

**Midterm Report to the ATRT**  
Berkman Center for Internet & Society  
September 13, 2010

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**Berkman**

The Berkman Center for Internet & Society  
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## TABLE OF CONTENTS

1. Midterm Report.....	2
2. Berkman Feedback on Working Group Issues Reports	
2.1 Feedback on Working Group General Template .....	7
2.2 Feedback on Working Group #1 Issues Report.....	9
2.3 Feedback on Working Group #2 Issues Report.....	16
2.4 Note Regarding Working Group #3 Issues Report.....	21
2.5 Feedback on Working Group #4 Issues Report.....	22
3. Selection Criteria and Proposed Interviewees.....	27
4. Revised Staff Questionnaires.....	33
5. Draft GAC Questionnaire .....	48
6. Draft Case Study: The Introduction of New gTLDs.....	54
7. Transparency Memorandum.....	76

## **MIDTERM REPORT**

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Midterm Report, covering activities from August 5 to September 10, 2010

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### **1. Background and Purpose of Document**

On August 5, 2010 the Berkman Center for Internet & Society entered into a services agreement with the Internet Corporation for Assigned Names and Numbers (ICANN). In this agreement, individual faculty and team members of the Berkman Center ("Berkman team") agreed to provide to the Accountability and Transparency Review Team (ATRT) academic consulting services that focus on ICANN's commitments in the Affirmation of Commitments (AoC) and address, specifically, the provisions of paragraph 9.1 of the AoC.

The purpose of this memorandum is to provide the ATRT with a summary of the research activities that the Berkman team has engaged in since August 5, 2010, following the approaches and methodologies outlined in the services agreement. This memorandum builds upon and updates the progress report submitted to ATRT on August 26, 2010 for the Beijing meetings.

The August 30–31 meetings with the ATRT were highly beneficial to the Berkman team, and have impacted both the draft inputs put forth in this midterm report and our workplan going forward. In addition to other key materials, described in more detail below, the 'course correction' recommended by the ATRT resulted in the following memos: a list of initial interview targets along with selection criteria/rationale (formal interviews were initiated on September 10, 2010); revised staff and GAC questionnaires, which reflect detailed and specific questions related to the case studies (this feedback also informed our 'customized' questionnaires, which are developed with the specific experience and expertise of the interviewee in mind); the feedback memos for each of the issues briefs shared by Working Groups 1, 2, and 4; and a draft gTLD case study and transparency memo. Additional materials are described in Section 4 below.

The midterm report was originally scheduled for September 8, 2010, but the ATRT and the Berkman team agreed to postpone it until September 13, 2010 due to workflow considerations.

### **2. Overview of Activities**

Most of the activities undertaken since August 5, 2010 fall within Phases 1 and 2 of the Berkman Center's workplan as set forth in the services agreement's Exhibit B. More specifically, the Berkman team has initiated a multi-layered fact-finding process aimed at identifying key issues, challenges, and areas of disagreement related to recent decisions and actions by ICANN, with an

emphasis on issues related to participation, transparency, and accountability. For this purpose, and following the principles and methods defined in the services agreement, the Berkman team has engaged in the following activities:

- Rapid initial review of public submissions from January 2008 to June 17, 2010 in order to identify main areas of concern expressed by various stakeholders and to create a tentative issues map that informs the fact-finding process (e.g., the drafting of an interview questionnaire—see below).
- Initial review of selected academic articles and scholarly works, plus the creation of an initial annotated bibliography that informs, either directly or indirectly, the Berkman team’s work as it relates to the review process.

Related, but analytically distinct from these “horizontal” research activities, the Berkman team has started a specific, “vertical” fact-finding process regarding the three case studies identified in the services agreement. More specifically, the Center has engaged in the collection of a representative sample of materials (including, for example, ICANN publications, independent reports and reviews, public comments, etc.) that enable a bottom-up and problem-oriented analysis of 1) the introduction of new gTLDs, specifically, the Expression of Interest proposal, the Implementation Recommendation Team, the role of the Governmental Advisory Committee (GAC), and vertical integration; 2) the .xxx top level domain, specifically, the review process (Independent Review Panel) and interactions between the GAC and the Board; and 3) the DNS-CERT proposal.

Since the submission of the progress report on August 26, 2010 the Berkman team has launched Phase 2 of the workplan as defined in the services agreement’s Exhibit B. Specifically, the Center has revised the draft interview questionnaires for staff, related to the three case studies, in the light of the feedback received by ATRT in the context of the Beijing meeting (see also below). We have also designed a written questionnaire that is specifically geared towards GAC members. Using these questionnaires as the baseline for our inquiry, we are creating customized questionnaires—based on specific areas of expertise or experience—for non-staff members, which will guide our interviews and conversations. All questionnaires and interviews are designed to invite the sharing of information on some of the key issues identified in the services agreement, including corporate governance aspects, from selected experts, ICANN staff, Board members, community members, Supporting Organizations (SOs), Advisory Committees (ACs), and other key stakeholders. The Berkman team shared with ATRT the revised staff questionnaires, the GAC questionnaire, and our list of proposed interviewees, which also enumerates the criteria that informed the interviewee nomination process. The Berkman team began conducting interviews on September 10, 2010.

### **3. Inputs to and Feedback from ATRT’s Beijing Meeting**

After 21 days of initial research, the Berkman team shared on August 26, 2010 the following draft documents with the ATRT members for the purposes of (a) contributing to the discussion among the ATRT members at the Beijing meeting, which took place on August 30–31, 2010, as

well as the broader ICANN community and other external stakeholders; and (b) inviting feedback and comments from all interested parties:

- *Draft Interview Protocol and Staff Questionnaires:* As noted, the Berkman Center drafted an interview protocol and questionnaires for ICANN staff regarding each of the case studies referenced above. These interviews will help the Berkman team to understand the range of perspectives on each case, to deepen the factual understanding of the core issues and to strengthen the recommendations regarding the accountability and transparency of ICANN decision-making processes.
- *Draft Public Input Memo:* In order to start exploring cross-sectional issues and to test the proposed approach to fact-finding, data collection, and other relevant inputs, the Berkman team drafted a series of mini-cases focused on the ways in which public input processes were implemented in the context of specific policy decisions. This effort has also provided the Berkman team with initial examples through which to develop participation-related working hypotheses and an opportunity to solicit feedback and input from the ATRT.
- *Draft Working Hypotheses:* Based on the research activities summarized above, and in accordance with common research methodology, the Berkman team developed a series of working hypotheses that can be tested and revisited in the second and third phase of the research process. The working hypotheses submitted to the ATRT as part of the progress report were highly tentative in nature, have since evolved, and will further develop over time.
- *Preliminary Annotated Bibliography:* As a first outcome of the initial review of selected academic articles and scholarly works, the Berkman team drafted an annotated bibliography that informs the team's research. The draft is a work in progress and not meant to be seen as comprehensive.
- *Feedback on ATRT Survey to the Community.* In mid-August, the Review Team requested that the Berkman team review their proposed survey format for the ICANN community. After a review of the document, with inputs from Research Statistician colleagues, we provided detailed feedback and suggestions for improvements.

In two half-day-long conference calls on August 30 and 31, 2010, the ATRT provided important feedback on the draft documents prepared by the Berkman team. The feedback focused on scoping, methodological, and process issues in particular. The Berkman team has taken into account and incorporated, to the extent appropriate, the feedback it received from the ATRT members during the conference call and by way of a small number of follow-up emails.

More specifically, the Berkman team has:

- specified its scope of inquiry based on the priorities expressed by ATRT;
- revisited its (tentative) working hypotheses; and

- identified selected subject matter experts from outside the U.S., including non-English-speaking countries.

With regard to the interview process, the Berkman team has:

- refined the draft questionnaires to the staff (see above), finalized a questionnaire for distribution to the GAC, and ensured that interviewee-specific questionnaires will incorporate detailed and specific questions regarding the case studies;
- initiated the interview process, with three conversations related to the new gTLD case study conducted on September 10, 2010; and
- developed criteria for interviewee nominations and shared a list of proposed interviewees with the ATRT.

With regard to interacting with and supporting the working groups, the Berkman team has:

- reviewed and commented on the WG template developed by the ATRT (see also below regarding additional observations);
- reviewed and commented on the draft issues papers prepared by the ATRT's WGs (see below); and
- defined the interfaces between the Berkman team and the ATRT's working groups (WG) within the feedback on the received WG draft issues papers (WG #1, 2, and 4).

In addition, the Berkman team has:

- prepared a memorandum on transparency issues (see below); and
- prepared a draft case study on the introduction of new gTLDs (see below).

#### **4. Overview of Midterm Deliverables**

Building upon the previous research activities outlined above and the feedback received in the context of the Beijing meeting, the Berkman team, as part of its midterm report, is sharing the following draft documents with the ATRT members for discussion purposes:

- *Feedback on the ATRT's Working Group Template:* The Berkman team offers additional cross-sectional observations regarding the structure of the template that ATRT drafted and which guides the work of the working groups.
- *Feedback on Issues Reports by the ATRT's Working Groups:* After an initial review of the WG#1, WG#2, and WG#4 issues reports as available per September 6, 2010 (and with partial updates based on the revisions circulated on September 10–11, 2010), the Berkman team offers a set of comments and observations regarding scope, issues, methodologies, and areas of potential interest to the ATRT, which are intended to stimulate the discussion and collaboration between the ATRT and the Berkman team.
- *Draft List of Proposed Interviewees:* Updated list of proposed interviewees, including criteria based on which the interviewee has been proposed (see also above).

- *Revised Interview Protocol and Questionnaires for Staff and the GAC:* Updated and revised version(s) of the staff questionnaires as further described above.
- *Draft Case Study on the Introduction of New gTLDs:* This draft case study is a work in progress and provides a tentative summary of the *facts* regarding the introduction of new gTLDs, specifically, the Expression of Interest proposal, the Implementation Recommendation Team, the role of the Governmental Advisory Committee (GAC), and vertical integration. The statement of facts, together with the other case studies and additional materials currently under investigation, will contribute to the Berkman team's (normative) issues analysis as outlined in the services agreement's Exhibit B, section 2.
- *Draft Transparency Memorandum:* This draft memo addresses the Berkman team's mid-term state of work on transparency-related issues. It also serves as cross-sectional feedback on the relevant ATRT issues papers, prepared by the respective working groups. The memo also allows further specification of some of the transparency issues described in the Berkman team's Draft Working Hypotheses submitted in the context of the ATRT's Beijing meeting (see above).

## 5. Next Steps

As immediate next steps, the Berkman team will engage in the following activities:

- Discuss and incorporate feedback from the ATRT's review of midterm report
- Conclude Phase 2 of the workplan
- Review and comment on final draft papers by the ATRT's working groups
- Launch Phase 3 of the workplan
- Share draft case studies with the ATRT by September 30, 2010
- Submit draft final report to the ATRT by October 20, 2010

## FEEDBACK ON WG GENERAL TEMPLATE

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Feedback on the WG General Template

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### 1. Introduction

Because of the overall role and importance of the proposed WG template, the Berkman team wishes to share some general observations with the ATRT before proceeding with its specific feedback to the respective working groups (WG).

### 2. Observations and Suggestions

#### 2.1 Re: Factual Statement

The term “Factual Statement” may need some clarification: There are statements of “fact” (such as references to documents, including, for example, Bylaws, policies, reports, published descriptions and listings of ICANN’s actions, etc.). But there are also perceptions (for example, perspectives put forth by members of the public in the form of community feedback). Such perceptions are also facts – for example, a communications exchange: “A”, in her email to “B” on date “X,” said “Y”). As long as these communications are quoted with reference to their particular context, such references remain factual. When weighing such statements, however, the role and impact of the reviewer will become stronger, and in some cases may lead to confusion about their “factual” character. While such an observation touches upon rather philosophical questions, it nevertheless – in our view – points to a possible communication challenge with the WG’s output should the terminology be maintained in the templates. We would therefore suggest using “Observations” or “Background and Inputs” rather than “Factual Statement” as a heading for this section.

The section relevant section may then have subsections such as outlined, for example, in the WG#1 document:

- relevant Bylaws,
- relevant published policies,
- relevant published procedures (here the difference to “policies” may not always be clear, if, e.g., a policy describes a procedure; in WG#1’s issues brief, the WG seems to refer to the *documented outcome* of procedures rather than the procedures themselves),
- community feedback,
- ICANN's activities under way, and
- other input.



## 2.2 Re: Analysis and Review Questions

Looking at the ways in which the template is currently structured, the Berkman team would like to share the following thoughts:

- The analysis and review subsections are obviously closely connected. The ATRT may consider putting the core review questions first, followed by the analysis section. Such an alternative structure would align perfectly with common research methodology that marks in a first step the problem space and identifies the issues and only in a second step discusses/analyzes them. That being said, it is acknowledged that analysis is also involved in arriving at those core questions as well as in selecting the "Factual Statements" (or in the proposed alternative terminology "Observations" or "Background and Inputs"), which may suggest clarifying in the template to what "analysis" precisely refers.
- Section 5 of the template addresses the "appropriateness" question. It is not intuitively clear why the question of appropriateness comes up towards the end of the template, especially since a selection process is already at work in section 2 that at least considers appropriateness. Against this backdrop, the ATRT may consider including an analysis on what is appropriate in section 1 of the template. This focus would then explain which materials have been chosen for section 2.
- Section 3 could then filter problematic issues from the materials presented in section 2 and analyze these problems as follows:
  - With regard to the discrepancies: How relevant are they? How much do they affect accountability and transparency? Is ICANN already doing something about it? What remains to be done to amend the situation?
  - With regard to community observations and observations by other sources: Are they addressing issues relating to the normative setting in which ICANN operates or are they related to the ways in which ICANN operates within this setting or is it a problem of both? Are those valid observations? Are the suggestions offered to overcome these problems (if there are any) valid and most likely effective or, if there are none, what would the WG suggest in terms of normative changes or changes of practice or both?

### 3. Final Remarks

These suggestions to slightly adjust and/or clarify the WG template seeks to maintain the overall analytical framework outlined by the ATRT. The final report of the Berkman team is likely to follow a different structure because of the differences in approach and to provide an added value to the final outcome of the ATRT review.

## **FEEDBACK ON WG #1 ISSUES REPORT**

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Feedback to the WG #1 issues report (according to WG template)

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### **1. Introduction**

After an initial review of the WG#1 background documents, sent to the ATRT list on September 10, 2010, the Berkman team offers the following comments and observations to the ATRT, which are intended to stimulate the discussion and collaboration between the ATRT and the Berkman team.

The current documents generated by the ATRT provide background research divided on two areas:

- Area 1. Board composition and skill-set background
- Area 2. Transparency of the Board decision-making process

The summaries and reviews of various background materials and inputs compiled in these documents are very clear and comprehensive. As noted by the working group lead, the section on questions arising from the background research is forthcoming.

### **2. Review of Issues**

#### *2.1 General Observations and Reflections*

- The documents provide excellent summaries of formal goals set out in the AoC, the Bylaws, published policies, and the published procedures of ICANN, as well as a summary of the community feedback on the issues of ICANN governance that are the focus of WG#1.
- The responses listed as underway or under staff consideration reflect the idea that improvements in processes will solve the problem. WG#1 may address the issue as to what extent metrics, templates, etc. are helpful, but also where reliance on such externalized process fails to recognize that the tasks of reconciling disputing desires in a diverse constituency of Internet stakeholders will by necessity involve trading off incommensurable goods. Among other issues, WG#1 may discuss the ways in which a better articulated and elaborated list of "whys" in the decisions taken by ICANN can help enhance the quality of the decisions and their acceptance by the stakeholders, address the extent to which such a mechanism is constraining and, as some of the comments suggest, may be viewed as after-the-fact window dressing.

- In addition to issues related to improvement of process, the Berkman team recommends that WG#1 also explore other factors that may lead to better outcomes. As Area 1 of the review suggests in its definition, the skills, personalities, and backgrounds of the individuals involved can be as important to the performance of the whole as the process within which they operate. In this context, the volunteer nature of the Board should be reviewed. (This isn't to say the lack of compensation isn't the right policy, it is just to say that it should be thought about as a part of the suite of issues to consider).
- The review may also benefit from a clear understanding of the very real virtues of transparency and accountability, but also of the other factors important for governance that need to be accommodated in the design as well. Moreover, transparency and accountability are not synonymous. For instance, there is a tendency to conflate the goals of (i) better internal decision-making procedures and the rationalization of processes, (ii) the transparency that makes these processes known/accessible, and (iii) the accountability that provides a review of the continued participation of the people who have made the decisions. All are important, but WG#1 should be careful to keep these aspects separate, and to understand that they are not always in alignment.
- Finally, while acknowledging the importance of transparency, the availability of review and accountability as elements in improving both the substance of governance decisions and their acceptance by a diverse group of participants and stakeholders, WG#1 may also want to address the ways in which they sometimes come at the cost of rapidity of decision, insulation from selfish influence, and crispness of execution, and explore how some models for governance of institutions overseeing public goods, such as central banks, build insulation from short-term accountability into their structure as a virtue.

## *2.2 Specific Issues for Consideration*

Based on an extensive review of public comments regarding corporate governance issues and a review of relevant scholarly material, the Berkman team would like to share with WG#1 some of the ICANN-specific core issues that it has identified with regard to the question of *governance structures*:

- An analysis of the trade-offs that exist in any governance design between achieving such goals as representation, inclusiveness, openness to review, decision-making efficiency, and crispness of execution. A review of the current mission and procedures suggests that inherent contradictions of aspiration may contribute to difficulties in meeting them all, and that some kind of optimization with unequal success across the many domains may be the best that can be achieved.
- The degree to which different cultural and political experiences of the global constituencies create conflicting expectations about the nature and deliberative processes

On the question of *skills and background of Board members*, the issues that need investigation include:

- What background, skills, and experience are desirable for good governance of a common pool resource?
- What background, skills, and experience are desirable for representing constituency interests so as to provide good decisions and continuing acceptance in the constituency?
- What background and skills are desirable for capably overseeing the tasks that ICANN is called on to perform?
- What are the perceived failings of the current Board make-up against these ideals, and how would changes in selection, compensation, and other factors help improve the results?

On the questions of *transparency and accountability* of ICANN governance and decision-making, the issues that need investigation include:

- What are the perceived failings of the current systems of disclosure and review in ICANN's decision-making process?
- To what degree are the perceived failings the result of correctable mistakes of process? To what degree can they be traced to organizational history, culture, personality, or other factors independent of process?

### **3. Interface with the Berkman Team's Work**

The Berkman team views its role as helping the ATRT to understand better the background issues that underlie governance choices and to widen the scope of its consideration of solutions and structures. In this context, we will develop both a deeper understanding of the nature of the challenges and a wide list of other models that can provide instructive lessons of success and failure and possible templates for application to ICANN governance.

