have contracts that go out of those policy agreements and they go out of other parts of the agreement, then we can enforce then and get it [complied with]—something that is by no means perfect.

By the way, on every comment that I've seen where somebody said something improved—somebody said, “Yes, but there's a way to go yet”—that's an eternal truth. That one will never go away. No matter how much any of this think we ever improve at doing any of this, we always need to get better. That's not an excuse for not being better enough, but it is sort of an explanation. Yes, we always have to [direct] on how to do it better.

I think the other question that I'm missing had to do—oh, and I've lost it again. Could you, please, Hadia, remind me of the piece that I have not answered yet? The second question.

HADIA ELMINIAWI: I think you addressed everything. I'm not sure if you've addressed fully Evan's question in regard to—yes, you did—in regards that ICANN is notorious for insisting that it is not a regulator and how much multi-lateral activity ... Basically, is ICANN's structure really sustainable, given pressure for actual Internet regulation? That's the basic question.

AVRI DORIA: That's true. And that one is related also partially to the previous question that had to do with, if you don't make your own rules, then someone else will make the rule, so therefore we better make more rules. It's that kind of question.

I think that our structure is being sustainable. I think sustainability is a step-by-step, day-after-day, month-after-month, year-after-year process. Like I said, it is constantly in evolution. It is constantly in improvement. So I tend to be a very strong believer in the multi-stakeholder model and the various ways in which it gets implemented and it gets brought to different environments. I think we do a good job at that. I think we're very open to how we can improve it. Sometimes I think we almost go overboard where we try to do too much improvement at once, but we eventually work our way through the pile of work that it filled. But we are constantly trying to improve it. We've got almost no one in this organization on either the Board, the Org, or the community that says, "Everything is fine. Everything is good. No need to worry about the structures. We've got it nailed down. We can just sail through this." I don't think there's a person that does.

The other thing that came up was the good-faith notion. I've actually been looking at—this is in my research side—the multi-stakeholder model democracy. In general, participants who are in a democracy in specific multi-stakeholder models as a form of that ... How do we deal with bad faith? How do we deal with people who come into this and are like, “No, we want the multi-lateral. We're going to resist you in not being able to self-regulate.”? Or, “We want this and we're going to do whatever is possible to get this, no matter how much we have to avoid consensus.”

Now, there's not a lot of that, but everywhere in the world where there is democracy—participatory democracy—or multi-stakeholder models of various sorts, there is also a certain amount of pushback. How do we deal with that? Do we know how to deal with that in-house yet? I'm not sure we do. But those are the other sides of those questions of how do we deal in good faith with others, how do we deal in good faith with governments, and vice-versa? Again, one of the notions I made at the beginning is we need to have a certain notion of bidirectionality in our relationships. Coming back to ALSes, I count on ALSes to be the ones to bring multi-stakeholder consideration into a local environment. So I have hope. Thanks.

HADIA ELMINIAWI:

Thank you, Avri. Keith, to you. How much attention is given to upcoming regulations, and is ICANN's structure really sustainable given pressure for actual Internet regulation?

KEITH DRAZEK:

Thanks, Hadia. I think, like Avri, I'm an optimist, as someone who has dedicated 20 years of my year—now more than 20 years of my career—to supporting the multi-stakeholder model, to engaging in the ICANN community. If I wasn't an optimist, I'd be doing something else.

So I just think that we as the ICANN community in this multi-stakeholder experiment have proven that we can function and that we can deliver. Do we have challenges? Yes. I think we are up to addressing those challenges.

Specifically, I want to get back to a couple of points. I know we're starting to run short on time. But this question of coming up with a structure for community engagement with ICANN Org and with the Board to have an early warning system, to be able to educate ... I know we've jumped the tracks in the chat on talking about lobbying, but that's not what we're talking about here. We're talking about educating. There's a big difference.

I'll give you an example. As the European Commission develops its focus in whether NIS2 or whatever may come next—I'm just using this as an example—it's really important for those lawmakers and for those regulators to understand the technical and operational implications of what they're proposing and what they're developing in terms of laws that we all have to be bound by if we're going to engage and operate in those markets, in those jurisdictions. An example is that there is a difference between a registry and a registrar in the domain name

ecosystem. We really can't expect lawmakers around the world and regulators around the world to fully understand the technical implications and the impact of what they may be developing on different parts of our industry, our ecosystem.

