MARRAKECH – Exploring the "Public Interest" Within ICANN's Remit
Monday, March 07, 2016 – 15:15 to 16:30 WET
ICANN55 | Marrakech, Morocco

OLIVIER CREPIN-LEBLOND: Okay. Will you please take your seats, ladies and gentlemen? And the recording is on? Okay. Excellent.

So good afternoon, everyone. Welcome to this session on exploring the public interest in ICANN's remit. I'm Olivier Crepin-Leblond and I shall be moderating this afternoon's session.

Sitting with me at the head table, we have at my far right Wolf Ludwig from EuroDIG.

Next to him and between me and him is Nora Abusitta, who is senior vice president of development and public responsibility programs.

To my left, Nii Quaynor, who led the working group -- was it a working group?

NORA ABUSITTA: Strategy panel.

OLIVIER CREPIN-LEBLOND: -- strategy panel on this topic.

And to his left is Marilia Maciel.

So let's start the whole session with an introduction from Nora Abusitta who is going to be giving us a bit of background on all the work that has been undertaken until now.

Nora, you have the floor.

NORA ABUSITTA: Thank you, Olivier, and thank you all for being here.

I think we recognize the theme as being very important, and this is why we are here today.

There have been many discussions on public interest -- sometimes referred to as "global public interest" -- but there definitely have been a lot of discussions about it ever since I personally joined ICANN.

One of our first attempts to tackle it was the strategy panel on public responsibility that Nii will talk about in more depth.

But since then, we have done a lot of work to examine the concept to try and understand what it means for us as an organization and for the community as a whole.

One of the reasons why we decided to have this session is because we, as staff, embarked on some background work to look at what the definition or a definition would mean for us internally, so we started some research with our different organizational departments to see if, one, do they know what public interest within ICANN's remit is; two, if there is a definition that's very broad like the one that was suggested by the panel on public responsibility, would they feel like it's representative enough, and what does it really mean for their operations.

So we took some time to conduct a survey, honestly, to prepare as much as possible for a discussion like this and for when the community is ready to take on another big project.

What we found was that the departments have a good understanding of the topic. We all refer to it. Maybe in our minds we refer to different things, but I think everything that we do inside ICANN within the different departments is within our remit in the public interest.

There are some gaps, of course, in the understanding, but we felt like it would be good to create a good inventory of all the instances where the term was referenced, so that when the community is ready to start a discussion, they have all the resources needed.

We put up a wiki page that houses everything that we could find, whether it's research that's relevant to the topic from other organizations that could potentially apply to us, any references in our bylaws, in our documentation to it, and anything that the community members who are participating in this discussion felt like were important documents.

This is a living resource so if anybody has documents on public interest or global public interest that they feel would be helpful for the discussion, please feel free to add them.

Another thing, of course, is that you can all add yourselves to the mailing list on public interest so that you are part of the conversation.

So the current inventory has these documents that you see listed.

Where we lack right now is to start a survey and understand what -- what the concept or what the term means for our community. So what does "public interest" mean in the SO/AC structures? Maybe we need to start a survey with our community like the one we did for our departments to try and see if they have an agreement on a specific definition, if they are comfortable enough with the proposed definition that was given to us by the panel on public responsibility.

So this is one of the things that our inventory lacks and certainly it's something that we would like to start working with the community on.

With that, I'll stop because I think it's very important to take a deeper look at the panel on public responsibility, the process they took to produce a definition, and the subsequent discussions.

Nii?

NII QUAYNOR: All right. Thank you very much.

Well, thanks for the opportunity for me to share a few words. There are really two topics here. There's public interest and there's public responsibility.

Since the panel was a panel on public responsibility, that distinction may need to come out as we go.

I was quite fortunate to have the benefit of a very experienced panel. In fact, Bob Hinden was here but it seems that he has moved on.

The catalog of work in this area may be very resourceful and very useful, and I encourage that you all take a good look at it.

In my opinion, this is a topic of great interest to many, equally important to the developing world who would be concerned that their interests will be preserved even as we are latecomers in the adoption of the Internet. You know, reflect on that.

So interest of a whole billions of people need to be somehow considered.

This effort at ICANN actually started before the NETmundial meeting, but it's interesting that Paragraph 28-5 of the roadmap of NETmundial has a quote which I throw out here, and it makes

reference to "process of globalization of ICANN speeds up, leading to a truly international and global organization serving the public interest with an independent status," and there are some few things there.

However, in that case, "public interest" was not, you might say, clearly defined or specified in any way.

The definition we put forth was informed -- was very informal, and the idea was to improve understanding.

I myself was very reluctant, in the beginning, to attempt a formal definition, but you, the community, kept on telling us that, "Let's make it clear."

And so in the process, we took a somewhat more inclusive, stable, open Internet as the context of our definition. In this case, we are looking for building trust not only on the Internet but on the entire ecosystem, because if there's doubt anywhere, that will have an impact on all of us.

Now, I think as a starting point, that needs more consideration, and in this case want to relate more closely to ICANN's remit, and at the same time impact on different community groups within ICANN and maybe beyond. We need to internalize that.

Just as missions vary, it's very possible that there will be variations in, you know, thinking around public interest, so we'd like to hear all those things.

From my view, public responsibility is addressed in the work we are doing. In this case, making our multistakeholder scheme that we use in policy and for decisions stronger and more diverse.

On the other hand, the public interest will go much beyond. It's now looking at the whole mission of ICANN, all the bylaws, all those things, so it's much wider -- okay? -- and requires, therefore, more involvement of everyone.

I conclude that while public responsibility enables us to get started, the larger task of public interest requires a clearer context, and it may even vary from organization to organization and it will require much more engagement for us to crystallize what the minimal kernel of this is.

What is true is if one is managing a critical resource, I imagine there would be a higher principle to guide service such that it is perceived as reasonably fair, you know, and with social equity and perhaps prevents harm to our beloved Internet.

My question to you would be: What does "public interest" really mean to you as an individual, as an institution that you are representing? And that's what I'd like to hear. Thank you.