In addition to providing a better design result, the Berkman team hopes that a more developed understanding of the underlying issues and their effect on design will strengthen the ability of the ATRT to provide supporting arguments for their final recommendations. Acceptance of these recommendations will rely on proposals that are widely seen as based in principal and good design considerations by the various ICANN constituencies.

The Berkman team's general work on internal procedures will have direct relevance for the work of WG #1, including Area 1, Board composition and skill-set background.

Area 2, Transparency (of board decision-making processes), will also be touched on in this work (please see included Draft Transparency Memorandum as a starting point for this analysis).

The case studies by the Berkman team also contain specific descriptions of transparency processes undertaken by ICANN that may be useful to WG#1, including:

- First, the Berkman team's draft case study on the **Introduction of New gTLDs** (included with this midterm report), coupled with our mini-cases on the public participation processes surrounding the development of the DAG, the EOI, and the IRT (please see the Berkman team's Progress Report, submitted August 30, 2010) provide examples of how information has been made public during various aspects of the development of the new gTLD program. The examples include descriptions of when and how ICANN has publicly explained its decisions and published analyses of the possible impact of those decisions on members of the public and other constituencies. The mini-cases also cover in detail the public comment periods related to the gTLD program, including examples of when these periods may have deviated from the requirements in Article III, section 6 of ICANN's Bylaws.
- Second, in the Berkman team's draft case study on **.xxx Sponsored Top-Level Domain**, the issue of transparency arises in the context of our examination of the review process (Independent Review Panel) and the interaction between the GAC and the Board during ICANN's decision-making processes.
- Third, our draft case study on the **DNS-CERT Proposal**, which centers on ICANN's proposal for a DNS-CERT organization, touches on the issue of transparency in two areas: first, in the development of the proposal and in the process of presenting it to the public, and second, in the ongoing revisions to the substance of the proposal itself.

The interviews the Berkman team is conducting with ICANN staff, current and former Board members, and members of the wider ICANN community may provide additional insights into some of the issues focused on by WG#1 – in particular, how transparency, with respect to Board decisions, Board selection, and ICANN actions in general, is perceived.

#### **4. Methodological Issues**

At least two modes of analysis can be distinguished:

- **Bottom-up analysis:** The analysis – as the current documents suggest – may start with the creation of an inventory of corporate governance–related issues and problems identified by various stakeholders and/or the review team at large. The analysis then focuses on these issues, seeks to understand why these issues have emerged, and addresses them by identifying appropriate measures and mechanisms.

- Top-down analysis: The second approach requires stepping back and considering the underlying nature of ICANN’s goals, tasks, and constituencies, and understanding that worthy elements in each of these categories may in fact conflict. This methodology takes as its starting point the idea that structure exists to serve governance needs and group goals and should therefore be considered in its context.

The Berkman team suggests the combination of these two approaches by starting with an issues-driven bottom-up analysis, but also including a more reflective and in-context perspective when analyzing and discussing these issues.

## 5. Alternative Models and Examples

The Berkman team is exploring a variety of examples from other sectors which may offer alternative models for approaching Board composition, transparency measures, accountability, and governance skill-set needs. In this process, we will make comparisons to private entities, public entities, and hybrids, both under U.S. law and in the international context. In making comparisons, an assessment must be made of the correspondence of goals, tasks and constituencies of the comparison group with those of ICANN.

Examples we are currently exploring are listed below. Please note that this is a preliminary list and will change and evolve going forward. The breadth of initial suggestions represents the hybrid nature of ICANN, as quasi private, quasi public, with policymaking and execution responsibilities, which opens the door to all kinds of comparisons and alternatives. Also, some of the examples skew towards representation of constituency models, and some towards insulation from interference for the public good models. One or two are even of the “autocrat-in-the-middle” format (still informative for buy-in, transparency, and feedback). Models from a number of cultures and governance traditions were also selected, reflecting the diversity goals of ICANN and this review.

### **A. Private Coordinating Entities with Membership or “Public” Functions:**

#### 1. U.S.

Creative Commons: <http://creativecommons.org/about/people/board>

Fannie Mae/Freddie Mac:

<http://www.fanniemae.com/governance/index.jhtml?p=Corporate+Governance>

MasterCard: <http://investorrelations.mastercardintl.com/phoenix.zhtml?c=148835&p=irol-govdownloads>

[http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_August\\_31/ai\\_n14938973/](http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_31/ai_n14938973/)

Scouts, Girl and Boy:

[http://www.girlscouts.org/strategy/gap\\_team\\_organizational\\_structure.asp](http://www.girlscouts.org/strategy/gap_team_organizational_structure.asp)

<http://usscouts.org/usscouts/aboutbsa/bsacharter.asp>

U.S. Red Cross: <http://www.redcross.org/governance/>

## 2. International

Advertising Standards Canada:  
<http://www.adstandards.com/en/>

Aga Khan Development Network: <http://www.akdn.org/about.asp>

Anglican Communion: <http://www.anglicancommunion.org/>

Bar Council of India: <http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/>

Bar Standards Board (UK): <http://www.barstandardsboard.org.uk/about/>

International Red Cross/Red Crescent: <http://www.ifrc.org/who/governance/board.asp>

International Olympic Committee: <http://www.olympic.org/en/content/The-IOC/Governance/Introductionold/?Tab=0>

## **B. UN Entities, Regional Organizations, and other Treaty Based and Quasi-Governmental Organizations**

African Union: <http://www.africa-union.org/root/au/index/index.htm>;  
[http://en.wikipedia.org/wiki/African\\_Union](http://en.wikipedia.org/wiki/African_Union)  
[http://www.africa-union.org/root/au/OtherPages/Others/Useful\\_Links.htm](http://www.africa-union.org/root/au/OtherPages/Others/Useful_Links.htm)

International Monetary Fund: <http://www.imf.org/external/about/govern.htm>

World Bank: <http://www.bicusa.org/en/Institution.Structure.5.aspx>

World Intellectual Property Organization: [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html)

World Trade Organization: [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm)  
And see: [http://www.ycsg.yale.edu/focus/gta/wto\\_rise.pdf](http://www.ycsg.yale.edu/focus/gta/wto_rise.pdf)

## **C. Public Entities Insulated from Politics (More or Less)**

### 1. U.S.

Public Service Boards, Rate Commissions, etc. (e.g. Vermont Public Service Board  
<http://www.state.vt.us/psb/site/mission.stm>)

Federal Reserve Bank: <http://www.federalreserve.gov/aboutthefed/default.htm>

## 2. Non-U.S. Domestic

Bank of England: <http://www.bankofengland.co.uk/about/governance/index.htm>

Peoples Bank of China: <http://www.pbc.gov.cn/english/renhangjianjie/orgnazition.asp>



## FEEDBACK ON WG # 2 ISSUES REPORT

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Feedback to the WG # 2 issues report (according to WG template)

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### 1. Introduction

After an initial review of the WG#2 issues report, the Berkman team offers the following comments and observations to the ATRT, which are intended to stimulate the discussion and collaboration between ATRT and the Berkman team. The materials, plans and questions compiled by WG#2 are well-conceived and offer a solid framework for assessing the relevant issues.

### 2. Review of Issues and Questions Asked

#### *(a) Re: Statement of Purpose*

According to Section 9.1 of the Affirmation of Commitments (AoC), ICANN commits to:

assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;<sup>1</sup>

According to the draft framework, the goal of WG#2 is to evaluate whether ICANN is adequately fulfilling this commitment. However, as stated in the August 10, 2010 press statement, the objective of WG#2 is to itself fulfill this commitment by evaluating the “GAC role, including its interactions with the Board and community, the existence of shared and clearly understood expectations with respect to the GAC’s role in ICANN’s decision-making processes, the quality and actionability of GAC input, and ICANN’s responsiveness to that input.”<sup>2</sup> The Berkman team suggests that WG#2 clarify the scope of its review: is it reviewing ICANN’s assessment (via the Joint Working Group) of the GAC’s role and effectiveness while conducting an independent evaluation of the interaction between the GAC and the Board? Or is the review solely targeted on assessing ICANN’s own GAC-related evaluation and recommendations?

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<sup>1</sup> ICANN, “Affirmation of Commitments,” September 30, 2009, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

<sup>2</sup> ICANN, “Accountability and Transparency Review Team – Selection of Independent Expert and Update on ATRT Review,” August 10, 2010, <http://www.icann.org/en/announcements/announcement-10aug10-en.htm>.

Based on the questions for review at the end of the WG#2 framework, the former appears to be the case, but the statement of purpose should clarify the full scope of WG#2's review.

*(b) Re: Factual Statement*

The draft framework presented by WG#2 contains a factual statement of the GAC's role based on ICANN's Bylaws, a summary of GAC advice, an overview of the actions the Board has taken to assess the GAC's role and effectiveness, and a summary of public comments to the ATRT on the relationship between the GAC and the Board.

The factual statement focuses on the GAC's role as defined in ICANN's Bylaws. WG#2 may also want to consider the GAC's own operating principles (mentioned briefly in the draft framework but not discussed), which describe in more detail the situations in which the GAC believes it should provide advice to the Board. The Berkman team has also found the GAC Chairman's "Report for the information to the ITU Council's Working Group" (WSIS June 2009)<sup>3</sup> helpful for understanding the GAC's advice and role in various public policy issues, including ccTLDs, gTLDs, the UDRP, WHOIS, and IDNs. The document contains a summary of GAC advice to ICANN between 1999 and 2009, including notes on the GAC's relationship with ICANN, which WG#2 may find useful.

The Berkman team also proposes that WG#2 include additional details regarding the work of the Joint Working Group (JWG) in this section. What is the status and content of the JWG's draft report? In addition to the GAC Chair and the Board member selected by the Board Governance Committee, who participated in this group? Have aspects of the JWG's work been open to public comment? WG#2 has indicated places for further research in its framework (i.e., the number of times the JWG has met and the date by which it expects to finish its work); the Berkman team agrees that these questions should be answered.

*(c) Re: Questions for Review*

Given that WG#2 has defined its role as evaluating ICANN's assessment of the GAC and ICANN's own recommendations for improvement, the WG may want to consider adding several questions focused on the JWG between the GAC and the Board, such as:

- Do the activities of the JWG constitute an adequate assessment of the role and effectiveness of the GAC on the part of ICANN?
- Are the JWG's recommendations for improvement adequate?
- To what extent would the JWG's recommendations for improvement increase the effectiveness of ICANN's consideration of GAC input on the public policy aspects of the technical coordination of the DNS?

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<sup>3</sup> [http://gac.icann.org/system/files/GAC\\_to\\_ITU\\_WSIS\\_WG\\_2009\\_final.pdf](http://gac.icann.org/system/files/GAC_to_ITU_WSIS_WG_2009_final.pdf)

If the goals of WG#2 include evaluating the efficacy of GAC interactions with the Board, the WG may want to consider adding a question focused on the timeliness of GAC advice to the Board. Public commentary and the GAC's March 2009 Mexico City Communiqué indicate that the Board may not have given the GAC sufficient time to respond to the second version of the Draft Applicant Guidebook and the Expression of Interest proposal. This directly affects the effective consideration of GAC advice by the Board. The WG may want to consider adding a question similar to the following:

- Would effective consideration of the public policy aspects of ICANN issues be improved if the GAC were to work intersessionally in order to more quickly respond to public policy changes proposed by ICANN?

In addition, as noted in WG#2's brief, creating a taxonomy of the various types of GAC outputs (e.g. verbal communication, Communiqués, letters, formal advice, issues documents, etc.), through what mechanisms they are conveyed to the Board, and at what stage in the policy development process such inputs have been put forth across a select number of policy decisions, may help to clarify the distinction between GAC formal advice, as defined by the Bylaws, and other forms of GAC inputs to the Board. This process may also help identify areas for improvement around clarification, timeliness, etc.

The Berkman team also suggests replacing "GAC opinion(s)" with "GAC advice" in the questions in order to conform to the language of ICANN's Bylaws.

### **3. Interface with Berkman Center's Work**

As noted in the WG#2's issues brief, the Berkman team's case studies will help to summarize specific instances of GAC advice:

- First, our draft case study on the **Introduction of New gTLDs** examines how the GAC Principles Regarding new gTLDs and advice included in GAC Communiqués have been incorporated into the Draft Applicant Guidebook for the new gTLD program, particularly with respect to geographic names, the Expression of Interest proposal, ICANN's analysis of the economic impact of the gTLD expansion, and the morality and public order standard for governmental objections to proposed gTLD strings.
- Second, our draft case study on the **.xxx Sponsored Top-Level Domain** examines the interactions between the GAC and the ICANN Board. Specifically, the case study charts the communications between former GAC Chair Mohamed Sharil Tarmizi and the Board, the GAC's Wellington and Lisbon Communiqués, and the role of the GAC's advice in the ICANN Board's decision (on March 30, 2007) to end registry agreement negotiations with ICM. The case also looks at other avenues of government influence throughout this process.
- Finally, in the Berkman team's **DNS-CERT** draft case study, the role of the GAC in ICANN policy development processes is addressed via the responses of some members

of the GAC to the call for the formation of a DNS-CERT organization. It also looks more generally at the GAC's involvement in the process of developing and announcing the DNS-CERT proposal. Additionally, this case study considers the role of GAC advice in the ongoing development of the substance of the DNS-CERT proposal.

The Berkman team's questionnaire to the GAC (please see attached Interview Protocol and Questionnaire to GAC members) may provide additional insights into how the GAC defines public policy considerations on which it must be consulted, how it communicates both formal and informal advice and opinions to the Board, how it presents a diversity of GAC member viewpoints to the Board, under what circumstances it believes the Board has an obligation to respond to its communications, and how it assesses its interactions with the Board overall. The questionnaire may also support WG2's understanding of specific cases of GAC advice related to the introduction of new gTLDs, the .xxx sTLD, and the DNS-CERT proposal.

#### **4. Methodological Issues**

The draft WG#2 framework asks whether ICANN is "adequately" assessing the GAC's role and effectiveness. The Berkman team proposes that more clear standards be set for this evaluation. By what standards will the ATRT's efforts to assess the GAC's role be evaluated? What constitutes an "adequate" assessment? Similarly, what benchmarks will WG#2 use to determine whether ICANN is "adequately making recommendations for improvement?" The Berkman team also suggests that WG#2 more clearly define "effective consideration" of GAC advice by the Board.

As mentioned above, if WG#2 is indeed conducting an independent evaluation of the GAC's role and effectiveness, while also evaluating ICANN's assessment of the same, the Berkman team suggests that the points at which these two evaluations differ be made explicit. If at any point the WG#2 incorporates the results of ICANN's evaluation of the GAC into its independent assessment, this should also be made explicit.

The stated objectives of the Joint Working Group are to: review the GAC's role within ICANN; consider measures to enhance support of the GAC's works; and propose better ways for governments to be informed about ICANN and for enhanced opportunities for the GAC to meet with the ICANN Board and community. Due to the overlap with the stated goals of WG#2, it is important to analyze, review, and incorporate, where appropriate, the findings and recommendations of the JWG into the activities of WG#2. In addition, in order to fully understand the GAC's role in the policy development process, the Berkman team recommends that WG#2 also consider the relationship between the GAC and other ICANN bodies and community members in the context of its review. It might also examine how well, and through what means, the range of GAC inputs to the Board are clearly communicated to the community.

#### **5. Alternative Models and Examples**

The Berkman team is exploring a variety of examples from other public-private partnerships which may offer models for approaching how government actors can usefully and transparently

feed into decision-making processes. In this process, we will make comparisons to private entities, public entities, and hybrids, both under U.S. law and in the international context.

## **NOTE REGARDING WG # 3 ISSUES REPORT**

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Note regarding the Berkman Team's Feedback on the WG # 3 issues report

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### **1. Introduction**

After a productive discussion with WG#3 during the August 30–31 Beijing meeting—in which we focused on our working hypotheses regarding public participation and community engagement, our draft public participation memo, and mini-case studies regarding ICANN public comments processes in the context of four case examples—the Berkman Team has been following the WG#3 discussion on the ATRT list regarding their scope and focus.

In an exchange ending on September 4<sup>th</sup>, the working group members discussed the challenges related to defining and scoping its core tasks and outlined a variety of possible ways forward. A first proposal centered on dividing their process into three steps, including, possibly, 1) a review of existing public input and participation mechanisms, as described in the ICANN Bylaws, and how these factor in to the PDP and Board decisions; 2) a review of a sample of ICANN Board decisions over a given period and test their acceptance by the community; and, 3) a review of the role of various SOs and ACs in the policy development process.

We look forward to additional updates from WG#3 regarding its scope, approach, and key questions, at which point we will offer related comments and observations to the ATRT.

## FEEDBACK ON WG #4 ISSUES REPORT

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Feedback to the WG #4 issues report (according to WG template)

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### 1. Introduction

After an initial review of the WG#4 issues report dated September 10, 2010, the Berkman team offers the following comments and observations to the ATRT, which are intended to stimulate the discussion and collaboration between the ATRT and the Berkman team. The materials and questions offered by WG#4 are generally on target and provide a solid basis for their inquiries.

### 2. Review of Issues and Questions Asked

*(a) Re: Statement of Purpose*

Section 9.1 (a) of the Affirmation of Commitments (AoC) as is relevant to WG#4, states:

ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency ... by: continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance... [,]and the consideration of an appeal mechanism for Board decisions;"

The draft framework presented by WG#4 covers three existing mechanisms for reviewing board decisions (requests for reconsideration, the Ombudsman, and the Independent Review Process) and also takes into account two additional mechanisms that were proposed in the context of an earlier report. This proposed approach raises the question whether the mechanisms "request for reconsideration" and "Ombudsman" fall under "appeal mechanism" as referenced in Section 9.1 AoC. While a narrow interpretation may suggest that "an appeal mechanism" (in contrast to a *review* mechanism; see section title IV of the Bylaws: "Accountability and Review") only includes a quasi-hierarchical review (in this case: a review by the Independent Review Panel), it arguably makes sense for WG#4 to take into account all existing review mechanisms given their interplay.

However, it should be noted that the scope of WG#4, according to the August 10, 2010 press release,<sup>4</sup> seems to follow a different interpretation by defining the scope of review as "*Independent Review of Board Decisions*" (emphasis added), which is arguably a more narrow

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<sup>4</sup><http://www.icann.org/en/announcements/announcement-10aug10-en.htm>

framing than the current interpretation of the scope according to the draft framework (reconsideration as a mechanism, for example, is not an independent review mechanism).

Against this backdrop, the Berkman team suggests clarifying the scope of the review. One possible approach is to zoom in on appeals mechanisms in the narrower sense and, within this area of inquiry, to focus in particular on the Independent Review Process. Other mechanisms should be discussed by way of setting the context and in order to illustrate the interplay among the different instruments of review.

*(b) Re: Factual Statement*

With regard to the framing of the factual statement in general – (see “Feedback on General Template”) – and with respect to perception issues in particular, the Berkman team refers to its general comments outlined in the separate feedback document in response to the WG’s generic template.