This gets specifically to the discussion of DNS abuse. I hope most or many of you were able to observe the Contracted Party House session yesterday that I moderated on DNS abuse. If you weren't able to, I encourage you to go watch that recording because I think it does draw some important operational and technical distinctions about what registries and registrars respectively are able to do technically in terms of being able to deal with DNS abuse and to recognize that we all sit in different parts of the Internet stack and that there are limitations. That's the kind of education that is really important for lawmakers to have an awareness of, an understanding. Really, I think it's incumbent upon us to help inform of those distinctions so that the laws they develop can be effective and can be appropriate and properly tailored to the way that things actually work operationally and technically in the domain name system.

So that's just an example of the education. But even beyond the education of lawmakers and regulators, as they develop their regulations, it's important for there to be an education component for us as the community and for those contributing in the policy development work.

So I really do see there's an education for those making the laws and education for those developing policy within the ICANN multi-stakeholder process. Those two things will inform one another.

Anyway, just to wrap up, I think that there's absolutely a role for ICANN and for the ICANN community and for the multi-stakeholder bottom-up consensus process to play a very important and critical role here. I'm optimistic that we will rise to the occasion and continue to improve ourselves along the way. Thank you.

HADIA ELMINIAWI:

Thank you, Keith. I would like to give the floor to Sebastien. He has a question. Sebastien, please go ahead.

SEBASTIEN BACHOLLET:

I'm going to speak French since we have interpretation. This is a comment I would like to have after listening to Keith. Congratulations on 20 years in the multi-stakeholder. For me, it's 21 years that I started with ICANN. I didn't miss any meetings, virtually or not.

You talked about GNSO. Yeah, life goes on, but ATRT3 asked for us to stop reviews and to put together the proposals of ATR3. So it would be quite interesting to see what ATRT3 proposed regarding continuous improvement.

To talk about what Avri said of the holistic review, we haven't had it until 2002. We had the IANA transition. We had reorganization of different silos. But I think we need a holistic review of ICANN. It's more

urgent than what the Board says: [“]We don’t have time to do it.[”] This is quite important. If we talk about structure, we have to start working on that so that, in 2022, we have a team working on the evolution of the structure in a holistic fashion.

We should talk also about what our ALSes do in different countries. We have structures that work in a country, but how do we do it in an organization? For instance, in Europe, we have the European Parliament, which is quite far from all the ALSes. This is an issue that we do have.

Thank you so much for giving me the floor. This is a great meeting.

HADIA ELMINIAWI: Thank you so much, Sebastien. Bertrand, do you have any comments?

BERTRAND DE LA CHAPELLE: No. I would just like to finish with one quote that I love to share, which is from Jean Monnet, who is, as some of you know, the creator of the European Union, basically. He said, “Nothing can be accomplished without humans, and nothing lasts without institutions.” And there’s another quote by Elinor Ostrom which I like even better, which is, “The purpose of policy is to develop institutions that bring out the best in humans.” There’s one criteria for evaluating whether an institution functions (and I agree with Avri that it’s constant evolution): does it bring out the best in people? Does it foster collaboration or not? I think that’s basically the fundamental criteria.

HADIA ELMINIAWI:

Thank you so much. We are almost done with our session. Our time is up. I would like to thank you all for this very interesting discussion. I think we have just started. Very important notes here. Collaboration between all stakeholders is necessary. We need to address all issues collectively. Also, I would point to the early warning system that Keith pointed out, the need to educate the community, the evolution of the structure, and, finally, the At-Large community and their very important role in what they actually do on the ground and their collaboration and work with their relevant regional structures and national bodies.

So, with this, I would like to thank our esteemed panelists and thank our panelists and thank staff and all those who made this meeting possible. Thank you all. See you in our future sessions. Thank you. Bye.

AVRI DORIA:

Thank you, Hadia.

KEITH DRAZEK:

Thank you, all. Bye.

BERTRAND DE LA CHAPELLE: Bye, everyone.

legislation and regulations, Challenges and Opportunities

EN

MICHELLE DESMYTER: Thank you so much. Today's meeting has been adjourned.

[END OF TRANSCRIPTION]