OLIVIER CREPIN-LEBLOND: Thank you very much, Nii.

And some discussions have already taken place, both in ICANN and outside of ICANN, so our two next experts are going to be relating the discussions that have already taken place as, I guess, a starting point to what we want to achieve today.

Wolf Ludwig, you're next, the discussion at the European at-large organization, ICANN 54.

WOLF LUDWIG: Thanks, Olivier, and thanks for inviting me to --

OLIVIER CREPIN-LEBLOND: Mic.

WOLF LUDWIG: -- to contribute to this session.

As we all know, the term of "the public interest" is somehow a very strange animal that appears from time to time in ICANN-related discussions, and I think there are -- is as much confusion about this notion of the public interest in the community and in the various constituencies of ICANN, and this was a challenge for us last year when we prepared EURALO's General Assembly in line with ICANN -- with the ICANN meeting in Dublin.

And as a starting point, I wrote a thesis paper on the issue for our community as an input for the discussion in Dublin, and it was basically an attempt trying to trace the public interest in the European context.

So I didn't try to do anything about the global public interest, which was mentioned here, so there are different related terms -- "public responsibility," as Nii pointed out, "the global public interest" -- and we started simply on public interest in the European context and history.

And you can easily find in various European languages related terms. In German, you have gemeinwohl. And you have in French bien public. You have the common good in English. And they are all more or less pointing to the fact that the public good should be rated higher than particular personal or group interests.

And we tried in this thesis paper to start a little bit with the concept of Aristotle back in ancient Greek history. You can trace it even to the Roman Empire. You have the notion of the public interest in the Middle Ages where a lot of the city states like Venice, Naples, et cetera, say -- use the term of the public interest in the ruling and in the order of the governance of their city at the time.

So there is a long and evident history that public interest, public policy should be in the interest of the population and should be higher than any interests of a group in a community.

And I think from this background for us in the European context and in the context of EURALO, it is clear. Also, if you look at composition of the EURALO members, of our member ALSs, there are various NGOs, certified ALSs, who in the local or national context fight for the public interest. So for us, it's a sort of a commitment. And for us, it's a sort of a responsibility.

And that was the reason why after the discussion at the General Assembly we meanwhile created a task force to now further elaborate the term and to find out a little bit more about it.

And it would be interesting to see from other regions perhaps in the different cultural context there are similar histories. There are similar links. And perhaps this should -- could be brought together.

I would stop here right now and if you have any more questions, please.

OLIVIER CREPIN-LEBLOND: Thank you very much, Wolf.

So now we've seen the public interest in the European context. There have also been a lot of other places where this has been discussed. And Marilia Maciel is going to take us through the discussions that have taken place at the IGF, the public interest in critical Internet resources.

Marilia, you have the floor.

MARILIA MACIEL: Thank you very much, Olivier. This is Marilia speaking. I would like to thank Nora for the invitation to be in this session for Lauren, for us to give input in the session together.

I have been asked to do a quick overview of the session that took place in the IGF. As you may know, the IGF meets once a year under the remit of the United Nations. But it is a truly multistakeholder forum in which different stakeholders can come on equal footing and discuss matters of interest. And this was a very interesting session which began with an academic overview of the concept of the public interest that helped to frame the debate.

And it was highlighted that traditionally in the literature "pursued in the public interest" is usually associated with developing regulation.

And there is a clear concern that in order to avoid the capture of the notion of public interest, which I think is a common concern that we have here in the community, it is very important that public interest is not developed by -- at the expense of the interest of sectors of the community. So due process, developing policies, following clear and due process is very important with active participation of the community in the policies that are developed.

The connection between public interest and human rights was very strongly made in the session in the IGF, either clearly by saying that one very important aspect of protecting the public

interest is protecting human rights or by connecting the idea of public interest with concepts that suggest social justice, equal access, education, connectivity for all, and respect for cultural diversity.

I believe that another point that was made during the session is an important one, which refers back to a process that we already know here in ICANN because we have discussed it a lot, which is the NETmundial meeting.

Maybe when we are discussing public interest we are not departing from a blank page. We are not departing from scratch. If we look around the Internet governance ecosystem, we see that collations of principles that should guide policy development have been put forward by different organizations over the years.

Many of these principles are regional. We have principles brought forth by the Council of Europe, by the European Commission. But most of them are national, such as CGI.br principles.

But in NETmundial, I think we have achieved something very remarkable which is to have the alignment of a multistakeholder

community from all regions of the world around a particular set of principles.

And these principles encompass not only technical principles that we understand and carry very much -- care about very much here such as unified and unfragmented space, security and stability, resilience, open and distributed architecture but also the human rights principles that many people point out that are very much in correlation with human rights such as freedom of expression and association, privacy, accessibility, and development.

So maybe we are not departing from a blank page. And the document that has been produced by NETmundial may help us as an organization to measure our policies and procedures against these principles and try to understand if they are upholding these principles or not.

Of course, NETmundial was one particular event. But we have the NETmundial initiative, which the main goal was to try to make sure that the NETmundial outcome document did not fall into oblivion but is constantly mentioned and not only mentioned but also implemented in different ways. So it's an attempt to carry out those principles.

Of course, there were also participants in the workshop in the IGF that have highlighted difficulties with the notion of public interest. One of them is that public interest by its own nature, it is an intrinsically an aspirational goal and keeps us moving towards a direction, keeps us moving towards something. But public interest is never fully achieved. So it's like a target, a goal that makes us walk but it's not completely achievable.

Another point was that it is a notion that's very fluid, is something that is perceived as public interest is perceived like this in a given time and context so the perception of what the public interest is may change. So maybe it's very hard for us to define it in a fixed format.

And the last point that was added to the discussion in the workshop is that sometimes it's very hard to define who is entitled to defend the public interest. Is it states? Is it non-governmental actors? In different situations, sometimes the voice of who is defending the public interest may change.

But I think that Bill Drake came to a very interesting conclusion. He was the one who organized this particular session in the IGF. And he said there are very -- we recognize that there are difficulties to try to define a public interest, but maybe it's more

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dangerous not trying to define it and leave it as a complete blank page.