The Berkman team re-emphasizes – in accordance with WG#4’s earlier information request filed with ICANN Staff and the Ombudsman – the need to include in this section detailed information regarding the use and outcomes of the reconsideration request procedures, as well as information on procedures before the Ombudsman. Such information should become part of ICANN’s active regular reporting duties, a recommendation that will likely be included in the Berkman team’s final report.

In addition, the Berkman team suggests including information on the selection, organization, and skills of the Board Governance Committee as well as, *mutatis mutandis*, respective information on the Office of Ombudsman.

Finally, it would be helpful to collect and make information available regarding the Independent Review Process in the .xxx case as far as, for example, allocated resources (e.g., ICANN staff time, costs of procedure, required know-how, etc.) are concerned. In case of legal concerns regarding such data, it might be possible to work with aggregated information or at least to provide ranges/estimates. Such information will allow the type of assessment WG#4 suggests under the header “review questions” (e.g., 4.2.2, “Do required resources, such as fees or expertise, prevent access to the mechanism?”).

*(c) Re: Analytical and review questions*

The analytical questions identified by WG#4 are on target. However, it might be advisable to differentiate for each type of mechanism – whether existing or proposed – between an evaluation of the ways in which the mechanism is being implemented (some of the issues might in fact be implementation issues) versus an evaluation of the mechanism in terms of how it contributes to accountability and transparency.



It would also be helpful to explain in greater detail the meaning and derivation of the evaluation criteria – accessibility, transparency, effectiveness, and interoperability – listed in the template. For instance, is interoperability different from the compatibility criterion mentioned in the context of the proposed mechanisms? That is, mutually exclusive mechanisms can be interoperable as a conceptual matter.

As to the role and scope of transparency analysis within the subject area of WG#4, we refer to the third observation in our methodological observations below (section 4).

Along the same lines, the Berkman team suggests a clarification of the relationship between the criteria listed in the template and an evaluation of how each of them affects the issues mentioned in Section 9.1(a) of the AoC quoted above.

The Berkman team also encourages WG#4 to address questions of interpretation of the Bylaws, for example, under the header “end-to-end transparency.” For example, what is the relationship and/or difference between the “materially affected by” requirement put forth in Article IV Section 2 (1) versus the “have been adversely affected by” criterion in Section 2 (2)?

Such an exercise might become part of a broader endeavor (either by the WG itself or as a task recommended by the WG) to restructure the presentation of review mechanisms in the Bylaws in a manner that clarifies the different purposes, conditions, and procedures of the review mechanisms in place. (At this stage, the Berkman team wants to flag to WG#4 that in the context of the work of WG#1, the transparency of procedures as well as a possible special procedure for cases where ICANN declines to release documents might interact with, or have an impact on, such an effort.)

The performance of at least two of the existing mechanisms – the request for reconsideration and the procedures before the Ombudsman – depends, in part, not only on the transparency, accessibility, interoperability, or binding/non-binding character of the respective processes and outcomes, but also on the selection, organization, and skills of the review entities (such as the Board Governance Committee and the Office of the Ombudsman).

### **3. Interface with the Berkman Team’s Work**

The Berkman team is focusing primarily on the Independent Review Process mechanism. In this context, at least two connection points exist between the Berkman team’s and the ATRT’s work streams.

- First, the Berkman team’s .xxx case study, which focuses on the Independent Review Process and the role of the GAC, may provide informational inputs for WG#4’s factual statement and serve as a basis for some of the review questions. The Berkman team’s questionnaire on the .xxx sponsored top-level domain may provide additional, fine-grained insights into some of the questions asked by WG#4, including review questions 4.1.1, 4.2.2, 4.2.3, 4.3.1, and 4.3.2 as far as the IRP mechanism is concerned.

- Second, the Berkman team’s final report is likely to include normative considerations regarding the Independent Review Panel mechanism, based on the facts collected in the .xxx case study; for example, regarding its scope and scrutiny, duration, and cost. Additionally, the Berkman team will consider the implications of an arbitration mechanism whose findings are considered non-binding on the ICANN Board versus an alternative regime.

#### **4. Methodological Issues**

Three methodological issues should be discussed:

- First, the evaluation of the existing mechanisms as proposed in the WG#4 template depends to large extent on the availability of certain data points (“facts”). In at least with regard to the (important) Independent Review Process mechanism, the factual basis for such an evaluation is thin, since it has only been utilized in one case. With regard to the other two mechanisms, the quantity and quality of information regarding their use is uncertain given the fact that such information hasn’t been made available yet, pending information requests by the ATRT. Thus, the Berkman team recommends revisiting the benchmarks put forth in the review section in order to “challenge” their reliability in the light of potentially limited data points.
- Second, as mentioned above, the Berkman team suggests clarifying the evaluation criteria and explaining how they interact with each other and feed into the benchmarks mentioned in Section 9.1(a) of the AoC. One suggestion in this context is to (a) derive the criteria – in the light of the purpose of the AoC – from the relevant Sections in the Bylaws, and to supplement these quasi self-set benchmarks by (b) “external” criteria used in legal scholarship on due/fair process.
- Third, the Berkman team suggests discussing the extent to which the criterion “transparency” as by WG#4, can be interpreted in a consistent manner across the ATRT and/or across working groups (e.g., see WG#1 terminology: active transparency = ICANN actively provides information; passive transparency = ICANN responds to information requests).
- Fourth (a minor issue of presentation rather than of methodology), the type of issues under discussion here are perhaps best presented in a matrix format, with the review mechanisms (either in place or proposed but not implemented) as columns, and the criteria of assessment as rows.

#### **5. Alternative Models and Examples**

The Berkman team is looking at online dispute resolution in general and some early frameworks of crowdsourced conflict management and resolution mechanisms that will aim at more inclusive community-oriented mechanisms. However, whether these approaches will be useful

alternatives for ICANN or merely add another layer of complexity that would prove to be too costly in terms of transparency, clarity, and usability is still a subject of internal discussions within the Berkman team.

## **SELECTION CRITERIA AND PROPOSED INTERVIEWEES**

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: DRAFT Interview Criteria and List of Interviewees

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### **1. Introduction: Objectives**

The Berkman team has drafted an interview protocol and questionnaires for each of the case studies. These interviews will help us to understand the range of perspectives on each case, to deepen our factual understanding of the core issues, and to strengthen recommendations regarding the accountability and transparency of ICANN decision-making processes.

A key goal is to create a 'smart sample' of interviewees who can provide a diverse set of perspectives on the case studies. This sample will be selected according to their ability to help us to fill in the gaps in our research, to provide input regarding areas where there are disputed facts or that require additional data collection, and to offer suggestions regarding other individuals who may have expert knowledge or insight into the case in question.

Given the short timeline for the study, we do not intend to conduct interviews with a comprehensive list of representatives of different roles, experiences, or viewpoints, or to achieve a precise balance among the various perspectives. Rather, we seek a diverse set of inputs that roughly maps against the spectrum of viewpoints and represents the major stakeholder groups, community, staff, and Board members, while including representatives of different regions of the world. We seek to elicit the thoughts and experiences of those who have been both supportive and critical of the actions and decision-making processes associated with the case studies. We will engage with those who can provide thoughts and opinions that are based upon direct experience with the case examples and provide facts and well-informed but diverse perspectives.

### **2. Draft General Selection Criteria**

For each case, we will aim to interview people from six different categories:

1. Board
2. Staff
3. Supporting Organizations (SOs) and Advisory Committees (ACs) (and, where relevant, working groups and other bodies/processes associated with those committees)
4. Members of the Governmental Advisory Committee
5. Additional community members
6. External experts: academics, outside observers, and former participants

With those broad categories in mind, we have developed a list of relevant 'niches' for each of the case studies based on the particular actors and bodies that played a key role in aspects of policy development and decision-making processes.

### **3. Broad-based Questionnaires: ICANN Staff and GAC Members**

For both the GAC and ICANN staff, the questionnaire and interview process will focus on ICANN's operations in several different topic areas: public participation, transparency, and accountability. These interviews will take place as a two-step process:

1. We will distribute a written questionnaire.
2. We will follow up with a phone conversation or an email after we've reviewed their answers. The purpose of this follow-up will be to clarify, where necessary, some of the written answers and to dig deeper into written responses that seem particularly valuable to us. We also hope to be able to identify future interviewees.

In the case of the GAC, we will take a broad-based approach by distributing a written questionnaire and aiming to follow up directly, where possible, with particular members who may have had more substantial involvement in the cases.

In the case of the staff, we will share questionnaires with select staff members who have played a particular role in an aspect of the case study in question. We will also engage with certain staff members regarding information and fact-finding related to our 'horizontal' topic areas (e.g., public participation).

We recognize in advance that for various reasons ICANN staff may be constrained in their ability to answer all of the questions that we ask of them. Additionally, we recognize that the ATRT has requested that we restrict the scope of our case analyses to events that occurred before June 17<sup>th</sup>, 2010. Finally, we recognize that the .xxx case study involves a number of legal sensitivities; interviews relating to this case study are being formulated specifically with these caveats in mind, while still aiming to gather a wide range of facts regarding the review process (Independent Review Panel) and the interaction between the GAC and the Board.

### **5. Niches for Each of the Case Studies**

The section below outlines different interview 'niches' for each of the case studies, based on the broad criteria outlined above. These niches represent different functional roles in the decision-making and input processes and different perspectives.

For the new gTLD, DNS-CERT, and .xxx cases, we have identified:

- different stakeholder groups/viewpoints of particular relevance to each case (e.g. commercial, non-commercial, IP groups, security experts, etc.), and
- different key policy-making, process and participation nodes within ICANN (e.g. GNSO, etc.)

Where possible, we have identified one or two people who we think would be able to respond for each of the niches.

## New gTLD process

Note: where a prospective interviewee may be able to speak to a particular sub-issue within the new gTLD case (the EOI proposal, the IRT, the MAPO standard, the role of the GAC, vertical integration, economic aspects of new gTLDs, background check requirements, etc.), we have indicated this below.

- 1) Board
- 2) Staff
  - Someone who can speak to aspects of the policy development process within the GNSO
    - Liz Gasster – ICANN Senior Policy Counselor, supports GNSO
      - familiar with the policy development process within ICANN and specifically within the GNSO
  - Someone who can speak to the development of the DAG
    - Kurt Pritz – ICANN Senior Vice President, Services // Karen Lentz – Manager, Business Research & Content
      - responsible for developing the Draft Applicant Guidebook
- 3) Supporting Organizations (SOs ) and Advisory Committees (ACs) (and, where relevant, working groups and other bodies/processes associated with those committees)
  - Someone representing the GNSO
    - Avri Doria – former GNSO Chair [**Interview 1, 9-10**]
      - sub-issues: IRT, MAPO
  - Someone representing business interests
    - Zahid Jamil – represents the GNSO’s Commercial and Business Users constituency on the GNSO council [**Interview 1, 9-13**]
      - sub-issue: economic aspects
  - Someone representing non-commercial interests
    - Avri Doria – see above
    - Milton Mueller – former chair of NCUC
  - Someone representing IP interests/the IRT
    - Kristina Rosette (IRT member; Special Counsel, Intellectual Property Constituency member) [**Interview 1, 9-10**]
      - sub-issue: IRT
    - Steve Metalitz (ex officio IRT member, former president of the Intellectual Property Constituency) [**Interview 1, 9-10**]
      - sub-issue: IRT
- 4) Members of the Governmental Advisory Committee
  - Someone who can speak to the MAPO standard
    - Bertrand de La Chapelle – France
    - Mark Carvell – UK
    - Frank March – New Zealand
    - Suzanne Sene – US
  - Someone who can speak to the geographic names issue

- Annabeth Lange – former Norwegian GAC representative; current Norwegian ccTLD representative
  - Ornulf Storm – Norway
  - William Dee – European Commission
  - Thomas Schneider – Switzerland
- 5) Additional community members
- Prospective applicant/TLD consulting side:
    - Antony von Couvering – CEO of TLD consulting services Minds + Machines
      - sub-issues: EOI, economic aspects
    - Eric Brunner-Williams – CTO of the Core Internet Council of Registrars, involved in native/cultural and linguistic TLD consulting
      - sub-issue: geographic and cultural names, vertical integration
    - A geographic name applicant, preferably from a country other than the United States
  - Someone representing the registries/registrars
    - Jon Nevett – VP of Policy at Network Solutions
      - sub-issue: vertical integration
- 6) External experts: academics, outside observers and former participants

## **DNS-Cert**

- 1) Board
  - Someone to offer insight into the Board’s decision-making processes regarding DNS-CERT
    - Suzanne Woolf— Security and Stability AC and Root Server AC Board liaison
- 2) Staff
  - Someone to discuss ICANN’s announcement of its DNS-CERT proposal
    - Rod Beckstrom—current ICANN CEO
  - Someone to discuss the thinking behind the DNS-CERT business case and the proposed strategic initiatives for DNS security, stability, and resilience
    - Greg Rattray —current Chief Internet Security Advisor at ICANN
- 3) Supporting Organizations (SOs) and Advisory Committees (ACs) (and, where relevant, working groups and other bodies/processes associated with those committees)
  - Someone to discuss the role of SOs and ACs, in particular, the GAC
    - Janis Karklins—former GAC Chair and liaison to the ICANN Board
    - Steve Crocker—Security and Stability AC
- 4) Members of the Governmental Advisory Committee
  - Someone to provide information regarding the extent to which governmental stakeholder concerns have been addressed in (1) the process of formulating and announcing the DNS-CERT proposal and (2) the substance of the DNS-CERT proposal
    - Peter Nettlefold—the Australian Government’s Department of Broadband: could be a source for evaluating the DNS-CERT proposal, particularly the

balance of roles/responsibilities between ICANN, governments, and other stakeholders

- 5) Additional community members
  - Someone to speak to the interests of the range of DNS security stakeholders as they pertain to the DNS-CERT proposal:
    - Paul Vixie—founder of DNS-OARC and DNS security expert; he’s called for the creation of a DNS-CERT organization
    - Peter van Roste—General Manager of the Council of European Top-Level Domain Name Registries; posted a public report in response to the DNS-CERT proposal
    - Sabine Dolderer—DeNIC (.de); could provide input from the ccTLD security perspective
    - Rodney Joffe—Neustar
    - Kathy Kleiman—founder of the Noncommercial Users Constituency
    - Ken Silva—SVP and CTO at VeriSign
  - ccTLD representatives
    - Lesley Cowley – Nominet
    - Roelof Meijer – SIDN
    - Keith Davison – Internet NZ
- 6) External experts - academics, outside observers and former participants
  - Someone to offer an expert non-ICANN perspective on the substance of the DNS-CERT proposal
    - Dan Kaminsky—leading DNS security expert

### **.xxx Case**

- 1) Board/former Board
  - Someone to offer diverse perspectives on the IRP process and its effectiveness as an accountability mechanism
    - Vint Cerf—former Board member, testified on behalf of ICANN in the IRP
    - Alejandro Pisanty—former Board member, testified on behalf of ICANN in the IRP
    - Susan Crawford—former Board member; dissented on ICANN’s decision to reject ICM’s application; blogged regarding her perspective on the process
- 2) Staff
  - Someone to discuss (1) the GAC’s role and (2) the IRP
    - Rod Beckstrom—current ICANN CEO
    - John Jeffrey—current ICANN General Counsel
    - Paul Twomey—ICANN President and CEO during the case (2003-2009)
- 3) Supporting Organizations (SOs) and Advisory Committees (ACs) (and, where relevant, working groups and other bodies/processes associated with those committees)
- 4) Members of the Governmental Advisory Committee



- Someone to contribute information relevant to our analysis of the interactions between the Board, the GAC, and other governmental actors:
    - Heather Dryden—current head of the GAC; will likely be able to suggest specific GAC representatives (perhaps from the UK, the Netherlands, Sweden or France)
    - Mohamed Sharil Tarmizi: GAC chair during the case
- 5) Additional community members/actors
- Someone to offer third-party commentary on the IRP [**We have been in active discussions with ICANN staff regarding recommendations for community members who can provide an insider, yet third party perspective on the case. We've also solicited feedback and input from the ATRT.**]
- 6) External experts - academics, outside observers and former participants
- Someone to contribute information relevant to our analysis of the IRP. Diverse perspectives could include a sampling of the following: [**In calls with the ICANN Staff members on 8-26 and 9-10, the Berkman team invited suggestions regarding additional interviewees, especially with regard to this category, in order to ensure that we include a diversity of perspectives and inputs into our research. They have agreed to offer such nominations to us. As with the whole of this document, the names below represent a preliminary list of potential interviewees; additional suggestions are most welcome**].
    - Becky Burr— legal counsel to ICM during the sTLD application process; also a former advisor to the NTIA and the FTC; testified on behalf of ICM in the IRP
    - Jack Goldsmith—testified on behalf of ICM in the IRP
    - David Caron—UC Berkeley law professor and arbitrator; testified on behalf of ICANN in the IRP
    - Milton Mueller—professor at the Syracuse University School of Information Studies; testified on behalf of ICM in the IRP
    - Elizabeth Williams—consultant to ICANN during its solicitations for TLD proposals; testified on behalf of ICM during the IRP
    - Kieran McCarthy—has kept a close watch on .xxx and has expertise in domain name controversy issues
  - Someone to contribute information relevant to our analysis of the interactions between the Board, the GAC, and other governmental actors:
    - Michael Gallagher—former head of the NTIA (currently sits on the Board of GoDaddy)—could provide perspective on the relationships between ICANN, the GAC, and governmental actors

# INTERVIEW QUESTIONNAIRE FOR ICANN STAFF

## New gTLD Program

Name: _____	Title: _____
Group/ Department: _____	Phone: _____
Years of Service: _____	Date: _____

### 1. BACKGROUND AND PURPOSE

As you know, Harvard’s Berkman Center for Internet & Society has agreed to assist ICANN’s Accountability and Transparency Review Process by conducting an independent, exploratory study analyzing ICANN’s decision-making processes and communications with stakeholders pursuant to the Affirmation of Commitments (AoC). The study will develop a framework and recommendations for understanding and improving ICANN’s accountability and transparency.

As part of this process, the Berkman Center team is analyzing case examples that were suggested to the ATRT by the ICANN community during its interactions with the community at the ICANN meeting in Brussels, Belgium. Those case studies include the introduction of new gTLDs, the .xxx top level domain, and the DNS-CERT proposal. The Berkman Center team is collecting data, conducting research, and initiating interviews regarding these case studies to provide the ATRT with analysis and recommendations to improve accountability and transparency under the AoC. The interviews will help us understand the range of perspectives on each case, deepen our factual understanding of the core issues and strengthen our recommendations regarding the accountability and transparency of ICANN decision-making processes.