And we see maybe this in the organization when we are called to discuss public interest commitments, for instance, without having a definition of public interest. When we do not discuss the definition or at least the principles in which we want to anchor this definition on, I believe that then we are much more susceptible of being encaptured by different interests.

So I do believe it's a very urgent discussion that is not only taking place here. I think it's important to highlight that for us that participate in the other spaces in the Internet governance ecosystem, there are different organizations that are raising the point of the importance of discussing the public interest.

There's a very interesting report that has been published by a think tank that gives support to the Dutch government, for instance, that talks about the need to keep the public core of the Internet neutral and free from undue interferences, be it from governments or the private sector. This report is being carried forward, I think, and accepted in very different spaces. And it mentions, for instance, that DNS should be seen as a core public structure function of the Internet and should be kept from

undue interference. And I think that this relates to what we are discussing here in ICANN very much.

And probably this topic will be tabled at the next United Nations GGE meeting that takes place in the First Committee and looks at issues of peace and security so that the importance of public interest is being escalated. And I think that we should be ready to discuss that as well.

So thank you, Nora, for organizing the meeting.

OLIVIER CREPIN-LEBLOND: Thank you very much, Marilia. Do you have any question that you would like to ask of the audience in particular?

MARILIA MACIEL: No. I would voice Nii's question. I think it's a very good one.

OLIVIER CREPIN-LEBLOND: We have gone through our panelists at the moment. I'm sure there will be thousands of people queuing up in a moment.

What we are trying to do here is to engage discussion, a big conversation about the topic and to see really how this relates to the ICANN remit.

I know that within ICANN circles, there are some who are completely supportive of the concept of the public interest in ICANN. As we know, it's in many documents but, yet, there's no real definition of it per se.

And, yet, there is also some people that think that the public interest could be a tool used for -- against, I guess, ICANN in some way or other by third parties that might wish to turn it to their advantage and effectively use the public interest for vested interest.

We have one gentleman on the microphone.

Nora would like to comment on what I've just said. So Nora Abusitta and then we'll come over to you.

NORA ABUSITTA: Sorry. Just very quickly. Just to recap a little bit, the panel on public responsibility did develop a definition. It developed a definition for public interest that was very broad that was not rejected by the community but wasn't completely accepted or adopted. One of the reasons why it wasn't adopted was there was a sense that not enough people were involved in the

development of the definition or that there wasn't enough time spent on discussing it with the whole community.

So a definition was proposed. I have yet to see a violent reaction against it. But I haven't seen very enthusiastic adoption of it either.

And the criticism was more about how we got to it rather than the content of it. Just to note that as we proceed.

OLIVIER CREPIN-LEBLOND: Thank you, Nora. So the first person at the microphone, please introduce yourself and then fire off your comment or your question.

MARK DATYSGELD: Good evening. I'm Mark Datysgeld, formerly from the next gen program, currently a fellow.

And what I would like to mention is actually that Ms. Maciel organized in Brazil an event concerning this document about the public core of the Internet. And the gentlemen, both researchers, they raised a point that I would like to propose to you and see what are your thoughts about it. Ms. Maciel raised it briefly, but they are very emphatic about it.

They say that the public core of the Internet or public good should be protected in terms of global law as in a binding agreement within the environment of the U.N. or of international protocols and in such a way that it is something defined and protected by international law.

And I would like to know your opinions concerning this point which I found very intriguing. But I haven't yet made up my mind about it. So thank you.

OLIVIER CREPIN-LEBLOND: Thank you very much. Anybody wishing to -- Marilia?

MARILIA MACIEL: Thank you, Olivier.

Actually, the report is very interesting, and I encourage you to read it.

They make a point in very brief terms that this public core be the Internet infrastructure, the carriers, the DNS system. This is something that is relevant for everyone to work.

And what the report notices is that there's an escalation in terms of not only talking about cyberspace in military terms but there are also policies that are being put in place such as DNS seizures to protect intellectual property or using Internet service providers as law enforcement elements into the Internet chain that are very concerning and destabilize the Internet.

So what the report tries to do is it does not neatly define what this public interest is. It's something that's open to discussion, but it advances the point that it's very important that if there is an international agreement, that whatever we define the public - - the core of the Internet, this needs to be protected. So this will be off limits.

If there's a conflict among states -- and this report is a very states-oriented, much more than private-sector oriented. If there's a conflict between states, then this public core should be seen as off limits.

I think this is an interesting idea because, as I mentioned, this group of governmental experts that functions inside the First Committee of the United Nations is moving to define the agenda for the next years.

And we know that there are interesting proposals there, but there are also proposals that talk about cybersecurity in terms of information security that are concerning.

So I think that maybe this is an interesting proposal that would help us reshape the focus of the group into something that is more productive. And I would personally like to see countries agree that the DNS infrastructure is something that in case they have a conflict they should not be meddled with. Thanks.

OLIVIER CREPIN-LEBLOND: Thank you, Marilia.

Nii.

NII QUAYNOR: Very brief. I am less interested in protection by agreements. I'm more interested in protection by a community. And which -- kind of underneath all of the things that we're doing here. So I'm looking for people to have an opt-in, wanting to, and do it by themselves because of a certain principle that you don't want all the resources finished before my village gets ready. So you have a (indiscernible) approach by which when my village gets ready, you'll be able to bring me on --- billion. So I have a slightly different perspective. I want community enforcement instead of agreement.

OLIVIER CREPIN-LEBLOND: Thanks very much, Nii, for this. There's several questions that are in the chat at the moment, but they relate to specific points and specific relationships between ICANN and other bodies or people that are in the ICANN community. That's not the scope of the discussion we're having here. We're here to try and develop a framework or some kind of path for this community to take to first build on the work that has been undertaken by Nii and my colleagues but also to gain the feedback from you with regards to the public interest in the frame of ICANN. Not specific topics or specific instances of the public interest being there or not there or being trumped by the -- the vested interest and so on. So let's go to the next person on the microphone, please. Would you introduce yourself?

PADMINI BARUAH: My name is Padmini Baruah. I'm a student of the law from India, and I'm currently working with the Center for Internet and Society. And my question -- or rather comment, I wanted your thoughts on what you think of the kind of engagement I've had with public interest and ICANN.

So my experience stems from the work that I've done with the documentary and information disclosure policy. And within that

strand ICANN has done two things with respect to public interest. One is where it denies me information and says that in the larger public interest it is probably a better idea if this kind of information isn't made available, which in some cases is probably true, in some cases probably not. I have no way of knowing.

Another thing that happens -- and this is the second strand, and this is interesting -- in their exclusion clauses for disclosing information under their documentary information disclosure policy they have a small paragraph at the bottom after they lay down those 12 clauses where they say that in the event that there is acute public interest involved in the information you're seeking then ICANN will exclude the fact that there are these clauses and it will overlook its existing policy and give it -- give you the information in the event that it feels that public interest is being served by the documents you're asking. Now, I filed, I don't know, over eight or nine DIDP requests and never has that clause been applied to me and, therefore, I was wondering what you would think would amount to a threshold where the exclusion clauses could be overlooked and why would ICANN perhaps -- in what instance you feel that public interest would rather be served by information not being disclosed. I thought this was interesting to debate on. Thank you very much.

OLIVIER CREPIN-LEBLOND: Thank you very much for this question. I'm not sure if we have anyone who's an expert in this on the panel. Does anybody wish to comment? Perhaps we can have Sam.

SAMANTHA EISNER: This is Sam Eisner from ICANN legal. I'm associate general counsel, and I work with some of the team that performs the DIDP analysis. And I'd like to point out that while I don't have in my head any specific DIDPs for which there's been a determination the public interest outweighed the defined questions for non-disclosure, there is actually a full -- a full range of information that has been categorically provided that the public interest in that information outweighs the disclosure policy and that is the Board's provision of briefing documents. If you look at the DIDP, the Board deliberational materials are actually specified as a defined condition for non-disclosure. And ICANN has made a determination as an organization that categorically those deliberation materials, unless they contain privileged information or otherwise confidential information based on other of the things, actually the public's interest in that information outweighs. So it is something that we consider and could consider again in the future.

OLIVIER CREPIN-LEBLOND: Thanks very much, Sam. Next to the microphone, please introduce yourself.

TIJANI BEN JEMAA: Thank you very much. Tijani Ben Jemaa. I am the vice chair of ALAC, but I am speaking on my own behalf.

I think that the public interest would be different from (indiscernible) to another. If you want to come up with a common definition of the public interest, it would be very broad. And as you said, Nora, a broad definition of the public interest would be, in my point of view, useless because you can put in it anything.

Why is it that because Marilia said -- came with the definitions they found in the IGF, for example. But in the IGF it is different. In the IGF we are speaking about the governance of the use of Internet. While you are here we are talking about the governance of the unique identifiers, and I think that the interests are different.

The danger on the public interest would be the narrow interest, and if we can avoid to be -- to -- how to say. If we can come up with something that make the public interest higher than the -- for example, for the political interest or the commercial interest,

it would be the right definition. And it would be a definition for a certain context. If it is for a broad context, I don't think it would be useful for anyone. Thank you.

OLIVIER CREPIN-LEBLOND: Thank you, Tijani. Any comment from our panelists? Okay. We continue. Let's continue. The next person, please.

MARIA MILAGROS CASTANON: My name is Maria Milagros Castanon. I'm from Peru, and I'm the GAC representative for Peru. I would have loved to have access to the debate that -- the debate taken before the notion of public interest was used in all the documents of ICANN. I don't know how anyone came out with that expression. The notion of public interest has, as the other person just said, a number of meanings and a number of exceptions. And basically it comes from different schools of thought, and one of them which seems to be the one most important for ICANN is a school of thought, an Anglo Saxon school of thought, very much involved with American theorist point of view. But when you study the purpose of ICANN and the multistakeholder philosophy, not as a platform but as a philosophy, you would have to reach out to the two different schools of thought that give a definition to public interest and you would be left with something a lot more basic, and in being basic, a lot more

important than the expression "public interest" which is the common good.

So I believe eventually, if we want to do things right, we will have to change wherever it's needed the expression "public good" for the expression of "common good" because then you have the confusion, like, for example, the lady a little while ago, she was mentioning public good, public -- public interest in regards to access to some documents, for example. That is not the idea behind the philosophy of the multistakeholder approach. The philosophy of the multistakeholder approach lies on the idea of -- of the notion of a (non-English phrase). The base -- the (non-English phrase), the common good. No?

OLIVIER CREPIN-LEBLOND: Common good.

MARIA MILAGROS CASTANON: So I would leave this to you to analyze. But I have really worked on this thoroughly, and I think that's the clue, the common good.

OLIVIER CREPIN-LEBLOND: Thank you very much for these comments. Just to note, we are taking notes on these, so …

ICANN|55
MARRAKECH
5 – 10 MARCH 2016

Nora.

NORA ABUSITTA: Just very quickly, a quick note to say this is exactly why we're having the discussion now. Because one, there is an appetite from the community. And two, it seems like they're worried they might not be as busy in the next six months as they have been, so this is why we're launching the discussion. And thank you to the lady from Peru. I know the GAC has another session, so I'm really happy that at least we have somebody from the GAC here.

OLIVIER CREPIN-LEBLOND: That's great. Thank you. So the next person in the queue, please.

MALCOLM HUTTY: Thank you. Malcolm Hutty, for the record. Speaking in an entirely personal capacity, although as someone who has some experience in dealing as an outsider in rule-making procedures. And I'd like to offer some comments as to how, in my experience, the terms like "public interest" are used in those rule-making and norms-generating procedures because I think it might add a little to have a functional analysis of this.