The ATRT has requested that we restrict the scope of our case studies to events that occurred before June 17th, 2010. However, we recognize that your responses may include reference to events or facts that have occurred after that date in order to reflect evolving developments. Such references will help us to deepen our understanding of the issue in question, but will not be included in the final published version of the case studies. Therefore, please mark in bold or italics any facts or responses that may, in whole or in part, refer to developments that have occurred after the June 17th cut-off date.

### 2. CONFIDENTIALITY

We assure you that all your written and other comments will remain confidential. The collected comments, experience and suggestions from all of the interviewees will be anonymized and reviewed by the Berkman Center’s team.

While our final report will contain a list with the names of the individuals we have interviewed,

it will not link specific comments to the respective names of individuals.

### 3. INTERVIEW INSTRUCTIONS

Today, we would like to interview you regarding the **introduction of new gTLDs** (in short: the “new gTLDs program”). The information you provide in this interview is part of the fact-finding process. Together with the responses of other interviewees, your responses will help us to gain a deeper understanding of perceptions of accountability, transparency, and participation in the context of this case example; we hope it may also shed light on possible areas for improvement and “lessons learned.” Our interest is to learn from your experience. There are no right or wrong or desirable or undesirable answers. We would like you to feel comfortable with saying what you really think and how you really feel.

We have designed the interview – which will focus on ICANN’s operations in several different topic areas: public participation, transparency and accountability – as a two-step process:

1. First, we would like to ask you to respond in writing to the questionnaire below. We expect that this portion of the process will take about 60 minutes of your time. Given the aggressive timeline of the review process, we would appreciate if you could return the form within \_\_ days upon receipt in PDF format to [ugasser@cyber.law.harvard.edu](mailto:ugasser@cyber.law.harvard.edu).
2. Second, we would like to follow up with you either in a phone conversation or through a follow up email after we’ve reviewed your answers. The purpose of this follow up will be to clarify, where necessary, some of the written answers and/or to “dig deeper” where your written responses seem particularly valuable to us. Regarding phone calls, we will not tape our conversation, but a research assistant will take notes from the call. These notes will only be shared with the Berkman Center’s team.

### 4. AGREEMENT

The nature and purpose of this project have been sufficiently explained to me and I agree to participate. I understand that I’m free to withdraw at any time.

Name (print): \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

## 5. QUESTIONS

### ***(A) Interviewee Background***

1. How long have you been involved with ICANN? In what capacity? What is your area of expertise/responsibility?
2. Please describe the capacity/manner in which you have been directly involved with the new gTLD program. How closely have you been following the issues with the introduction of new gTLDs? During what time period?

### ***(B) Public Participation***

3. To begin, we would like to learn more about the ways in which inputs from the public have played a role in the introduction of new gTLD program (including the development of the DAG, the EOI, IRT, trademark decisions). More specifically:
  - From your perspective, what were the biggest challenges in analyzing and assessing the public comments?
  - How useful do you find the public comments process in general? Are there certain types or categories of comments that you find particularly helpful?
  - In what ways do you think public input played a meaningful role in the decision-making process? At what level? How responsive has ICANN been to public comments surrounding the introduction of new gTLDs? Has ICANN responded appropriately?
  - How are individual public comments weighted against each other during the development of new versions of the Draft Applicant Guidebook? Are there particular comments or commentators whom you thought were given too much or too little weight?
  - How are public comments as a whole weighted against the views of various ACs and SOs?
  - Based on your experiences with the new gTLD program, how could the processes and instruments of public participation offered by ICANN be improved?
4. Let's focus on the role of the Supporting Organizations (SOs) and Advisory Committees (ACs) in the context of the new gTLD program.
  - How would you describe the roles of the GAC, the GNSO Council, the ALAC, and other stakeholders in the decision-making process? What have been their interactions with the Board?

- In your view, were the inputs of these stakeholders adequately considered during the process? Do you have specific examples in mind?
- How are the views of different SOs and ACs weighted against each other in the development of the DAG? Do some groups have opportunity for greater access or influence? If so, how? Why? In your opinion, have any groups been given too much weight? Too little?
- Did governmental actors provide input or recommendations via avenues other than the GAC? If so, what was the substance of their input, and how was it communicated?
- Against the backdrop of the new gTLD program, do you think the information flow between GAC and the ICANN staff and Board could be improved? If so, how, at what level and by what means?

### ***(C) Transparency***

5. ICANN has a commitment to transparency. Looking at the new gTLD program, we would like to learn more about your views on how transparency is ensured – and, eventually, how it could be further improved.
  - What have been the main processes and instruments used by ICANN in the context of the new gTLD program to ensure transparency?
  - In your opinion, how successful was ICANN in creating transparency in this particular case? Can you give us some specific examples in support of your assessment?
  - Do you think transparency in the development of the new gTLD program could be improved? If so, how, at what level and by what means?

### ***(D) Accountability***

6. ICANN is an organization that seeks to be accountable to the Internet community. Against this backdrop, we would like to learn more about your observations regarding accountability in the context of the new gTLD program.
  - In your interpretation, what does “accountability” mean in the context of the new gTLD program? What criteria would you use to “measure” it?
  - Using these criteria, how accountable do you think ICANN has been throughout the process of the new gTLD program?
  - In general, do you believe ICANN can meaningfully commit to timelines or final decisions? What are the key barriers to implementation?

- How do ICANN bodies define consensus? Is this definition appropriate? Consistent? Can ICANN processes reach consensus?
- Were the four new gTLD “overarching issues” given proper consideration?
- Is the selection of outside panelists or experts an appropriate way to resolve disputes over string confusion, morality and public order objections, geographical names, community support, and contention between applicants? What are the costs? What are the benefits? Do you have a sense of how external findings factor into decision-making processes?
- Who is accountable for the decisions of these panels? Are there relevant appeal mechanisms and clear rules regarding the finality of decisions?

***(E) Case Specifics***

7. As part of the gTLD case study, the Berkman Team has been asked to examine several specific issues. Among these:
  - Do you believe the staff was allotted enough time to consider public input on the EOI proposal – from both the public comment forum and from ICANN bodies – before submitting the proposal to the Board in December 2009?
  - The domain name industry and the ALAC criticized the IRT for containing only trademark industry representatives and excluding consumers, Internet users and domain name registrants. In light of this, how did ICANN mediate between the concerns of consumers and those of intellectual property holders with respect to trademark protection in new gTLDs?

***(F) In Conclusion***

8. Looking at the new gTLD program, what improvements would you suggest to strengthen ICANN’s public participation mechanisms, transparency, and/or accountability?
9. Is there anyone you recommend we interview regarding these case studies or ICANN’s public participation mechanisms, transparency and/or accountability in general?

Thank you very much for your time and consideration.

# INTERVIEW QUESTIONNAIRE FOR ICANN STAFF

## .xxx Top level Domain

<b>Name:</b> _____	<b>Title:</b> _____
<b>Group/ Department:</b> _____	<b>Phone:</b> _____
<b>Years of Service:</b> _____	<b>Date:</b> _____

### 1. BACKGROUND AND PURPOSE

As you know, Harvard's Berkman Center for Internet & Society has agreed to assist ICANN's Accountability and Transparency Review Process by conducting an independent, exploratory study analyzing ICANN's decision-making processes and communications with stakeholders pursuant to the Affirmation of Commitments (AoC). The study will develop a framework and recommendations for understanding and improving ICANN's accountability and transparency.

As part of this process, the Berkman Center team is analyzing case examples that were suggested to the ATRT by the ICANN community during its interactions with the community at the ICANN meeting in Brussels, Belgium. Those case studies include the introduction of new gTLDs, the .xxx top level domain, and the DNS-CERT proposal. The Berkman Center team is collecting data, conducting research, and initiating interviews regarding these case studies to provide the ATRT with analysis and recommendations to improve accountability and transparency under the AoC. The interviews will help us understand the range of perspectives on each case, deepen our factual understanding of the core issues and strengthen our recommendations regarding the accountability and transparency of ICANN decision-making processes.

The ATRT has requested that we restrict the scope of our case studies to events that occurred before June 17th, 2010. However, we recognize that your responses may include reference to events or facts that have occurred after that date in order to reflect evolving developments. Such references will help us to deepen our understanding of the issue in question, but will not be included in the final published version of the case studies. Therefore, please mark in bold or italics any facts or responses that may, in whole or in part, refer to developments that have occurred after the June 17th cut-off date.

### 2. CONFIDENTIALITY

We assure you that all your written and other comments will remain confidential. The collected comments, experience and suggestions from all of the interviewees will be anonymized and reviewed by the Berkman Center's team.

While our final report will contain a list with the names of the individuals we have interviewed, it will not link specific comments to the respective names of individuals.

### 3. INTERVIEW INSTRUCTIONS

Today, we would like to interview you regarding the **xxx. Top Level Domain**. We are focusing on the role of the GAC and the IRP, with no intention of addressing litigation-relevant matters. The information you provide in this interview is part of the fact-finding process. Together with the responses of other interviewees, your responses will help us to gain a deeper understanding of perceptions of accountability, transparency, and participation in the context of this case example; we hope it may also shed light on possible areas for improvement and “lessons learned.” Our interest is to learn from your experience. There are no right or wrong or desirable or undesirable answers. We would like you to feel comfortable with saying what you really think and how you really feel.

We have designed the interview – which will focus on ICANN’s operations in several different topic areas: public participation, transparency and accountability – as a two-step process:

1. First, we would like to ask you to respond in writing to the questionnaire below. We expect that this portion of the process will take about 60 minutes of your time. Given the aggressive timeline of the review process, we would appreciate if you could return the form within \_\_\_ days upon receipt in PDF format to [ugasser@cyber.law.harvard.edu](mailto:ugasser@cyber.law.harvard.edu).
2. Second, we would like to follow up with you either in a phone conversation or through a follow up email after we’ve reviewed your answers. The purpose of this follow up will be to clarify, where necessary, some of the written answers and/or to “dig deeper” where your written responses seem particularly valuable to us. Regarding phone calls, we will not tape our conversation, but a research assistant will take notes from the call. These notes will only be shared with the Berkman Center’s team.

### 4. AGREEMENT

The nature and purpose of this project have been sufficiently explained to me and I agree to participate. I understand that I’m free to withdraw at any time.

Name (print): \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_



## 5. QUESTIONS

### **(A) Interviewee Background**

1. How long have you been involved with ICANN? In what capacity? What is your area of expertise/responsibility?
2. Please describe the capacity/manner in which you have been directly involved with the .xxx case. How closely have you been following the issues with .xxx case? During what time period?

### **(B) Public Participation**

3. To begin, we would like to learn more about the ways in which inputs from the public have played a role in the .xxx top-level domain process. More specifically:
  - From your perspective, what were the biggest challenges in analyzing and assessing the public comments?
  - Based on your experiences with the .xxx top level domain, how could the processes and instruments of public participation offered by ICANN be improved?
  - Did you notice significant changes in the volume or substance of public input across ICANN's various comment periods on issues relating to ICM's .xxx proposal?
4. Let's focus on the role of the GAC in the context of the .xxx top level domain.
  - How would you describe the role of the GAC in the context of the .xxx top level domain process?
  - Through what channels or mechanisms has the GAC provided input on this case?
  - On what specific .xxx issues has the GAC provided input to the Board?
  - Against the backdrop of the .xxx top level domain process, do you think the information flow between GAC and the ICANN staff and board could be improved? If so, how, at what level and by what means?
  - Did governmental actors provide input or recommendations via avenues other than the GAC? If so, what was the substance of their input, and how was it communicated?
5. Let's focus on the role of Supporting Organizations (SOs) and Advisory Committees (ACs) the ALAC in the context of the .xxx top level domain.

- How would you describe the role of these bodies in the context of the .xxx top level domain process?
- Through what channels or mechanisms has each body provided input on this case?
- On what specific .xxx issues has each body provided input to the Board?
- Against the backdrop of the .xxx top level domain process, do you think the information flow between these bodies and the ICANN staff and board could be improved? If so, how, at what level and by what means?

***(C) Transparency***

6. ICANN has a commitment to transparency. Looking at the .xxx top level domain process, we would like to learn more about your views on how transparency is ensured – and, eventually, how it could be further improved.
- What have been the main processes and instruments used by ICANN in the context of the .xxx top level domain to ensure transparency?
  - In your opinion, how successful was ICANN in creating transparency in this particular case? Can you give us some specific examples in support of your assessment?
  - Do you think transparency in the .xxx top level domain process could have been improved? If so, how, at what level and by what means?

***(D) Accountability***

7. ICANN is an organization that seeks to be accountable to the Internet community. Against this backdrop, we would like to learn more about your observations regarding accountability in the .xxx top level domain process.
- In your interpretation, what does “accountability” mean in the context of the .xxx top level domain process? What criteria would you use to “measure” it?
  - Using these criteria, how accountable has ICANN been throughout the process of evaluating ICM’s application?
  - Without commenting on the specifics of the case, what are or could be mechanisms that allow the Board to reevaluate or revisit its decisions?

8. One mechanism aimed at ensuring accountability in ICANN's decision-making process is the Independent Review Panel (IRP). We would like to get your views on the IRP, both in general terms and in the specific context of the .xxx top level domain process.
  - How well, in your opinion, has the IRP worked as an instrument to ensure accountability in the .xxx top level domain process?
  - Do you think the IRP as interpreted by the arbitrators has provided the right level of scrutiny? Why? If not, how would you define the right level of scrutiny and implement it procedurally?
  - In your view, why has there been only one IRP arbitration?
  - Based on your experience with the IRP in the .xxx top level domain process (e.g., regarding its scope, duration, and/or cost), what do you think about its promise and limitation as an accountability tool more generally?
  - In your view, what are the consequences of the IRP's ruling in the .xxx case for the future of the IRP and its effectiveness as an accountability mechanism?

***(E) In Conclusion***

9. Looking at the .xxx top level domain case, what improvements would you suggest to strengthen ICANN's public participation mechanisms, transparency, and/or accountability?
10. Is there anyone you recommend we interview regarding these case studies or ICANN's public participation mechanisms, transparency and/or accountability in general?

Thank you very much for your time and consideration.

# INTERVIEW QUESTIONNAIRE FOR ICANN STAFF DNS-CERT

<b>Name:</b> _____	<b>Title:</b> _____
<b>Group/ Department:</b> _____	<b>Phone:</b> _____
<b>Years of Service:</b> _____	<b>Date:</b> _____

## 1. BACKGROUND AND PURPOSE

As you know, Harvard's Berkman Center for Internet & Society has agreed to assist ICANN's Accountability and Transparency Review Process by conducting an independent, exploratory study analyzing ICANN's decision-making processes and communications with stakeholders pursuant to the Affirmation of Commitments (AoC). The study will develop a framework and recommendations for understanding and improving ICANN's accountability and transparency.

As part of this process, the Berkman Center team is analyzing case examples that were suggested to the ATRT by the ICANN community during its interactions with the community at the ICANN meeting in Brussels, Belgium. Those case studies include the introduction of new gTLDs, the .xxx top level domain, and the DNS-CERT proposal. The Berkman Center team is collecting data, conducting research, and initiating interviews regarding these case studies to provide the ATRT with analysis and recommendations to improve accountability and transparency under the AoC. The interviews will help us understand the range of perspectives on each case, deepen our factual understanding of the core issues and strengthen our recommendations regarding the accountability and transparency of ICANN decision-making processes.

The ATRT has requested that we restrict the scope of our case studies to events that occurred before June 17th, 2010. However, we recognize that your responses may include reference to events or facts that have occurred after that date in order to reflect evolving developments. Such references will help us to deepen our understanding of the issue in question, but will not be included in the final published version of the case studies. Therefore, please mark in bold or italics any facts or responses that may, in whole or in part, refer to developments that have occurred after the June 17th cut-off date.

## 2. CONFIDENTIALITY

We assure you that all your written and other comments will remain confidential. The collected comments, experience and suggestions from all of the interviewees will be anonymized and reviewed by the Berkman Center's team.

While our final report will contain a list with the names of the individuals we have interviewed, it will not link specific comments to the respective names of individuals.

### 3. INTERVIEW INSTRUCTIONS

Today, we would like to interview you regarding the **DNS-CERT proposal**. The information you provide in this interview is part of the fact-finding process. Together with the responses of other interviewees, your responses will help us to gain a deeper understanding of perceptions of accountability, transparency, and participation in the context of this case example; we hope it may also shed light on possible areas for improvement and “lessons learned.” Our interest is to learn from your experience. There are no right or wrong or desirable or undesirable answers. We would like you to feel comfortable with saying what you really think and how you really feel.

We have designed the interview – which will focus on ICANN’s operations in several different topic areas: public participation, transparency and accountability – as a two-step process:

1. First, we would like to ask you to respond in writing to the questionnaire below. We expect that this portion of the process will take about 60 minutes of your time. Given the aggressive timeline of the review process, we would appreciate if you could return the form within \_\_ days upon receipt in PDF format to [ugasser@cyber.law.harvard.edu](mailto:ugasser@cyber.law.harvard.edu).
2. Second, we would like to follow up with you either in a phone conversation or through a follow up email after we’ve reviewed your answers. The purpose of this follow up will be to clarify, where necessary, some of the written answers and/or to “dig deeper” where your written responses seem particularly valuable to us. Regarding phone calls, we will not tape our conversation, but a research assistant will take notes from the call. These notes will only be shared with the Berkman Center’s team.

### 4. AGREEMENT

The nature and purpose of this project have been sufficiently explained to me and I agree to participate. I understand that I’m free to withdraw at any time.

Name (print): \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

### 5. QUESTIONS

#### *(A) Interviewee background*

1. How long have you been involved with ICANN? In what capacity? What is your area of expertise/responsibility?

2. Please describe the capacity/manner in which you have been directly involved with the DNS-CERT case. How closely have you been following the issues with the introduction of the DNS-CERT proposal? During what time period?
  - Did you participate in the drafting of the “DNS-CERT Business Case,” the “Proposed Strategic Initiatives for Improved DNS Security, Stability, and Resiliency,” or any other ICANN documents relating to DNS security?

***(B) Public Participation***

3. To begin, we would like to learn more about the ways in which inputs from the public played a role in ICANN’s DNS-CERT proposal and decision-making process. More specifically:
  - On April 6-7, 2010, ICANN hosted a workshop in Washington, D.C. to identify the requirements for responding to Internet and DNS security events. Were the workshop proceedings adequately transparent? Did the workshop and the report it generated provide adequate opportunities for substantive input from the public?
  - From your perspective, what were the biggest challenges in analyzing and assessing the public comments?
  - In what ways do you think public input played a meaningful role in the decision-making process? At what level? How responsive has ICANN been to public comments surrounding the DNS-CERT proposal? Has ICANN responded appropriately?
  - How have individual public comments been weighted against each other? Are there particular comments or commentators whom you thought were given too much or too little weight?
  - Based on the DNS-Cert case, how could the processes and instruments of public participation offered by ICANN be improved?
4. Let’s focus on the role of Supporting Organizations (SOs) and Advisory Committees (ACs) in the context of the DNS-CERT proposal and decision-making process.
  - What do you think of the feedback ICANN has received in response to its DNS-CERT proposal—particularly the concerns raised by ISOC, the ccNSO and the GNSO?
  - In ICANN conversations about DNS-CERT thus far, how have the views of various stakeholders been represented and communicated?