And I note two particular ways in which this term is often used. And one is -- the first is to distinguish the public interest from a private interest if you consider a scenario where a group of stakeholders are gathered to consider some sort of rule-making process or norm-setting process and they have a discussion that goes along, "Well, I do this already so I'm willing to do that." "I'm willing to go that far" or "I don't want to do this because it will be too onerous or expensive."   These are -- while legitimate statements, they are praying in aid to their private interests, and in that context, when we talk about the public interest, we are somewhat delegitimizing those comments or at least reducing the weight of them to say, it's all very well that you might have those concerns but what about the broader public interest. And many would think that in that context and used in that way the term "public interest" could be helpful to ensure a more broader and inclusive introduction of the concerns of a broad audience. But there is another way in which the term "public interest" is very commonly used, and I think we actually had a -- one microcosm example of it just a moment ago with the lady that spoke about the DIDP. When you are speaking to someone in authority, a decision-maker or a rule-setter or someone like that, and you ask them why did you do this? Why did you act this way? Why did you fail to act that way? Why did you decline to do that? If the response you get is, I determined it was in the public interest, that is a claim of power. It is actually a refusal to

answer the question. It's a statement that I'm not going to give in any sense objective or measurable or co-measurable standards by which my decision can be weighed. But instead I'm simply going to make a statement that evaluates to I determined that this is good.

Now, it may be in many cases that a particular decision is good. It may be that it -- that decision would have been justified by some standard. But -- but in stating it in those terms, or more particularly, in refusing to state it in any other terms, it is setting that decision apart from any objective standard or indeed from the ability to measure that standard against other precedents and so forth and look for consistencies. And in that case, the term "public interest" only acts to secure the flexibility of essentially arbitrary power and to reduce the ability of those that would challenge that and hold those to measurable standards.

Now, I think there are many of those who support the term and the use of the term "public interest" in ICANN might find that problematic. So I would suggest -- and in a sense certainly we can look to the definitions that are often touted around for support for this. We see that they are always very broadly stated in very vague terms. And that is because everybody wishes to be able to attach to their -- to that definition, their own view of

what constitutes the public interest, and to use it for whatever they think is good and against whatever they think is bad. But -- in practice this term is actually used by those in power, by decision-makers. And so a -- using this -- using the term "public interest" as a standard or as a grant of authority is a grant of broad discretionary authority that empowers the powerful and that reduces the opportunity for challenge. Thank you.

[Applause]

OLIVIER CREPIN-LEBLOND: Thank you for sharing this with us, Malcolm.

Nii, you wanted to follow up on this?

NII QUAYNOR: I think -- I wish with the experience he has, whether he could comment on the specific definition that we came out with and maybe guide us or advise us on how to improve it. Because I think this is not very broad. This is talking about ICANN and the Internet that we think our interest is in, you see?

And if you notice, it really picks specific things. It says, "Don't ruin it, don't ruin it." You see? And it tells you that, "Make sure that the properties we find valuable are retained." At the same time, it tells you, "Build trust."

So I'm wondering where we -- where we stand with respect to the two things that you've defined.

MALCOLM HUTTY: Well, I had quite a long time at the microphone --

OLIVIER CREPIN-LEBLOND: Malcolm, please.

MALCOLM HUTTY: -- so I'm not going to really give a proper answer to your question other than that I look forward in continuing to engage in this. But I will say that when we covered this topic in the accountability working group, I was certainly one that was skeptical of the use of the term "public interest" itself and more -- and very positive about pulling out the specific things that actually I see recollected within this statement, but asking them to be made more specific and more measurable so that objective tests could be made as to whether they've been lived up to or not.

Thank you.

OLIVIER CREPIN-LEBLOND: Thank you very much, Malcolm, and I remind you that there is a mailing list that has been set up so we're really at the very beginning of this process of interaction and discussion and I encourage you to subscribe to this mailing list. It's referenced in the PowerPoint presentation that is linked to this session, so you'll be able to get on it.

Next person on the mic, please.

GEORGE SADOWSKY: Thank you. George Sadowsky, member of the board, clearly speaking in my own personal capacity, and given the -- some of the comments that have been made, I feel compelled to say that I am not a lawyer.

This is an important topic and there have been a number of good thoughts that have been advanced.

I have several. I'll throw them in for what they're worth.

One of the congressmen in the United States, in a discussion of pornography, said, "I can't define it but I know it when I see it." And it would be really good if we could use a criterion like that to consider the public interest.

In cases where -- which are largely black and white, I think you can, but most aren't.

I've been involved with ICANN now for almost 10 years. We've had lots of controversies on the floor, in groups. I can't remember a time when somebody said, "Yes, but my argument is in accordance or follows the global public interest."

We don't use that. We haven't used that term. We're concerned more about defining it.

And my sense is that it's probably not -- I like the definition. I'm happy with an ambivalent and ambiguous definition. It's more important what we do with it and how we use it. And I'm wondering if there isn't some analog to case law here where -- If you're trying to decide what the law says and two people disagree, you go to court and judges make a ruling and eventually there's a -- there are sets of opinions that generate case law upon which future decisions can be -- can be based. Is it possible that if we consider the furtherance of the global public interest as -- however defined, as an ICANN objective and then say, "When things come up where there are differences of opinion, what's in the global public interest? How can we -- why is it in the global public interest? How can we develop a set of

criteria that will help us in the future to make decisions on this basis?"

One of the issues that mitigates against this, I think, or has to be considered if we do it, is that ICANN's very process-based, and essentially the consequences, the policy that comes out, is a -- is an output of the process. We don't define the consequences or the goals ahead of time and then determine what processes are used to reach those goals.

Let me leave it there. Thank you.

OLIVIER CREPIN-LEBLOND: Thanks for these comments, George.

Any feedback from our panel? No? Okay. Let's continue in the queue, then.

And I note there are, I think, five people in the queue. Yes. So let's close it for the time being because we've only got half an hour and I believe that each one of our people on the floor have much to say.

So next person, please, on the mic.

RON ANDRUFF: Thank you very much for that half an hour.

                        [Laughter]

OLIVIER CREPIN-LEBLOND: Limited to 30 seconds, but that's fine. But go for it.