### ***(C) Transparency***

5. ICANN has a commitment to transparency. Looking at the DNS-CERT business case and decision-making process, we would like to learn more about your views on how transparency is ensured – and, eventually, how it could be further improved.
- Do you think ICANN properly handled the announcement of its DNS-CERT proposal?
  - Are there other ways that ICANN could have announced the DNS-CERT proposal that would have been regarded as more transparent?
  - Since the announcement of the proposal, what have been the main processes and instruments used to ensure ongoing transparency in communication between ICANN and the community? Have these methods been successful?
  - In your opinion, how successful was ICANN in creating transparency in this particular case? Please give specific examples in support of your assessment.
  - Do you think transparency in the DNS-CERT proposal could have been improved? If so, how, and at what level?

### ***(D) Accountability***

6. ICANN is an organization that seeks to be accountable to the Internet community. Against this backdrop, we would like to learn more about your observations regarding accountability in the DNS-CERT proposal and decision-making process.
- In your interpretation, what does “accountability” mean in the context of the DNS-CERT proposal? What criteria would you use to “measure” it?
  - Using these criteria, how accountable has ICANN been throughout the process of the DNS-CERT proposal?

### ***(E) In Conclusion***

7. Finally, we’d like to get your thoughts on the utility of a DNS-CERT and ICANN’s role in its creation:
- What do you think about the substance of ICANN’s DNS-CERT proposal? Is there a need for a DNS-CERT? If so, what are its responsibilities?
  - Is an independent DNS-CERT organization necessary? If so, what should ICANN’s role be in its creation?

- Is the creation of a DNS-CERT a matter for one of the ICANN Supporting Organizations or Advisory Committees? Is it in the direct remit of the CEO?
8. Looking at the DNS-CERT proposal and decision-making process, what improvements would you suggest to strengthen ICANN's public participation mechanisms, transparency, and/or accountability?

Thank you very much for your time and consideration.



# DRAFT INTERVIEW PROTOCOL AND QUESTIONNAIRE GAC MEMBERS

<b>Name:</b> _____	<b>Title:</b> _____
<b>Affiliation (Country or Organization):</b> _____	
<b>Years of Service:</b> _____	<b>Date:</b> _____

## 1. BACKGROUND AND PURPOSE

As you know, Harvard’s Berkman Center for Internet & Society has agreed to assist ICANN’s Accountability and Transparency Review Process by conducting an independent, exploratory study analyzing ICANN’s decision-making processes and communications with stakeholders pursuant to the Affirmation of Commitments (AoC). The study will develop a framework and recommendations for understanding and improving ICANN’s accountability and transparency.

As part of this process, the Berkman Center team is analyzing case examples that were suggested to the ATRT by the ICANN community during its interactions with the community at the ICANN meeting in Brussels, Belgium. Those case studies include the introduction of new gTLDs, the .xxx top level domain, and the DNS-CERT proposal. The Berkman Center team is collecting data, conducting research, and initiating interviews regarding these case studies to provide the ATRT with analysis and recommendations to improve accountability and transparency under the AoC. The interviews will help us understand the range of perspectives on each case, deepen our factual understanding of the core issues and strengthen our recommendations regarding the accountability and transparency of ICANN decision-making processes.

For GAC members, we have created the following written questionnaire in order to collect a variety of perspectives regarding the **Governmental Advisory Committee’s (GAC) role in ICANN decision-making processes in general, and in the context of each of the case examples in particular**. The information you provide is part of the fact-finding process. Together with the responses of other participants, your responses will help us to gain a deeper understanding of perceptions of accountability, transparency, and participation regarding the role of the GAC. We hope it may also shed light on possible areas for improvement and “lessons learned.” Our interest is to learn from your experience. There are no right or wrong or desirable or undesirable answers. We would like you to feel comfortable with writing what you really think and how you really feel.

## 2. CONFIDENTIALITY OPTION

If you wish, we will treat your written and, where relevant, follow up comments as confidential.

In this case, the collected comments, experience and suggestions from all of the interviewees will be anonymized and reviewed by the Berkman Center’s team. While our final report will contain a list with the names of the individuals we have interviewed, it will not link specific comments to the respective names of individuals.

Please indicate here whether you wish that your comments remain confidential:

YES: \_\_\_

NO: \_\_\_

Signature: \_\_\_\_\_

### 3. INSTRUCTIONS

We have designed the questionnaire – which will focus on ICANN’s operations in several different topic areas: public participation, transparency and accountability – as a two-step process:

- 1.) First, we would like to ask you to respond in writing to the questionnaire below. We expect that this portion of the process will take about 60 minutes of your time. Given the aggressive timeline of the review process, we would appreciate if you could return the form within 7 days upon receipt in PDF format to Urs Gasser <[ugasser@cyber.law.harvard.edu](mailto:ugasser@cyber.law.harvard.edu)>. Please don’t hesitate to be in touch should you have any questions or need any clarification while answering the questionnaire.
- 2.) Second, we would like to follow up directly with a select sample of respondents—either in a phone conversation or through a follow up email—after we’ve reviewed your answers. The purpose of this follow up will be to clarify, where necessary, some of the written answers and/or to “dig deeper” where your written responses seem particularly valuable to us. Regarding phone calls, we will not tape our conversation, but a research assistant will take notes from the call. These notes will only be shared with the Berkman Center’s team.

### 4. QUESTIONS

#### *(A) General Questions Regarding the Role of the GAC*

1. Are the existing criteria for “public policy considerations” on which the GAC advises the Board clear? In particular, is there consensus between members of the GAC and the Board regarding the circumstances in which the Board must notify the GAC of an issue that may have such considerations? If not, what might be done to improve clarity on this issue?

2. What are the primary mechanisms through which GAC advice is submitted to the Board? Are there different types of GAC inputs to the policy development process? If yes, please describe examples of each and the means through which they are submitted.
3. What is the process by which the documents describing “GAC principles” are created?
4. How is the diversity of viewpoints among GAC members represented to the Board? Absent 'consensus' how do you expect the variety of positions to factor into the Board's decision-making process?
5. How would you describe the role of the GAC in ICANN’s policy development processes, especially in light of the input of other actors and stakeholders? Are there ways in which it can enhance its role in the decision-making process?
6. In what instances has ICANN adequately taken into account the advice of the GAC in its decision-making processes, in what instances not? Do you have suggestions for improving the effectiveness of GAC-ICANN interactions?
7. Does the GAC play a role in the transparency and accountability of the ICANN Board? In what way?
8. Do you think the transparency and accountability of the GAC could be improved? If so, how, at what level and by what means?

### **General Questions Regarding the Role of the GAC in the Context of the Case Studies**

#### ***(B) .xxx Top Level Domain***

9. Please describe the capacity/manner in which you have been directly involved with the .xxx case. How closely have you been following the issues with case? During what time period?
10. Let’s focus generally on the role of the GAC in the context of the .xxx top level domain.
  - How would you describe the role of the GAC in the context of the .xxx top level domain process?
  - Through what channels or mechanisms has the GAC provided input on this case?
  - On what specific .xxx top level domain issues has the GAC provided input to the Board?
  - Did governmental actors provide input or recommendations on the .xxx top level domain process via avenues other than the GAC? If so, what was the substance of their input and how was it communicated?

- Against the backdrop of the .xxx top level domain process, do you think the information flow between GAC and the ICANN staff and Board could be improved? If so, how, at what level and by what means?

11. More specifically:

- Has the GAC's input regarding the .xxx top level domain changed over time? How was this communicated to ICANN?
- Were members of the GAC generally in agreement regarding the GAC's stance towards .xxx? If not, what were the key points of disagreement?

*(C) DNS-CERT*

12. Please describe the capacity/manner in which you have been directly involved with the DNS-CERT proposal. How closely have you been following the issues with the introduction of the proposal? During what time period?

13. Let's focus generally on the role of the GAC in the context of the DNS-CERT case.

- How would you describe the role of the GAC in the context of the DNS-CERT process?
- Through what channels or mechanisms has the GAC provided input on this case?
- On what specific DNS-CERT issues has the GAC provided input to the Board?
- Against the backdrop of this process, do you think the information flow between GAC and the ICANN staff and Board could be improved? If so, how, at what level and by what means?
- Did governmental actors provide input or recommendations on the DNS-CERT case via avenues other than the GAC? If so, what was the substance of their input and how was it communicated?

14. Generally, is there consensus among GAC members about current DNS security needs? Is there consensus about the appropriate role of ICANN in meeting these needs? If not, what are the main areas of disagreement?

15. How would you characterize the GAC's reaction to the call for a DNS-CERT?

16. Do GAC members have significant problems with ICANN's DNS-CERT business case and proposed strategic initiatives?

***(D) New gTLD Process***

17. Please describe the capacity/manner in which you have been directly involved with the new gTLD program. How closely have you been following the issues with the introduction of new gTLDs? During what time period?

18. Let's focus generally on the role of the GAC in the context of the gTLD case.

- How would you describe the role of the GAC in the context of the gTLD case?
- Through what channels or mechanisms has the GAC provided input on this case?
- On what specific new gTLD issues has the GAC provided input to the Board?
- Against the backdrop of this case, do you think the information flow between GAC and the ICANN staff and Board could be improved? If so, how, at what level and by what means?
- Did governmental actors provide input or recommendations on new gTLDs via avenues other than the GAC? If so, what was the substance of their input, and how was it communicated?

19. More specifically:

- Have the concerns of the GAC been adequately considered during the development of the new gTLD program? Are the GAC principles regarding new gTLDs adequately reflected in the Draft Applicant Guidebook (DAG)?
- What is your assessment of the role of the GAC and its interaction with the Board with respect to new gTLDs?
- Was the GAC given enough time to weigh in on the Expression of Interest proposal? During other stages of the DAG development process, were there any instances in which you felt the GAC was not given enough time to provide input? If so, please describe the situation(s).
- Under what circumstances should members of the GAC be able to object to proposed gTLD strings? What mechanisms or provisions should be built into the new gTLD program to enable these objections?

***(E) In Conclusion***

20. What improvements would you suggest to strengthen ICANN's public participation mechanisms, transparency and/or accountability? Are there specific examples, with regard to the cases outlined above, that would best help us to understand the role, types of inputs, effectiveness and modes of communication between the GAC and the Board?
21. Is there anyone you recommend we interview regarding these case studies or ICANN's public participation mechanisms, transparency and/or accountability in general?

Thank you very much for your time and consideration.

## **DRAFT Case Study: The Introductions of New gTLDs**

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Draft Case Study: The Introduction of New gTLDs

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### **1. Introduction: Cover Note**

This draft case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports and expert opinion. It provides a tentative summary of the facts regarding the introduction of new gTLDs. As per Exhibit B, section 2 of the services agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the new generic top-level domain name (gTLD) program. Together with the other case studies, it will help identifying processes and decision-making that demonstrated ICANN's accountability and transparency, as well as processes and decision-making that could be modified to enhance ICANN's accountability and transparency.

This draft case study attempts to compile the most salient facts, decisions, debates, and perspectives, though does not attempt or claim to provide a comprehensive or exhaustive review of the case. We have made an effort to avoid including opinions and subjective evaluations by the Berkman team; this document does not include a normative evaluation of the events and decisions of this case.

The Berkman team will continue to add to this case study based upon feedback by the ATRT and interviews with ICANN staff, community and stakeholders, which are currently being conducted as part of the second phase of the workplan. The final case study will serve as an important component of the Berkman Center's overall study: it not only is the starting place to identify some of the core issues and challenges within the area of review (see Section 9.1 AoC) that will be addressed in the final report, but also enables the Berkman team to practically illustrate some of the considerations and recommendations set forth in the final report.

*Note:* As per the services agreement, this case study focuses on events prior to June 17, 2010. However, the new gTLD program is still evolving. As such, this study may not reflect the most recent developments in this case.

### **2. Abstract**

In June of 2008, the ICANN Board unanimously adopted the Generic Names Supporting Organization's policy recommendations for the introduction of new generic top-level domain names (gTLDs) and resolved to begin work on the implementation of a new gTLD application process. The new program, initially scheduled to launch in September 2009, is currently expected to go into effect at the end of 2010 or in early 2011.

The proposed process has been fraught with controversy, including criticisms over its delays, whether ICANN's method of publishing and incorporating public comments is sufficiently

transparent and responsive, and whether new gTLDs should even exist. Critics have also raised a number of specific substantive issues, including the Expression of Interest proposal, trademark protection, the role of the Governmental Advisory Committee, the proposed morality and public order standard for objections to new gTLDs, and vertical integration.



## DRAFT Case Study: The Introductions of New gTLDs

### 1. Introduction

One of ICANN's roles, as articulated in its Articles of Incorporation, is "performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system."<sup>5</sup> Since the early 1970s, the DNS has contained eight gTLDs: .arpa, .com, .edu, .gov, .mil, .net, .org and .int. In 2000, ICANN issued a call for proposals for new gTLDs. Between late 2000 and 2004, it introduced seven new gTLDs: .aero, .biz, .coop, .info, .museum, .name and .pro. In 2005, ICANN announced five more approved gTLDs – .cat, .jobs, .mobi, .tel, and .travel – bringing the total number to 21.<sup>6</sup>

In October 2007 the Generic Names Supporting Organization (GNSO)<sup>7</sup> finalized a list of policy recommendations on the introduction of new gTLDs,<sup>8</sup> in line with ICANN's stated commitment to "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."<sup>9</sup> The ICANN Board approved these recommendations in June 2008, and staff began work on a new Draft Applicant Guidebook (DAG) four months later.

ICANN's timeline for the launch of the new gTLD program has repeatedly been pushed back. In June 2008, ICANN estimated that the Applicant Guidebook would be finalized by November 2008 and that the program would launch by early 2009.<sup>10</sup> In response to comments on the first draft of the guidebook indicating that the proposed timeline was too aggressive, in February 2009 ICANN extended this launch date to December 2009. Three months later, ICANN revised the timeline, pledging to begin accepting applications in early 2010.<sup>11</sup> At the October 2009 ICANN meeting, ICANN faced criticism from potential applicants who claimed, "the timetable hasn't slipped, but has been abandoned" and implored ICANN to "just pick a date." "We're losing faith in this process as we see delay after delay after delay," said one.<sup>12</sup>

The DAG is currently in its fourth iteration, published on May 31, 2010. The timeline on the New gTLD Program section of ICANN's website estimates that the final Applicant Guidebook

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<sup>5</sup> ICANN, "Articles of Incorporation," revised November 21, 1998, <http://www.icann.org/en/general/articles.htm>; United States Department of Commerce, Statement of Policy on the Management of Internet Names and Addresses, June 5, 1998, <http://www.icann.org/en/general/white-paper-05jun98.htm>.

<sup>6</sup> On December 11, 2009, ICANN entered into a TLD sponsorship agreement with the Universal Postal Union (UPU), under which the UPU sponsors the .post gTLD. The domain has not yet been added to the root. ICANN, "POST Sponsored TLD Agreement," December 11, 2009, <http://www.icann.org/en/tlds/agreements/post/>.

<sup>7</sup> The GNSO is one of three Supporting Organizations (the others being the Address Supporting Organization and the Country Code Names Supporting Organization) that develop and recommend policies to the ICANN Board. Each Supporting Organization also appoints two voting members to the Board.

<sup>8</sup> GNSO, "Final Report - Introduction of New Generic Top-Level Domains," August 8, 2007, <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>9</sup> ICANN, "Bylaws for Internet Corporation for Assigned Names and Numbers," amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

<sup>10</sup> ICANN, "New gTLD Program: What kind of internet do you want?," June 23, 2008, [http://par.icann.org/files/paris/BAA\\_Intro\\_NewGTLDs\\_Paris\\_23Jun08.pdf](http://par.icann.org/files/paris/BAA_Intro_NewGTLDs_Paris_23Jun08.pdf).

<sup>11</sup> ICANN, "New gTLD Program Update," May 31, 2009, <http://www.icann.org/en/announcements/announcement-07may09-en.htm>.

<sup>12</sup> ICANN, "New gTLD Overview: ICANN Meeting, Seoul, Korea," October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>.

will be published some time in 2010 and lists the date of program launch as “to be determined.”<sup>13</sup>

## **2. Proposed Application Process**

According to the current version of the DAG, applicants for new gTLDs must complete the following steps:

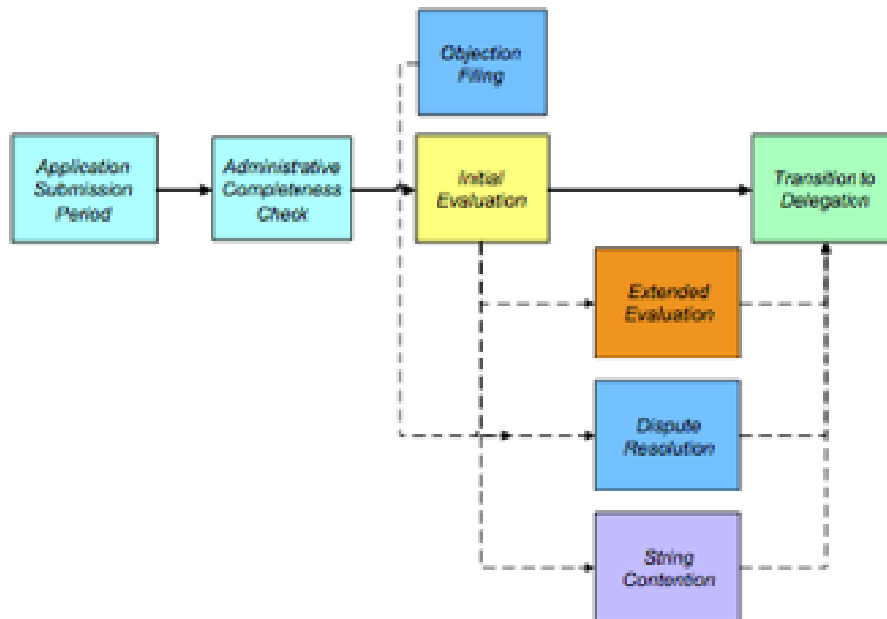
1. Register for the TLD Application System.
2. Submit a partial deposit of \$5000 for each gTLD desired.
3. Complete the full gTLD application and submit the remainder of the evaluation fee (\$180,000, for a total cost of \$185,000).
4. Pass evaluations of both the requested string (to determine that it “is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names”) and of the applicant (to determine “whether the applicant has the requisite technical, operational and financial capabilities to operate a registry”). Pass a background check for the operator and key members.
5. If applicable, sufficiently address any objections made on the grounds of “string confusion, legal rights, morality and public order and/or community.”
6. Undergo a 45-day public comment period.
7. Pass a secondary Extended Evaluation if the application does not meet the criteria for the initial evaluation.
8. Transition to delegation: Complete a registry agreement with ICANN and pass a series of technical tests.<sup>14</sup>

Not all of these steps are necessary for all applicants, and all of these steps are subject to change before the process is finalized and the gTLD program is formally launched. The fourth version of the DAG illustrates the process as follows:

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<sup>13</sup> ICANN, “New gTLD Program: New to the Program? Start Here! ,” <http://www.icann.org/en/topics/new-gtlds/program-en.htm>.

<sup>14</sup> ICANN, “Draft Applicant Guidebook, Version 4,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>.



**Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.**

### 3. Controversial Issues

ICANN’s decision to begin work on a new gTLD application process met with opposition from some in the global business community, including trademark holders and members of the financial sector, as well as a number of governments.<sup>15</sup> Opponents argued that a gTLD expansion would “create morality, trademark and geographic problems at the top level,” confusing consumers and placing a great financial burden on business owners who would be forced to defensively register both TLDs and second level domains in new TLDs to protect their brands.<sup>16</sup> Other concerns included fears that increasing the number of gTLDs would threaten the stability of the DNS, that the expected benefit to consumers through greater competition would not outweigh the costs associated with such an expansion, and that the new program may invite an increase in criminal conduct such as phishing, malware and botnets.

#### 3.1 “Overarching Issues”

Based on public comments on the first version of the Draft Applicant Guidebook, ICANN identified four “Overarching Issues” related to the introduction of new gTLDs: 1) Trademark

<sup>15</sup> Michael Palage, “ICANN’s gTLD Proposal Hits a Wall: Now What? ,” The Progress& Freedom Foundation PFF Blog, December 22, 2008, [http://blog.pff.org/archives/2008/12/icanns\\_gtld\\_pro.html](http://blog.pff.org/archives/2008/12/icanns_gtld_pro.html).

<sup>16</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

Protection; 2) Potential for Malicious Conduct; 3) Security and Stability/Root Zone Scaling; and 4) TLD Demand and Economic Analysis.<sup>17</sup>

### **3.1.1 Trademark Protection**

In response to trademark-related concerns raised in public comments on the first draft of the DAG, ICANN pledged to discuss trademark issues stemming from the introduction of new gTLDs “with all relevant parties” and with Intellectual Property organizations around the world. On March 6, 2009, the ICANN Board resolved to direct the GNSO’s Intellectual Property Constituency, in conjunction with ICANN staff, to form an Implementation Recommendation Team (IRT) to address trademark concerns.<sup>18</sup> For additional information on the IRT, please see section 3.3 of this report.

### **3.1.2 Potential for Malicious Conduct**

In February 2009, ICANN promised to “actively solicit[] feedback” on the potential for malicious conduct (specifically criminal conduct: phishing, pharming, malware, botnets) in the new DNS namespace. ICANN set up a wiki to address all four “overarching issues” in April 2009.<sup>19</sup> In December 2009, ICANN staff announced that the organization would establish two temporary groups of experts to address these issues.<sup>20</sup> These two groups, the Zone File Access (ZFA) Advisory Group and the High Security Top-Level Domain Advisory Group (HSTLD), published a set of documents on malicious conduct within new gTLDs and held two workshops at the March 2010 ICANN meeting in Nairobi.<sup>21</sup>

### **3.1.3 Security and Stability/Root Zone Scaling**

The ICANN Board delegated work on this issue to the Security and Stability Advisory Committee and the Root Server System Advisory Committee, which jointly conducted a study analyzing the impact of the proposed gTLD expansion on security and stability within the DNS root server system. A report on root scaling was published on August 31, 2009; a study on root zone augmentation and impact analysis followed on September 17, 2009.<sup>22</sup>

### **3.1.4 TLD Demand and Economic Analysis**

In October 2006, motivated by public comments on the proposed registry agreements between ICANN and the operators of the new .biz, .info and .org registries, the ICANN Board resolved to direct the President of ICANN to:

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<sup>17</sup> ICANN, “New gTLD Draft Applicant Guidebook: Analysis of Public Comment,” February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

<sup>18</sup> ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>19</sup> ICANN, “New gTLD Overarching Issues,” [http://st.icann.org/new-gtld-overarching-issues/index.cgi?new\\_gtld\\_overarching\\_issues](http://st.icann.org/new-gtld-overarching-issues/index.cgi?new_gtld_overarching_issues).

<sup>20</sup> ICANN, “Temporary Expert Advisory Groups Formed on New gTLD Malicious Conduct Initiatives,” December 3, 2009, <http://www.icann.org/en/announcements/announcement-03dec09-en.htm>.

<sup>21</sup> ICANN, “Mitigating Malicious Conduct in New gTLD – Zone File Access and High Security Zone TLD,” February 22, 2010, <http://www.icann.org/en/announcements/announcement-22feb10-en.htm>.

<sup>22</sup> ICANN, “Security and Stability: Root Zone Scaling,” [https://st.icann.org/new-gtld-overarching-issues/index.cgi?security\\_and\\_stability\\_root\\_zone\\_scaling](https://st.icann.org/new-gtld-overarching-issues/index.cgi?security_and_stability_root_zone_scaling).

commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market, such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by who?<sup>23</sup>

In a December 18, 2008 letter to Peter Dengate-Thrush and Paul Twomey, the United States Department of Commerce expressed concerns that the publication of the first draft of the DAG had preceded the completion of this study.<sup>24</sup> Several other groups, including the National Association of Manufacturers,<sup>25</sup> AT&T,<sup>26</sup> and the Internet Commerce Coalition<sup>27</sup> also expressed concerns that ICANN had not yet filled its obligation to conduct a thorough economic study prior to releasing the DAG.<sup>28</sup>

In March 2009, ICANN released two studies by University of Chicago economist Dennis Carlton, one on the impact of gTLDs on consumer welfare and one the possibility of price caps on the prices charged by new gTLD registries for second level domains. In these studies, Carlton concluded that the introduction of new gTLDs would “improve consumer welfare by facilitating entry and creating new competition.... The likely effect of ICANN’s proposal is to increase output, lower price and increase innovation.” He also stated that price caps on new TLDs were “unnecessary” and that imposing price caps may harm the marketplace by placing limits on the pricing flexibility new registries without providing many benefits to registrants.<sup>29</sup>

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<sup>23</sup> ICANN, “Adopted Resolutions from ICANN Board Meeting,” October 18, 2006, <http://www.icann.org/en/minutes/resolutions-18oct06.htm>.

<sup>24</sup> Meredith A. Baker, United States Department of Commerce, “Letter to Chairman Dengate-Thrush,” December 18, 2008, <http://www.icann.org/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>.

<sup>25</sup> National Association of Manufacturers, “Industry Comments to the New GTLD Program and Process,” December 15, 2009, <http://forum.icann.org/lists/gtld-guide/pdf7xgwqYBTl6.pdf>.

<sup>26</sup> AT&T, “AT&T Comments on New gTLD Guidebook,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/docvN9GJ3ZMCd.doc>.

<sup>27</sup> Internet Commerce Coalition, “Comments on the New gTLD Program and Process,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/pdfwiBzRRbU1A.pdf>.

<sup>28</sup> Michael Palage, “ICANN’s Economic Reports: Finding the Missing Pieces to the Puzzle,” *Progress Snapshot* 5.4, April 2009, [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1494671\\_code759757.pdf?abstractid=1494671&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1494671_code759757.pdf?abstractid=1494671&mirid=1).

<sup>29</sup> ICANN, “New gTLDs – Preliminary Reports on Competition and Pricing,” March 4, 2009, <http://www.icann.org/en/announcements/announcement-04mar09-en.htm>.

ICANN opened a 45-day public comment forum after publishing the reports, during which time period they were widely criticized.<sup>30</sup> Andrew Alleman of the Domain Name Wire blog accused ICANN of “whitewash[ing]” its own positions on new gTLDs and pointed out that Carlton contradicted himself in the reports by saying new gTLDs would benefit consumers by creating competition but that they would not be successful enough to pose a threat to trademark holders.<sup>31</sup> University of Miami law professor and long-time ICANN watcher Michael Froomkin called the studies “naïve” and challenged Carlton’s credibility, pointing out that the studies included very little quantitative data to back up their conclusions.<sup>32</sup>

In June 2009, ICANN commissioned Carlton to write two new papers responding to these criticisms. Reactions were mixed, with those who criticized the original papers unmoved and others – including several potential gTLD applicants – supporting the papers.<sup>33</sup> Between June 2009 and March 2010, the GAC emphasized the “lack of comprehensive analysis of economic and competition impacts” of the new gTLD program in three communiqués to the Board and a separate letter to Peter Dengate-Thrush. In July 2009, the International Trademark Association Board of Directors passed a resolution stating that “ICANN has yet to commission the independent, comprehensive economic study of the domain name registration market called for by its Board of Directors in 2006” and that, “accordingly, ICANN has demonstrated no adequate economic or public policy justification for the introduction of new gTLDs.”<sup>34</sup>

In September 2009, two members of the United States House of Representatives’ Judiciary Committee sent a letter to Rod Beckstrom stating that “the only economic justification put forth thus far has been an ICANN-commissioned report that has been widely criticized for failing to include empirical data or analysis” and asking whether ICANN intended to follow through on its commitment to carry out an economic study.<sup>35</sup> Beckstrom responded by pointing to the two reports by Carlton and an October 2008 study on vertical integration by CRA International. He stated that “Even with what appears to be the compelling benefits of competition, ICANN’s commitment to open and transparent processes requires further action on ICANN’s part” and declared that ICANN would “retain economists to review and summarize work to date regarding the costs and benefits of new gTLDs...and then evaluate whether additional study is required.”<sup>36</sup>

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<sup>30</sup> ICANN, “[competitiong-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

<sup>31</sup> Andrew Alleman, “ICANN Releases Two ‘Whitewash’ Reports to Defend its Positions on new gTLDs,” *Domain Name Wire*, March 5, 2009, <http://domainnamewire.com/2009/03/05/icann-releases-two-whitewash-reports-to-defend-its-positions-on-new-gtlds/>.

<sup>32</sup> Michael Froomkin, “Deeply, deeply flawed economic report and analysis,” *ICANN Watch*, March 4, 2009, <http://www.icannwatch.org/article.pl?sid=09/03/05/0248231>.

<sup>33</sup> ICANN, “[competitiong-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

<sup>34</sup> International Trademark Association, “Creation of New gTLDs and Trademark Protection,” July 8, 2009, [http://www.inta.org/index.php?option=com\\_content&task=view&id=2005&Itemid=153&getcontent=](http://www.inta.org/index.php?option=com_content&task=view&id=2005&Itemid=153&getcontent=).

<sup>35</sup> Lamar Smith and Howard Coble, Letter to Rod Beckstrom, September 15, 2009, <http://www.icann.org/correspondence/smith-coble-to-beckstrom-15sep09-en.pdf>.

<sup>36</sup> Rod Beckstrom, Letter to Lamar Smith and Howard Coble, September 22, 2009, <http://www.domainnamenews.com/wp-content/uploads/2009/09/2009-09-22-letter-from-rod-beckstrom.pdf>.

## 3.2 Expression of Interest Proposal

The concept of an Expression of Interest (EOI) model was advanced at the October 2009 ICANN meeting by various participants, primarily prospective applicants frustrated at the delays and uncertainty surrounding the gTLD program and concerned that the process, which was becoming increasingly expensive, may be put off indefinitely.<sup>37</sup> An EOI model would serve as a sign of progress, helping to move the process forward. At the meeting, the ICANN Board resolved to direct ICANN staff to “study the potential impact of a call for formal ‘expressions of interest,’” and to submit a draft proposal for Board consideration at the December 2009 Board meeting.<sup>38</sup> The Board noted that the model “could assist the resolution of the remaining issues and assist ICANN in planning for the coming new gTLD round” and “will likely contribute to a better understanding of: 1) the economic demand for new gTLDs; 2) the number of gTLDs that are likely to be applied for; and, 3) relevant industry data.”<sup>39</sup>

On November 11, 2009, ICANN announced it was considering soliciting expressions of interest in new gTLDs.<sup>40</sup> ICANN opened a month-long public comment period between November 11 and December 11, 2009 and asked for input on the form an EOI model might take. (Note: in this announcement, ICANN stated that those who wanted to have their comments considered by the ICANN Board during its December meeting should submit comments no later than November 27.)<sup>41</sup>

In this round of public comments, supporters of an EOI model included a number of Internet marketing companies, TLD consulting firms, self-identified potential gTLD applicants (including business and civil society organizations), and GoDaddy. They argued it would kick-start the application process and ensure that only serious applicants were involved. Potential gTLD applicant Stephen Ruskowski’s comment is typical of the sentiments expressed by EOI proponents:

I welcome the transparency and approve of any screen that helps ensure all applicants are serious, viable, and well-intentioned. Restricting the round to those who have participated in the formal EOI (with attendant fees, toward the full application fee) would establish a minimum level of commitment and go a long way toward ensuring the integrity, order, and manageability of the application

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<sup>37</sup> ICANN, “New gTLD Overview: ICANN Meeting, Seoul, Korea,” October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>. A sample comment from potential applicant Bret Fausett is indicative of this concern: “There are people who are burning money trying to build businesses on this ICANN platform, and it’s very difficult when you don’t know what the target is.”

<sup>38</sup> ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

<sup>39</sup> ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

<sup>40</sup> ICANN, “Expressions of Interest in new gTLDs: ICANN seeks input and advice,” November 11, 2009, <http://www.icann.org/en/announcements/announcement-11nov09-en.htm>.

<sup>41</sup> ICANN, “Expressions of Interest in New gTLDs,” <http://www.icann.org/en/public-comment/public-comment-200912.htm#eoi-new-gtlds>; ICANN, “[eoi-new-gtlds] Chronological Index,” <http://forum.icann.org/lists/eoi-new-gtlds/>; ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

process. Also, making these EOIs public would promote early conflict resolution and perhaps help some groups and individuals avoid more serious risk as they become aware of better-positioned, more experienced competition.<sup>42</sup>

On December 18, 2009, ICANN published a draft EOI model, which would require prospective applicants to submit information about themselves and the requested TLD as well as a \$55,000 deposit in order to be allowed to participate in the first round of gTLD applications. Those who did not participate in the EOI would not be eligible to submit a gTLD application until later rounds.<sup>43</sup> ICANN opened a second public comment period on this model through January 27, 2010. Arguments against the proposed model clustered around four main points: effectiveness, cost, possible favoritism toward ICANN insiders, and its potential to create a secondary market for TLD slots.<sup>44</sup>

- 1. Effectiveness:** In its announcement of the EOI draft proposal, ICANN stated that the goal of the EOI was to gather information about the potential number of applications it would eventually receive. Opponents argued that many serious applicants would stay out of the EOI process to avoid revealing their ideas for a string, preventing unwanted competition (the proposed EOI applied only to the first round of applicants; later rounds were open to anyone). Others believed the EOI model was premature given that draft status of the Applicant Guidebook and that would further delay the application process while pulling attention away from the other, more serious “overarching issues.”

Supporters argued the EOI model would “illuminate” the gTLD landscape, providing a better picture of the prospective applicants, helping avoid conflicting applications and better informing potential applicants of any serious threats to their applications.

- 2. Cost:** For many, the \$55,000 EOI fee stood out in sharp contrast to the lack of a similar fee during the EOI phase of first round of gTLD proposals in 2000.<sup>45</sup> Opponents of the fee worried that non-profits, applicants from the developing world, or those who had been affected by the economic crisis would be effectively priced out of applying. One comment stated that the program “should not be used as a revenue raising tool for ICANN.”

Supporters of the fee, which included many self-identified potential applicants, believed it would effectively prevent non-serious proposals. They also noted that the \$55,000 EOI fee would be applied to the \$185,000 evaluation fee required for any TLD application and that the total cost of entering a new TLD into the root is around \$500,000, making the EOI fee a relatively small part of the process. Those who cannot afford the EOI fee likely cannot afford to apply for or manage a TLD, they argued.

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<sup>42</sup> Stephen Ruskowski, “EOI,” November 17, 2009, <http://forum.icann.org/lists/eoi-new-gtlds/msg00009.html>.

<sup>43</sup> ICANN, “New gTLD Program: Aspects of an Expressions of Interest and Pre-Registration Model,” December 18, 2009, <http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>.

<sup>44</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

<sup>45</sup> In 2000, interested parties were instructed to submit a brief (no more than ten pages) description of their proposal indicating how likely they were to formally apply. No fee was assessed until an applicant officially applied. ICANN, “ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains,” June 13, 2000, <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm#V>.



- 3. Possible favoritism toward ICANN insiders:** Opponents to the EOI proposal feared that it would give those who tend to be more involved in ICANN an unfair advantage over general Internet users in applying for new gTLDs. Eric Brunner-Williams, the Chief Technology Officer of Core Internet Council of Registrars, specifically voiced this concern, claiming the EOI idea “raises profound anti-competitive and institutional confidence issues from ICANN itself gaming the rules to benefit a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally.”<sup>46</sup>

Proponents, including Richard Tindal (Senior Vice President of domain name registrar eNOM), pointed out that the rules for obtaining a new gTLD were the same no matter who was applying and that a well-executed communications campaign would ensure that all who might want to submit an EOI would be able to do so.<sup>47</sup>

In its analysis of the public comments, ICANN noted that if the Board were to approve the EOI proposal, it would need to organize a widespread information campaign to ensure that all potential applicants were aware of the program.<sup>48</sup>

- 4. Potential to create a secondary TLD market:** Some opponents, including Microsoft and Time Warner, expressed concern that applicants would try to “game the system” by first submitting multiple EOIs and then turning around and selling the resulting TLDs to those with real interest in maintaining them and the ability to pay more than the original cost. Those in favor of the EOI system, including Richard Tindal, noted that each EOI costs \$55,000 and provides no guarantee that the desired TLD will actually be obtained, so the likelihood that someone will decide the possible advantages outweigh the financial risks is quite small.<sup>49</sup>

ICANN received nearly 400 public comments during its two open forums on the EOI proposal. In its analysis of these comments, ICANN staff noted that while “many responses expressing opposition actually state the EOI is acceptable if conducted in a certain way,” there was a “general consensus that certain other overarching issues should be addressed prior to the launch of the EOI or gTLD program.”<sup>50</sup>

ICANN held a public discussion on the EOI proposal during the March 2010 ICANN meeting in Nairobi.<sup>51</sup> At that meeting, the ICANN Board voted against implementing an EOI model, claiming it would cause unnecessary confusion and delay and that it would take resources away

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<sup>46</sup> ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

<sup>47</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

<sup>48</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

<sup>49</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

<sup>50</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

<sup>51</sup> ICANN, “New gTLD Update and EOI Panel Discussion,” March 8, 2010, <http://nbo.icann.org/node/8877>.

from other critical issues.<sup>52</sup> ICANN CEO and president Rod Beckstrom said that the EOI proposal, if enacted, would have “added another step, another process, another set of community discussions and debate” to the gTLD process.<sup>53</sup>

### 3.3 Trademark Issues and the Implementation Recommendation Team

Of the four “overarching issues” identified by ICANN staff via the comments on the first version of the DAG, issues related to trademark protection have elicited the most public attention.