RON ANDRUFF: My name is Ron Andruff. I'm an Internet user and longtime
                        ICANN member.

                        I wanted -- I think George really -- I'm grateful to follow him
                        because it was a perfect segue to what I wanted to say, in so
                        much as the definition is one that one can sense. And if you think
                        about the governments of the world, their responsibility is to
                        protect the public interest, the interest of their citizens, so
                        there's a protection element here that one has to consider, not
                        just an element about access.

                        And in ICANN 46, Beijing, the Governmental Advisory Committee
                        came forward and said that highly regulated strings should -- we
                        should be sure within ICANN that we manage that process well.
                        Why did they do that?

Because in the real world, highly regulated strings are managed very carefully by governments because they know that people will abuse that ability and authority to manage that very important resource.

We at ICANN, however, didn't seem to deem that as being relevant. And since ICANN 46, we are here at 55 and we continue to fight over the issue of public interest commitment specifications as requested by the Governmental Advisory Committee in Beijing on highly regulated strings.

What's happened? We've just kicked the can down the road, kicked the can down the road, kicked the can down the road, till we get to a point where all of a sudden they say, "Oh, gee, it's just too late. We can't make changes now."

This is one of the systematic problems we have within ICANN. So however the definition is defined, I think that it needs to be put forward at the very most front point of ICANN that ICANN protects the public interest and we're interested in making sure the public interest is protected, first and foremost.

Because when we put out regulated strings in the hands of registry operators that have zero nexus to that community and they have the ability to make policy on how those strings will be

used without any input from the community that is impacted in that highly regulated space, the folly is going to come back on ICANN when we're trying to stand up an institution that really has a lot of breadth and depth and has the confidence of the users.

So from my point of view, it really doesn't matter how that definition finishes up. We're splitting hairs in many ways. But the reality is, it has to come down to ICANN saying that is our first priority, to make sure that we as an institution protect the public interest. Because the public are naive in general. They expect that someone has made sure that .BANK, .INSURANCE, .HEALTH, someone's checking to make sure those domains, in fact, are protected. But they're not protected right now. There is zero discussion about making sure that the public interest commitment specifications that were called for at ICANN 46 that was back in March of 2013 -- we're still talking about that, and in fact, people don't want to talk about it anymore because unfortunately it's a very open sore.

So I wish you good luck in your endeavors and I highly recommend that we make that our most important commitment. Thank you.

OLIVIER CREPIN-LEBLOND: Thank you very much, Ron.

Next person in the queue, please.

AMR ELSADR: Yeah. My name is Amr Elsadr. I'm from the noncommercial stakeholder group in the GNSO. Excuse me.

Well, I agree with a few of the previous speakers. I personally believe that defining the public interest is not just maybe difficult; I believe it is undesirable.

And the reason I say this is because I really approach this from a gTLD policy development perspective.

"Public interest" is a very subjective term. If you ask someone like Marilia what she believes is in the public interest, she'll give you one opinion. If you ask a state security officer from Egypt, where I come from, what he or she believes is in the public interest, you'll very likely get a very different answer. And trying to build consensus around conflicting special interests to define the public interest will only result in a watered-down version of everybody's opinion of what is in the public interest.

So what you have is not actually the public interest. What you have is a consensus definition that nobody's actually really a hundred percent happy with.

The question I have for you is: How do you feel that this factors in with what is involved in gTLD policy development?

Ron just mentioned the PICs, the public interest commitment specifications. I think some of those specifications in the registry agreement are very good specifications. I think some other ones are not as good. But I do not see the need to label them as public interest commitment specifications.

If you look at the gTLD applicant guidebook, there was also the limited public interest objections. Those had very specific reasons under which you could file the objection, and so it was quite clear. But also, calling them public interest objections is also, I feel, unnecessary.

But my question is to you, from -- as an output from the strategic panel: When you define the public interest, and if you would like more inputs on how this definition should be changed, how do you feel that this should sort of interplay between what "public interest" means in the gTLD policy development process? Thanks.

OLIVIER CREPIN-LEBLOND: Thanks, Amr. Wolf Ludwig.

WOLF LUDWIG: Well, I think for the context you mentioned, in my opinion there's one good example. We had the application of .KINDER from a candy producer which is called Ferrero and he wanted -- the company wanted to register .KINDER.

"Kinder" is a generic term in German for kids. So it's a generic word even known, I think, in the English context by "kindergarten," which became also a very common term in the anglophone word, and in my eyes it was against the public interest and ICANN decided to allocate .KINDER to Ferrero as a closed domain.

So this is not in the public interest. It would have been in the public interest, in my opinion, to allocate .KINDER even to Ferrero but as an open community domain, so anything related as a public initiative by others could be subsumized [sic] under .KINDER. Then it would have been a different issue. But giving it exclusively to a candy producer like Ferrero for their marketing interest, this in my opinion was a wrong decision which was not in the public interest.

OLIVIER CREPIN-LEBLOND: Thanks for sharing your opinion, Wolf. Amr, you had a follow-up?

AMR ELSADR: Yeah. Thanks. Respectfully, Wolf, I don't think you answered my question how the definition now interplays with the gTLD policy development process but I think you actually -- what you did is make my point, because you rightfully repeatedly said "in my opinion."

So what if you present your opinion in a bottom-up multistakeholder policy development process? Your opinion will not be the one that is eventually reflected in the policy. It will be considered. Parts of it may be implemented. But it will be complemented by other people's perception of what the public interest may be.

So what I'm thinking is, why not just argue the substantive issues, the exact issues you want to -- why you believe, for example, kinder should not be a closed gTLD, .KINDER. So you argue the exact reasons. Instead of saying it's not in the public interest, give specific reasons on why you believe this should not be a closed gTLD and should be available to everyone.

And, well, I didn't realize "kinder" meant kids in German. I guess that makes me a little childish for enjoying Kinder chocolates. Thank you.

[Laughter]

OLIVIER CREPIN-LEBLOND: Thank you very much, Amr.

Nora.

NORA ABUSITTA: Just very quickly, you make a very important point again that tells me this is a very important discussion because one of the things that was presented to us was, okay, have an umbrella of a definition like the one you have in front of the screen and then take a look at every function within ICANN and develop something very specific for it. Maybe a set of criteria, maybe a set of parameters.

And the -- to go even beyond that and do not call it public interest. Call it something else. Because it's not really that broad term that everybody refers to so that they can get themselves out of an argument.

So I take your point very well. I'm going to stop here because I'm interested in listening to the rest of the participants.

OLIVIER CREPIN-LEBLOND: Thank you, Nora.

Before we go to Sam, did you want to comment directly on what Nora was saying or --

SAMANTHA EISNER: I have a response to a question that was posed earlier.

OLIVIER CREPIN-LEBLOND: Okay. If it's -- okay. Let's go over to you and then we'll go over to the -- there's another queue also on line. Not such a queue, but there are a few questions on line, so let's go over to you, please, Sam Eisner.

SAMANTHA EISNER: Thank you. Quickly, Sam Eisner, ICANN associate general counsel.

As this conversation has been bubbling up, I -- we've done some looking to see if we could find the origins of where the term "public interest" came into our corporate documents.

So the answer that I found is based just on research but not really documented anywhere that ICANN is a 501(c)(3) organization under the laws of the State of California and the I.R.S. tax regulations. And it's a very common usage to use the term public interest to distinguish from private interest because ICANN is barred from taking decisions to benefit the private interest because of its not-for-profit status.

So the origins of the term don't necessarily help us with the discussion that we're having today, which is the discussion that we need to be having for the ICANN of today and not about the founding of it based on just the pure not-for-profit status.

OLIVIER CREPIN-LEBLOND: Thank you, Sam.

Now we have Debra with a comment and a question.

REMOTE INTERVENTION: Okay. There is a comment from William Cunningham. Getting to a definition is very difficult but must be done. A reasonable technology policy requires it.

There's a question from John Curran, ARIN. If the ICANN community feels that it is necessary to opine on the global

public interest such as offered in the panel definition, would it be prudent to make it to be in relation to the Internet's unique identifier system rather than in relation to the Internet as this would better -- be better aligned.

OLIVIER CREPIN-LEBLOND: I think you might have missed the end. Better aligned with the scope of ICANN's mission was the end of that comment.

Nii, maybe you wanted to mention this or, Marilia, because you have spoken about the overall public interest with regards to the Internet. But ICANN's mission.

MARILIA MACIEL: Thank you, Olivier.

I think it brings us back to a point that was raised at the beginning of the conversation that define the public interest here in an organization that's focused on critical resources different than discussing public interest in the IGF.

I think it depends on the direction that we want to take the conversation.

I do like the idea to have a very broad definition that we were like a vision, like a company has a vision, mission, goals. And the vision will guide the direction that you want to go.

In my opinion, what I -- what my opinion is about, since you asked what our opinion is about the definition, I think it covers many of the technical concerns that ICANN, of course, is devoted to. But it does not cover something that is very important.

That's why I came back to the NETmundial outcome document, which is the end user, which is the individual that is at the end of the relation when you think about what ICANN does.

So I see that a way to discuss public interest should take into account all the things that we want to preserve that have been defined by the NETmundial outcome document which is unified, unfragmented, et cetera, but also the rights of the end user.

And coming back to Amr's point, I think one way to bring this into the PDP is to have a vision or principles clear like this. And try -- when we are in the process of developing policy, ask ourselves: Is this policy upholding this particular principle or not?

And, of course, we may come to different answers. But I don't think it is a problem at all. The important thing is that we measure the policies that we are trying to develop against these principles. And being in the GNSO, I know that we do not always do that. When we developed the new gTLD program, maybe we talked about security, stability. Did we think about it enough?

We end up having discussions on the domain name collision that maybe we would not have if we had thought more carefully.

Did we think about human rights? Freedom of expression? Were these words mentioned, or was this considered off scope? I think it shouldn't be.

So I think it's trying to measure what we do against these ideas and principles that will lead us into the direction of achieving something like public interest. It's not the work done. It's a work in progress always. Thanks.

OLIVIER CREPIN-LEBLOND: Thank you, Marilia.

Next person in the queue, please.

ALAN GREENBERG: I'm Alan Greenberg. I am chair of the At-Large Advisory Committee but speaking clearly purely on my own behalf.

I have been around ICANN now for nine plus years, and I participated in a fair number of these discussions, both public and private. And my ideas have evolved.

I must admit I started with what I have then determined to be a rather naive view that if we use the term in documents, we should clearly define it. Typically in any contract, if you use a term, you have to define it so everyone understands the same thing.

I'm no longer -- I don't believe that anymore. Certainly I don't believe we are at a stage where we can define it right now.

Amr's example of the PDP, I think, is one of the reasons. The PDP does not have an obligation to serve the public interest. It has an obligation to make decisions based on the people who are making the arguments. And the people in that group may well decide, perhaps correctly, that the private good trumps the public good. And that's a real -- that's the real conundrum.

I don't think -- I like George's idea of case law. I think we really -- before we can ever attempt to define it, if we ever can, we need

some examples. We need to understand the process by which we come to the conclusion of: Is this in the public interest? Does Kinder -- use by a company trump the use of the generic word or vice versa?

And I think we need essentially rulings. And then the community can debate are we right, are we wrong, and start to develop methodology for determining the public good. Maybe eventually we'll have enough cases that we can feel comfortable in coming up with a definition.

Coming up with a definition before that, I think we end up with something that will be so generic that, yes, we'll have words on a paper but they won't really act as any guidance in making the decisions. Thank you.

OLIVIER CREPIN-LEBLOND: Thank you very much, Alan.

Looking around. None of the panels want to react or -- Nora?

NORA ABUSITTA: Very quick point. Thank you, Alan. I wanted to mention -- and I forgot to mention this in my intervention -- this was part of the requests that came in and made it into the strategic plan, the

five-year strategic plan that was accepted and vetted by the community: One, exploring the public interest and then, two, measuring our work by it.