For many trademark holders, the introduction of new gTLDs raises concerns about trademark protection. ICANN is taking these concerns seriously; of the twenty principles laid out in the GNSO recommendations, the need to protect existing trademarks is listed third, above the need to prevent technical instability within the DNS and the need to comply with international human rights norms.<sup>54</sup>

The GNSO recommendations also include the need to prevent TLDs that are “confusingly similar” to second level domains; this recommendation is listed second. While this recommendation does not specifically reference trademarks, the accompanying notes largely concern trademark law. In a comment on the recommendation, Avri Doria, then Chair of the GNSO Council, expressed her concern with the language, noting:

By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.<sup>55</sup>

Within trademark law, the concept of “confusingly similar” holds a different legal standard than the concept of “likelihood of confusion.” Two names – Acme Hardware and Acme Realty – may be “confusingly similar,” but, as they are used for dissimilar goods and services, are unlikely to cause confusion and therefore do not infringe on one another’s trademark. American University law professor Christine Farley explains that in domain name policy, where only the requested string is being considered, “confusingly similar” is the only standard that can be applied because domain names lack the real-world context necessary to determine “likelihood of confusion.” The GNSO recommendation “equates domains names with trademarks as legally protectable properties,” she writes, pointing out that under the proposed standards American University, which currently owns american.edu, would theoretically be able to prevent anyone else from registering .american. Furthermore, she notes, trademarks are largely regionally and market-

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<sup>52</sup> ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>; Elisa Cooper, “EI, EI — NO!,” *Circle ID*, March 12, 2010, [http://www.circleid.com/posts/20100312\\_icann\\_expression\\_of\\_interest\\_ei\\_ei\\_no/](http://www.circleid.com/posts/20100312_icann_expression_of_interest_ei_ei_no/).

<sup>53</sup> Ascio, “Highlights from the ICANN Meeting 7-12 March – Nairobi, Kenya,” March 25, 2010, <http://www.ascio.com/NewsContent.aspx?id=296>.

<sup>54</sup> GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>55</sup> GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” footnote 39, August 8, 2007, [http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_ftn39](http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_ftn39).

based, whereas domain names are global; a “one-size-fits-all approach would leave consumers confused in one place, while unjustifiably denying speech rights in another.”<sup>56</sup>

On the other side of the debate are trademark holders, who fear that the introduction of new gTLDs will worsen existing problems with trademark infringement and cybersquatting. They fear they will be required to “defensively register” their trademarks as gTLDs – a costly process at \$185,000 per gTLD – as well as purchase second level domains in each new TLD to protect their brands. Monitoring and enforcing their trademarks across a broad new swath of domain registries will be overwhelming, they argue.<sup>57</sup> (Not all agree with these assertions. Using ten years of data from cases decided according to the Uniform Dispute Resolution Policy, Fred Kreuger and Antony Von Couvering of Minds + Machines estimate that the total annual cost to trademark holders resulting from new gTLDs may be as little as \$0.10 per trademark worldwide.<sup>58</sup>)

At the March 2009 ICANN meeting in Mexico City, the Board resolved to request the GNSO’s Intellectual Property Constituency to form an Implementation Recommendation Team to “develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs.”<sup>59</sup> The IRT was organized by the GNSO’s Intellectual Property Constituency in consultation with the ICANN staff. According to the Board resolution, the team should be “comprised of an internationally diverse group of persons with knowledge, expertise, and experience in the fields of trademark, consumer protection, or competition law, and the interplay of trademarks and the domain name system.” The resolution also directed the IRT to “solicit input from the interested constituencies prior to its first session to ensure broad community input at the outset of its work.” The IRT was criticized by the domain name industry and the ALAC for containing only trademark industry representatives and excluding consumers, Internet users and domain name registrants. In a statement regarding the IRT’s final report, ALAC said, “We are aware of a number of qualified individuals who expressed interest in participating in the IRT but were summarily refused without reason.”<sup>60</sup>

The IRT met via teleconference and held two in-person sessions (one in Washington, D.C. and one in San Francisco) between March 25, 2009 and the submission of its final report to the ICANN Board on May 6, 2009. Its draft report, published on April 24, 2009, was open for public comment between April 24 and May 24, 2009. The final report was made available for comment between May 29 and June 29, 2009; this period was later extended to July 6, 2009. The Board

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<sup>56</sup> Christine Haight Farley, “Convergence and Incongruence: Trademark Law and ICANN’s Introduction of New Generic Top-Level Domains,” Washington College of Law Research Paper No. 2009-22, <http://ssrn.com/abstract=1400304>.

<sup>57</sup> Joshua S. Jarvis, “New gTLDs Still On Track Despite Trademark Concerns,” *Trademark and Copyright Law Blog*, April 2, 2010, <http://www.trademarkandcopyrightlawblog.com/2010/04/articles/domain-names/new-gtlds-still-on-track-despite-trademark-concerns/>.

<sup>58</sup> Fred Kreuger and Antony Von Couvering, “A Quantitative Analysis of Trademark Infringement and Cost to Trademark Holders in New gTLDs,” Minds + Machines Working Paper 2010-1, February 10, 2010, <http://www.mindsandmachines.com/wp-content/uploads/M+M-Quantitative-Analysis-of-Cost-of-New-TLDs-to-Trademarks.pdf>.

<sup>59</sup> ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>60</sup> ALAC, “Statement of the Committee to the Public Consultation on the Implementation Recommendation Team (IRT) Final Report of 29th May 2009,” July 7, 2009, <https://www.atlarge.icann.org/files/atlarge/correspondence-07jul09-en.pdf>.

directed the IRT to deliver its final report for community discussion at the June 2009 ICANN meeting in Sydney, Australia. The May 2009 final report proposed the following mechanisms for trademark protection:

- IP Clearinghouse, Globally Protected Marks List and associated Rights Protection Mechanisms, and standardized pre-launch rights protection mechanisms;
- Uniform Rapid Suspension System;
- Post delegation dispute resolution mechanisms (PDDRP);
- Whois requirements for new TLDs; and
- Use of algorithm in string confusion review during initial evaluation.<sup>61</sup>

These recommendations have raised multiple objections, as described in the ICANN staff analysis of public comments on the IRT final report.<sup>62</sup> Among them:

1. The International Trademark Association generally praised the IRT recommendations but expressed concerns that they “may not be adequate to address the potential problems associated with an unlimited expansion of NTLDs [new gTLDs].”<sup>63</sup>
2. Some have raised the concern that the IP Clearinghouse, which would act as a repository of trademark rights (including family names, trade names, unregistered marks and globally protected marks), may “represent a step towards a wholly new global registered trademark system,” the creation of which “is outside ICANN’s scope and authority.” Comments submitted by the NCUC and ALAC express concerns that the creation of this clearinghouse “could effectively derail ICANN.”
3. A Globally Protected Marks List (GPML) would prevent the registration of gTLDs and second level domain names matching any of the marks it contains. The list would contain only those marks registered in countries in each of the five global regions defined by ICANN. Opponents argue that registering a trademark in each region in order to include it in the GPML would constitute a major burden on trademark holders while providing relatively little protection. The current version of the DAG makes no mention of a GPML.
4. A comment submitted by George Kirikos calls the Uniform Rapid Suspension System (URSS) an “extremist view of trademark rights favoring IP interests in comparison with the UDRP” [ICANN’s existing Uniform Domain-Name Dispute-Resolution Policy] that “goes beyond what is protected by law and due process.” Opponents to the URSS fear it could become “an easy, cheap tool for Reverse Domain Name Hijacking.”

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<sup>61</sup> ICANN, “Final Report on Trademark Protection in New gTLDs,” May 29, 2009, <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>.

<sup>62</sup> ICANN, “Summary Analysis of IRT Final Report Comments (Post-delegation Process and other Comments),” October 2009, [https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark\\_protection:20091006224010-0-1875/original/summary-analysis-irt-final-report-04oct09-en.pdf](https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20091006224010-0-1875/original/summary-analysis-irt-final-report-04oct09-en.pdf).

<sup>63</sup> Anthony J. Biller and Jennifer Bisk, “Who is Going to Own DotAmazon? The Pending Domain Name Land Grab,” *Landslide 2* (2009).

5. Privacy advocates worry that the Whois requirement may pose a threat to free speech. In a statement delivered at the Sydney ICANN meeting in June 2009, the At-Large Community, the At-Large Advisory Committee and the Non-Commercial Users Constituency noted that the Whois requirement did not take into account international privacy standards or national laws protecting privacy.<sup>64</sup>

The report was criticized as heavily weighted in favor of existing IP interests and overstepping both the bounds of existing copyright and trademark law and ICANN's own mandate by asking that ICANN take responsibility for policing instances of trademarked terms in second and third level domains. In their joint statement in June 2009, the At-Large Advisory Committee and Non-Commercial Users Constituency claimed that "in the case of the IRT Report, we had neither transparency nor openness" and announced their formal opposition to the GPML, Uniform Rapid Suspension System and thick Whois proposals.<sup>65</sup>

Following the IRT report, the Board sent an October 12, 2009 letter to the GNSO Council for rapid review, saying it would implement several IRT recommendations unless the GNSO Council voted otherwise.<sup>66</sup> On October 28, the GNSO called for participants from all stakeholder groups to a broad "Special Trademark Issues" working group (STI). The STI worked to produce a consensus representing tradeoffs and compromises among positions. Its December 11, 2009 report<sup>67</sup> was approved by the GNSO Council, which "resolve[d] that the STI proposal to create a Trademark Clearinghouse and a Uniform Rapid Suspension procedure as described in the STI Report are more effective and implementable solutions than the corresponding staff implementation models that were described in memoranda accompanying the Draft Applicant Guidebook Version 3."<sup>68</sup> The GNSO posted the STI report for public comment between its December 2009 meeting and January 26, 2010.

ICANN revised the IP clearinghouse and Uniform Rapid Suspension System proposals in the DAG to reflect the STI recommendations and posted these new proposals for public comment on February 15, 2010. At the March 2010 meeting, the Board voted to analyze public comments on the new proposals and to create guidelines accordingly to add to the Draft Applicant Guidebook for new gTLD applicants. The Board also resolved to analyze public comment on the PDDRP and to "synthesize those comments, as appropriate," in the DAG.<sup>69</sup>

The current version of the DAG states that requested gTLDs will be reviewed for similarity with existing TLDs, reserved names (a list of 34 strings such as "example," "test" and "tld"), applied-for gTLDs and strings requested as Internationalized Domain Name country code TLDs. Second level domains will not be included in the string similarity review process. Trademark holders

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<sup>64</sup> ICANN, "Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report," June 25, 2009, [http://st.icann.org/gnso-liaison/index.cgi?at\\_large\\_irt\\_process\\_working\\_group](http://st.icann.org/gnso-liaison/index.cgi?at_large_irt_process_working_group).

<sup>65</sup> ICANN, "Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report," June 25, 2009, [http://st.icann.org/gnso-liaison/index.cgi?at\\_large\\_irt\\_process\\_working\\_group](http://st.icann.org/gnso-liaison/index.cgi?at_large_irt_process_working_group).

<sup>66</sup> GNSO, "Letter from Rod Beckstrom & Peter Dengate Thrush to GNSO Council," October 12, 2009, <http://gnso.icann.org/correspondence/beckstrom-to-gnso-council-12oct09-en.pdf>.

<sup>67</sup> GNSO, "Special Trademark Issues Review Team Recommendations," Special Trademark Issues Work Team, December 11, 2009, <http://gnso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>.

<sup>68</sup> GNSO, "GNSO Council Minutes," December 17, 2009, <http://gnso.icann.org/meetings/minutes-council-17dec09-en.htm>.

<sup>69</sup> ICANN, "Adopted Board Resolutions — Nairobi," March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

may file objections to gTLD applications in accordance with the draft WIPO Rules for New gTLD Dispute Resolution.

### **3.4 The Role of the Governmental Advisory Committee**

The GAC is one of four Advisory Committees that, according to the ICANN Bylaws, “shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.”<sup>70</sup> Among the Advisory Committees, the GAC has a special role, in that the ICANN Board is required to inform the GAC of “any proposal raising public policy issues” and must take into account the GAC’s comments, i.e., the Board must affirmatively vote to differ from any issues the GAC raises as “advice.” The GAC is also enabled to recommend new policies and revisions to existing policies, in many senses operating more like a Supporting Organization than its fellow Advisory Committees. The 2009 Affirmation of Commitments increased the power of the GAC, giving it a permanent seat on each of the four new accountability review teams.<sup>71</sup>

ICANN’s Bylaws state that no member of the Board of Directors may be a government official or a representative of a multinational entity established by a treaty between governments, but each Advisory Committee, including the GAC, may appoint one non-voting liaison to the Board. The GAC also appoints an additional liaison to the ICANN Nominating Committee and to each of the Advisory Committees and Supporting Organizations.

The preamble to the GAC’s March 2007 list of principles relating to gTLDs emphasizes the “sovereign right of States” over “international Internet-related public policy issues” as laid out in the 2003 World Summit on the Information Society Declaration. It also points to ICANN’s own Bylaws, which commit the organization to “seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision-making” and “recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.” Following the preamble is a list of principles that the GAC states “need to be respected.”<sup>72</sup>

The final section of the document states that, in line with ICANN’s Bylaws, “ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the implementation of these principles” and that “if any individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them.”

The GAC principles state that new gTLDs should respect national, cultural, geographic and religious sensitivities. They also state that ICANN should “avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities” and that applicant registries should pledge

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<sup>70</sup> ICANN, “Bylaws for Internet Corporation for Assigned Names and Numbers” (Article IX, Section 1), amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

<sup>71</sup> ICANN, “Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers,” September 30, 2009, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

<sup>72</sup> GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

to block “at no cost and upon demand of governments...names with national or geographic significance at the second level of any new gTLD.”<sup>73</sup>

According to Internet governance scholar and Syracuse University Professor Milton Mueller, the GAC has long been concerned with the use of the names of countries, regions, languages or peoples as domain names. He writes that as early as 1998, the GAC “demanded...that ICANN abstain” from assigning these names.<sup>74</sup> Mueller points out that after the first TLD expansion in 2000, the director-general of the European Commission wrote to ICANN’s President and asked that governments have the first shot at registering ISO country codes in the new TLDs (example: uk.biz and gbr.biz). These proposed rights have no basis in international law, Mueller writes. However, in 2001, the GAC requested – and ICANN approved this request – that all country names be reserved in the .info TLD for government use. Mueller points out that the Domain Name Supporting Organization (the precursor to the GNSO) was not involved in this decision, despite being responsible for suggesting policy related to TLDs.

Throughout the development of the new gTLD program, the GAC has submitted its advice to the ICANN Board via communiqués published after each of its meetings and via direct letters.

### 3.4.1 Geographic Names

In its October 2007 communiqué, the GAC expressed concerns that the GNSO recommendations for new gTLDs did not “properly take into account” the GAC principles regarding the use of country names in new gTLDs.<sup>75</sup> The GAC expressed this concern again in its June 2008,<sup>76</sup> November 2008,<sup>77</sup> March 2009,<sup>78</sup> June 2009,<sup>79</sup> October 2009<sup>80</sup> and March 2010<sup>81</sup> communiqués, as well as in letters on April 24<sup>82</sup> and August 18, 2009.<sup>83</sup>

The second version of the DAG, published on February 19, 2009, required “evidence of support, or non-objection from the relevant government of public authority” for applicants for geographic

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<sup>73</sup> GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

<sup>74</sup> Milton Mueller, “Governments and Country Names: ICANN’s Transformation into an Intergovernmental Regime,” <http://listweb.syr.edu/~mueller/gacnames.pdf>.

<sup>75</sup> GAC, “GAC Communiqué – Los Angeles,” October 31, 2007, [http://gac.icann.org/system/files/GAC\\_30\\_Los\\_Angeles\\_Communique.pdf](http://gac.icann.org/system/files/GAC_30_Los_Angeles_Communique.pdf).

<sup>76</sup> GAC, “GAC Communiqué – Paris,” June 26, 2008, [http://gac.icann.org/system/files/GAC\\_32\\_Paris\\_Communique.pdf](http://gac.icann.org/system/files/GAC_32_Paris_Communique.pdf).

<sup>77</sup> GAC, “GAC Communiqué – Cairo,” November 5, 2008, [http://gac.icann.org/system/files/GAC\\_33\\_Cairo\\_Communique.pdf](http://gac.icann.org/system/files/GAC_33_Cairo_Communique.pdf).

<sup>78</sup> GAC, “GAC Communiqué – Mexico City,” March 5, 2009, [http://gac.icann.org/system/files/GAC\\_34\\_Mexico\\_City\\_Communique\\_English.pdf](http://gac.icann.org/system/files/GAC_34_Mexico_City_Communique_English.pdf).

<sup>79</sup> GAC, “GAC Communiqué – Sydney,” June 24, 2009, <http://gac.icann.org/system/files/Sydney%20Communique.pdf>.

<sup>80</sup> GAC, “GAC Communiqué – Seoul,” October 8, 2009, [http://gac.icann.org/system/files/Seoul\\_communique.pdf](http://gac.icann.org/system/files/Seoul_communique.pdf).

<sup>81</sup> GAC, “GAC Communiqué – Nairobi,” March 10, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

<sup>82</sup> Letter from Janis Karklins to Paul Twomey, April 24, 2009, <http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf>.

<sup>83</sup> Letter from Janis Karklins, the Chairman of the Governmental Advisory Committee, Ambassador of Latvia to France to Peter Dengate Thrush, the Chairman of the Board, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

name-based gTLDs.<sup>84</sup> In response, representatives of the Internet Commerce Association demanded to know why ICANN had chosen the recommendations of the GAC over those of the GNSO, in which geographic names were given less protection.<sup>85</sup>

### 3.4.2 Expression of Interest Proposal

The ICANN Board introduced the concept of an EOI after the Governmental Advisory Committee's October 2009 meeting and originally intended to vote on the proposal at its February 2010 meeting, before the next in-person GAC meeting. Michael Palage has noted that Article III, Section 6 of ICANN's Bylaws requires ICANN to consult the Governmental Advisory Committee (GAC) "in those cases where the policy action affects public policy concerns." The same section of the Bylaws also require ICANN to hold in-person public forums, "where both practically feasible and consistent with the relevant policy development process," to discuss proposed policies before any final Board action is taken.<sup>86</sup> In January 2010, Palage wrote that if the ICANN Board were to vote on the EOI proposal during its February 2010 meeting, as it had originally proposed, it would be violating these Bylaws. The Board ultimately postponed its decision on the EOI until its March 2010 meeting.