And so I think this will help shape the next few months, but it was very important to say at least there was agreement that we need to consider it and decide on it.

ALAN GREENBERG: If I may, exploring is very different from defining.

NORA ABUSITTA: And I agree. We could come out of this discussion that may last a year or so or hopefully less with a conclusion that we don't need a definition. But at least we would all agree on that.

OLIVIER CREPIN-LEBLOND: Thanks, Nora.

Marilia?

MARILIA MACIEL: Thank you, Olivier. I agree we may not need a definition, but I think there are keywords of this proposed definition that are important to retain.

And I would be really concerned if a policy adopted in the GNSO just decides to trump an stable or secure Internet or an inclusive Internet or anything.

We are not talking about a very broad set of values but the core values that I believe should guide every policy. And if policies trump these core values, I would really be concerned.

OLIVIER CREPIN-LEBLOND: Thank you, Marilia.

Nii?

NII QUAYNOR: Actually, I'm beginning to wrestle with the subject of PDP being somewhat innocuous to public interest. And the reason is, the policy development process should serving the interest of the community.

So if it doesn't see what the interest of the community is, then it may not be fulfilling its objective.

So I understand the challenge we have. But I think if the community believes, especially when you are a single

coordination body, you must have some responsibility and that responsibility is probably what we are trying to capture by saying it's in the public interest. You know, for instance, it should be fair and so on and so forth, okay?

So it's not like totally free to decide any which way you want, public interest or private interest. We are suggesting that there are some things that need to be above the private interest because we happen to be a coordination function. We're making policies for that.

And that must be in some sense constrained by not working against the public who are not even here yet. Do you see how complex it is? So, anyway, that's my reaction.

OLIVIER CREPIN-LEBLOND: Thank you, Nii.

And as we reach the final five minutes of this session, let's have the next person in the queue, please.

FABRICIO PESSOA: I'm Fabricio Pessoa. I'm a second-time fellow. And I work for AXUR in Brazil.

So I see that one of the main reasons why the definition is broad is because the terms that we used are very broad, right? Kind of when you say about public interest in relation to the Internet, public -- one of the things that I can understand is that it's the different publics of the different aspects of the Internet, right?

And it all goes to what the purpose of the definition is. I think that what Marilia said is very interesting, the thing about towards a goal, kind of a main philosophy or a mission, let's say and sometimes maybe even if it's broad because we want to include, for example, the end user.

But then it's a bit complicated as well because we are the ones that are here discussing things and, of course, we are trying to -- with our best intentions trying and see what's the best for everybody, right, for all, like you said there.

But there's one issue that I see here is that when we talk about the end user, most people that use the Internet don't understand how the Internet works. So they cannot real speak for themselves, right?

So I think that we only maybe have a real idea of what the public interest is only when everybody actually knows how the Internet works, and they can speak for themselves.

Meanwhile, we can kind of use it as a goal, I say "I think." But we cannot believe in that 100% sure that we are working towards the public interest. That's my point.

OLIVIER CREPIN-LEBLOND: Thank you very much, Fabricio. And I think we are only three minutes away from the end of this session. Next steps are a big question. Are we to create a cross-community working group, a cross-community working party, a different kind of structure? What is the next way forward? These are questions which I think will probably go unanswered at this very moment in time. But we do have a mailing list, as I mentioned a bit earlier.

I was going to ask each one of our panelists to give us a one-minute or even 30-second tweet about their final words on this session.

First starting with Wolf Ludwig, please. I would like a tweet from you. Just a few words to close off the session. And you've lost ten seconds already, so you're good.

[Laughter]

No, no, you'll have 30 seconds.

WOLF LUDWIG: It sounds strange. I'm not using Twitter, so I have no idea about tweets. So I give it over to the younger generation on the panel.

OLIVIER CREPIN-LEBLOND: Let's go to the younger generation. Nii Quaynor.

[Laughter]

NII QUAYNOR: Managing critical resources requires public interest.

OLIVIER CREPIN-LEBLOND: Thanks, Nii.

Marilia?

MARILIA MACIEL: Thank you, Olivier.

My final remark is just to thank Nora very much for organizing the session. I think it's very important.

I'm happy that we made an open mic session because I think that the ideas that were shared by you were the highlight of the session, and we learned very much. And it was a fruitful discussion that moved us forward, I feel.

OLIVIER CREPIN-LEBLOND: Thank you, Marilia.

Now back to Wolf?

WOLF LUDWIG: Sorry. I would retweet what Marilia said.

[Laughter]

OLIVIER CREPIN-LEBLOND: Thanks, Wolf.

And, Nora, I think you might be afforded more than a tweet.

NORA ABUSITTA: Excellent. Well, being the optimist that I am, I was hoping to leave this session with a clear direction of my next steps. But I kind of knew in the back of my mind that this is just the beginning of a conversation. I certainly don't want to fall into

the same trap of working on this without enough participation from you and from the community. So, please, give us some of your time so that we can develop this together.

Whether we end up with a definition or not, whether we change the way we refer to public interest, whether the outcome is not what we had expected in the beginning, at least we need to formally have the conversation. And the first place to start is that mailing list. Thank you all for participating.

OLIVIER CREPIN-LEBLOND: Thank you, Nora.

And just before we close off, I thought I'd mention a comment from Matthew Shears that's actually very topical since the CCWG accountability proposal includes changing the current core values in the bylaws to incorporate this reference to the global public interest.

And I'm going to have to take a deep breath before reading it. "Seeking and supporting broad informed participation and reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public

interest and that those processes are accountable and transparent."

So that's the -- that's what's proposed. And, of course, we've got a lot of work in front of us to be able to reach consensus on this topic.

So as I mentioned earlier, we have a mailing list. There is a Wiki page there. You've got all of that in a PowerPoint presentation linked to this session.

I'd like to thank all of our panelists who have come here today and, of course, to thank you for all of your very good insights. We're going to be reading the transcripts again, listening to the whole session and, of course, taking all of the comments in the chat as well. Thank you. And this session is now over. Thank you.

[END OF TRANSCRIPTION]