### 3.4.3 Overarching Issues

The GAC has also expressed concerns related to the four "overarching issues" identified by ICANN staff in February 2009. In an August 2009 letter, the GAC stressed the importance of a "controlled and prudent expansion" and a "more measured rollout," worried that the potential benefits to consumers might not outweigh the potential harms of such an expansion, and expressed concerns that new gTLDs might confused consumers and lead to "a multitude of monopolies, rather than increasing competition."<sup>87</sup>

## 3.5 The Morality and Public Order Standard

The current approach to handling governmental objections to nationally, culturally and religiously sensitive gTLD applications is based on the Paris Convention for the Protection of Industrial Property, a 19th century trademark treaty that allowed national governments to refuse to recognize a trademark on the grounds that it conflicted with their local definition of "morality and public order."<sup>88</sup> The morality and public order standard first appeared in the GNSO final report on new gTLDs; the report's sixth recommendation stated that "strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law." In its notes on this recommendation, the

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<sup>84</sup> ICANN, "Draft Applicant Guidebook, version 2," February 19, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>.

<sup>85</sup> ICANN, "Public Comment Analysis Report: Draft Applicant Guidebook, version 2," May 31, 2009, <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>.

<sup>86</sup> Michael D. Palage, "Top Three Reasons to Just Say No to ICANN's Current EOI gTLD Proposal," Progress & Freedom Foundation Progress Snapshot 6, no. 3, January 2010, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619468](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619468).

<sup>87</sup> Janis Karklins, Chairman of the Governmental Advisory Committee, Letter to Peter Dengate Thrush, Chairman of the Board, ICANN, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

<sup>88</sup> Paris Convention for the Protection of Industrial Property, March 20, 1883 (amended September 28, 1979), [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html).



GNSO Committee on New TLDs explained that it had “examined the approach taken in a wide variety of jurisdictions to issues of morality and public order” and had “sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94.” The Committee also stated that the reference to morality and public order “remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.”<sup>89</sup>

However, the standard has met with objections from both civil society and the GAC. Opponents point out that there are no globally applicable standards of “morality and public order” and argue that the policy could be used to violate free expression rights.<sup>90</sup> Former GNSO Council Chair Avri Doria submitted a formal comment on the GNSO recommendations that typifies these objections:

By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g., a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN’s mission, I do not believe it includes the definition of a system of morality.<sup>91</sup>

The GAC has also expressed concerns about the morality and public order standard as the method of handling governmental objections to proposed TLDs. A March 2010 communiqué to the ICANN Board stated:

The GAC questions the appropriateness of the phrase “morality and public order” and is unclear how the proposed mechanism would work in practice. The GAC believes this item should not be listed on the ‘closed items’ list with respect to the new gTLD process and requests a more detailed briefing from the ICANN staff on the anticipated practical implementation of the approach.<sup>92</sup>

In October 2008, ICANN published an explanatory memorandum on the morality and public standard. The document stated that ICANN would likely restrict morality and public order objections to three areas: incitement to violent lawless action; incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; and

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<sup>89</sup> GNSO, “Final Report – Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>90</sup> Milton Mueller, “ICANN and GAC discuss censorship,” *Internet Governance Project*, June 23, 2010, [http://blog.internetgovernance.org/blog/\\_archives/2010/6/23/4560694.html](http://blog.internetgovernance.org/blog/_archives/2010/6/23/4560694.html).

<sup>91</sup> GNSO, “Final Report – Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>92</sup> “GAC Communiqué – Nairobi,” March 10, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

incitement to or promotion of child pornography or other sexual abuse of children.<sup>93</sup> A follow-up document released in May 2009 added “a determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law” to the acceptable list of morality and public order objections.<sup>94</sup> This definition is currently part of the DAG, though ICANN has not yet responded to calls from the NCUC and others that it disclose the legal analysis by which it concludes that there are such “generally accepted legal norms.”

### 3.6 Vertical Integration

A major question facing ICANN in conjunction with the introduction of new gTLDs is whether registries and registrars should be forced to remain separate. Some stakeholders recommend a clear policy preventing registry operators from acting as registrar for their own gTLDs. This policy of vertical separation is the current policy, established in response to the previous monopoly position of Network Solutions, which provided both registry and registrar functions for .com, .net and .org. Supporters of vertical separation argue that ICANN’s current policy against integration “eliminated the conflict of interest inherent in the system and resulted in robust, competitive markets for both registrars and registries, significantly lower consumer prices, and dramatic DNS growth – without jeopardizing stability or security.”<sup>95</sup>

Supporters of vertical separation argue that allowing registries to act as registrars gives them the opportunity to misuse data regarding consumer demand. Supporters of vertical integration argue the forced separation between registries and registrars is outdated.<sup>96</sup> Vertical integration, they believe, could in fact lower prices and increase quality of service.<sup>97</sup>

ICANN has commissioned two independent studies on vertical integration. The first, a report by CRA International, was made available for public comment on October 24, 2008.<sup>98</sup> It contained two primary recommendations: 1) that single organization TLDs be permitted to operate both the registry and the registrar selling domains within that TLD; and 2) that a registry may own a registrar, provided that the registrar does not sell domains within the TLDs operated by the registry. ICANN received 32 comments on this report between October 24 and December 23, 2008.<sup>99</sup>

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<sup>93</sup> ICANN, “New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs,” October 29, 2008, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>.

<sup>94</sup> ICANN, “New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research,” May 30, 2009, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

<sup>95</sup> Supporting True Intra-Registry Separation to Help Prevent Insider Trading, “Open Letter to ICANN in favor of True Registry-Registrar Separation,” <http://intratldregistryregistrar-separation.org/>.

<sup>96</sup> Tony Kirsch, “Registry/Registrar Separation: Clarifying the Mess!,” *AusRegistry*, February 17, 2010, <http://www.ausregistry.com/blog/?p=300>.

<sup>97</sup> Steven C. Salop and Joshua D. Wright, “Registry-Registrar Separation: Vertical Integration Options,” January 28, 2010, <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>.

<sup>98</sup> ICANN, “Public Comment: CRAI Report on gTLD Registries and Registrars,” October 24, 2008, <http://www.icann.org/en/announcements/announcement-24oct08-en.htm>.

<sup>99</sup> ICANN, “CRA Report: Revisiting Vertical Separation of Registries and Registrars — Summary & Analysis of Comments,” January 12, 2009, <http://forum.icann.org/lists/crai-report/pdfMQnSWwIenD.pdf>.

ICANN commissioned a review of vertical integration options from two consultants – Steven Salop, Professor of Economics and Law at Georgetown University, and Joshua Wright, Assistant Professor of Law and Economics at George Mason University – in advance of its February 2010 board meeting. The paper was made available to the public in March in order to “inform the public debate on the topic.”<sup>100</sup> The review recommends that ICANN adopt vertical separation rules regulating when a registry or registrar may acquire ownership interest in an entity at the opposite level and that these rules be based on market share. It further recommends that ICANN, rather than automatically prohibiting registries and registrars from acquiring this interest when they are above a certain market share threshold, instead notify the appropriate government authorities and make the ultimate decision to allow or disallow the acquisition based on their response.

At the March 2010 ICANN meeting in Nairobi – less than a week after the paper was made public – the ICANN Board voted to maintain vertical separation for gTLD registrars and registries. The Board cited the desire to avoid conflicts with the possible development of a new GNSO policy on vertical integration as well as the need to move forward with the gTLD process as major factors in its decision.<sup>101</sup> A summary of vertical integration proposals currently being considered by the GNSO working group can be found on the ICANN wiki.<sup>102</sup> Additional GNSO documents on vertical integration can be found on the GNSO site.<sup>103</sup>

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<sup>100</sup> John Jeffrey, “Vertical Integration Options Report Available to Community,” *ICANN Blog*, March 8, 2010, <http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/>.

<sup>101</sup> ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

<sup>102</sup> ICANN, “Vertical Integration PDP,” [https://st.icann.org/vert-integration-pdp/index.cgi?https\\_st\\_icann\\_org\\_vert\\_integration\\_pdp\\_index CGI\\_vi\\_resources](https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index CGI_vi_resources).

<sup>103</sup> GNSO, “Issues,” <http://gnso.icann.org/issues/>.



## TRANSPARENCY MEMORANDUM

From: Berkman Center's ICANN Review Team  
To: Accountability and Transparency Review Team (ATRT)  
Date: September 13, 2010  
Re: Draft Transparency Framework for ICANN Review

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### 1. Background and Purpose of Document

This memorandum summarizes the Berkman team's mid-term progress on ICANN transparency issues. It seeks to further specify some of the transparency issues identified in the relevant portion of the Berkman team's Draft Working Hypotheses that were submitted, as part of the progress report, in the preparation of the ATRT's Beijing meeting.<sup>104</sup> Finally, the memo seeks to provide cross-sectional feedback to the ATRT working groups related to transparency.

### 2. Berkman Team's Tentative Approach to ICANN Transparency

The rationale for this memorandum goes back to a preliminary analysis of ICANN case examples and case studies currently being finalized by the Berkman team, which was aimed at mapping and evaluating ICANN's internal decision-making processes. The initial review of these materials, however, revealed the limited availability of data about ICANN's information-related practices, which in turn are at the heart of any decision-making process. Against this backdrop, a review and evaluation of ICANN's overall transparency structure seemed necessary as a prerequisite step in order to bridge this information gap and develop a framework for evaluation of individual case examples. The starting point for this analysis is ICANN's transparency structure as set forth in various policies and outlined in its *Accountability & Transparency Frameworks and Principles*.<sup>105</sup>

While remaining aware of the hybrid institutional character of ICANN, the Berkman team borrowed from conceptual models and approaches used mainly to analyze public sector institutions in order to structure and discuss ICANN's transparency mechanisms. Building upon such an analytical framework and reviewing ICANN case examples, policies, and other relevant materials (including public commentary), three types of interacting, but analytically distinct, transparency mechanisms can be distinguished: ICANN's approach to **active transparency**, **passive transparency** and **participatory transparency**. We use this terminology – which categorizes information flow structures from ICANN's perspective – as follows:

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<sup>104</sup> Berkman Center for Internet & Society, *Progress Report to the ATRT*, August 28, 2010, pp. 51-54.

<sup>105</sup> ICANN, "ICANN Accountability & Transparency Frameworks and Principles," January 8, 2008, available at <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>.

- **Active Transparency:** ICANN actively makes documents available by putting them on its website.
- **Passive Transparency:** ICANN provides documents upon request from members of the general public.
- **Participatory Transparency:** ICANN involves the stakeholders and the general public in its decision-making processes by eliciting comments and inviting consultation, and thus shares and *receives* information.

### 3. Initial Observations

#### 3.1 Active Transparency

ICANN proactively publishes certain categories of information considered to be of key importance for the ICANN process on their website.<sup>106</sup> As noted in the Documentary Information Disclosure Policy (DIDP), the following categories are to be publicly available:

- Annual Reports;
- Articles of Incorporation;
- Board Meeting Transcripts;
- Minutes and Resolutions;
- Budget; Bylaws (current);
- Bylaws (archives);
- Correspondence;
- Financial Information;
- Litigation documents;
- Major agreements;
- Monthly Registry reports;
- Operating Plan;
- Policy documents;
- Speeches,
- Presentations & Publications;
- Strategic Plan;
- Material information relating to the Address Supporting Organization (ASO); (including ASO policy documents, Regional Internet Registry (RIR) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs);
- Material information relating to the Generic Supporting Organization (GNSO) (including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents), and council administration documents;
- Material information relating to the country code Names Supporting Organization (including meeting agendas, minutes, reports, and presentations);
- Material information relating to the At Large Advisory Committee (ALAC) (including correspondence, statements, and meeting minutes);
- Material information relating to the Governmental Advisory Committee (GAC)(including operating principles, gTLD principles, ccTLD principles, principles regarding gTLD Whois issues, communiqués, and meeting transcripts, and agendas);

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<sup>106</sup> Ibid.

- Material information relating to the Root Server Advisory Committee (RSSAC) (including meeting minutes and information surrounding ongoing projects); and,
- Material information relating to the Security and Stability Advisory Committee (SSAC) (including its charter, various presentations, work plans, reports, and advisories).<sup>107</sup>

The tentative review of policies and practices in the context of active transparency leads to the working hypothesis that ICANN’s active transparency approach has been largely based on providing documents as lists of links on its website, with navigation tools such as topical clusters, keywords, and search. Such information design choices are likely to have an impact on transparency. The capacity of the interested public to handle this material may need improvement (see below, section 5).

### 3.2 *Passive Transparency*

Any member of the public may request information that is not made publicly available (passive transparency). These requests are embedded in a special procedure:

If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.<sup>108</sup>

According to the DIDP, ICANN is not required to compile information summaries on request or respond to requests for information that is already publically available. Both the DIDP and the ICANN Bylaws state that translations of documents may be possible.<sup>109</sup>

An initial review of ICANN’s passive transparency policies and practices identifies two main problem areas associated with ICANN’s approach to passive transparency that deserve further investigation. First, the ways in which information about the conditions and procedures of passive transparency are shared with the community. Second, the limitations set forth in the review procedures in the case of refused information requests.

Regarding the latter aspect, if a public request for information is refused by ICANN, the DIDP states that a requestor may appeal the denial through the Reconsideration Request procedures or Independent Review procedures to the extent applicable.<sup>110</sup> However, both the Reconsideration Request and Independent Review appeal procedures are only available to persons who have been “materially affected” by an adverse decision. This reference leads to a problem in interpreting what is meant by “materially affected”, especially in the light of Article IV Section 2 (1) versus Section 2 (2) “have been adversely affected by”. The Berkman team has flagged this problem in its Feedback on WG#4 Issues Report.

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<sup>107</sup> Ibid., pp. 9-10.

<sup>108</sup> Ibid. at p. 10.

<sup>109</sup> ICANN Bylaws, Art. III, Section 7.

<sup>110</sup> *Supra* n. 2 at 11.

### 3.3 Participatory Transparency

Conceptually more difficult to capture than active and passive transparency is the notion of participatory transparency. The Berkman team, borrowing from the toolset of information law analysis, uses this term to describe a third kind of information flow, in this case from the general public to ICANN, which takes place within a formalized procedural environment to which ICANN refers to as “public comment” and “consultations.” These mechanisms of participatory transparency are aimed at channeling public discourse, opinion, and advice into the ICANN decision-making process.<sup>111</sup>

A tentative review of ICANN’s respective policies and practices suggests the need to clarify the concepts of “participation,” “consultation,” and “comments.” Related to this, the question of how the flow of information from the public to ICANN is conceptualized and designed deserves attention. More specifically, it remains to be discussed as to what extent such information flows are only meant to enhance the informational input for ICANN or are intended to fully embrace the concept of participation-oriented transparency in order to involve the community in the decision-making process.

There may be a significant difference in meaning between “public comment” and “consultation” in the public’s understanding. For the time being, we are following ICANN’s use of both terms. According to the ICANN Bylaws, the public consultation and comment procedures are triggered when the Board is considering any decision that “substantially affect[s] the operation of the Internet or third parties.” According to the DIDP and Bylaws, once these procedures are triggered, ICANN is required to:

- Provide the public with all necessary, contextual information in a timely manner;<sup>112</sup>
- explain the purpose and use of public consultation and comments;<sup>113</sup>
- provide a calendar of current consultations to the public and, where possible, future consultations that allows the ICANN community to be aware when their views will be sought on matters;<sup>114</sup>
- use online forums as the basic form of participatory involvement;<sup>115</sup> and,
- provide translations for its international audience<sup>116</sup>

In addition to the above requirements, ICANN is also required to follow a number of procedural and technical commitments. For example, ICANN must ensure all public comments are visible to all parts of the community, tag the comments, so they are linked with their sources and with their context, and provide summaries, comments and explanations. The public participation processes are also subject to an annual review.

Participatory transparency is at the intersection of participation and transparency. In the context of its transparency analysis, the Berkman team focuses on the *informational side* of the

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<sup>111</sup> Ibid. at 26.

<sup>112</sup> See the DIDP *supra* n. 3, at 7-8.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.



participation process and seeks to analyze the extent and manner in which this process contributes to transparency, in particular to the transparency of ICANN's internal decision-making processes.

### 3.1 Exemptions

In the course of reviewing the transparency-relevant materials mentioned above through the lenses of the proposed analytical framework, the Berkman team located a series of important transparency exemptions, which exempt certain types of documents and information from being shared with the public. These exemptions are described in the DIDP<sup>117</sup> and apply to all of ICANN's transparency policies and practices discussed above.

According to these rules, transparency requirements may be limited or waived where ICANN has "*identified (...) conditions for the non disclosure of information.*"<sup>118</sup> Such "conditions" comprise the following categories of information:

- Information that has been exchanged with governments or international organizations under the expectancy of confidentiality;<sup>119</sup>
- Internal information and information exchanged with entities with which ICANN is cooperating that would compromise or would be likely to compromise ICANN's internal decision making procedures;<sup>120</sup>
- Information that would constitute an invasion of privacy and information from internal appeal procedures;<sup>121</sup>
- Information provided by a third party the disclosure of which would affect the economic interests of this party and information covered by a confidentiality agreement;<sup>122</sup>
- "Confidential business information and/or internal policies and procedures;"<sup>123</sup>
- Information affecting the core interests (life, health, safety) of an individual or information affecting the administration of justice;<sup>124</sup>
- Privileged information and information affecting investigations;<sup>125</sup>
- Drafts;<sup>126</sup>
- Information relating to the security and stability of the Internet,<sup>127</sup>
- "Trade secrets and commercial and financial information not publicly disclosed by ICANN;"<sup>128</sup> and,
- Unreasonable information requests or abusive and vexatious requests.<sup>129</sup>

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<sup>117</sup> Ibid. at 9.

<sup>118</sup> Ibid, at 10.

<sup>119</sup> Ibid. at 10.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid. at 11.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

ICANN can choose to eschew these exemptions if it determines that “the public interest in disclosing the information outweighs the harm that may be caused by such disclosure” in a particular circumstance.<sup>130</sup>

Finally, it’s worth noting that the exemptions also include a “catchall” exemption, which permits ICANN to withhold the release of information “under conditions not [otherwise designated in the exemptions] if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.”<sup>131</sup>

#### **4. Next Steps**

With the outlined analytical framework at hand, which was developed by reviewing ICANN’s transparency structure, the Berkman team will revisit the case examples and case studies that are currently being finalized. The standard of evaluation will be primarily based on ICANN’s self-imposed obligations as expressed through its transparency policies. ICANN, however, has also committed itself to a dynamic understanding of its obligations and to further *develop* these policies in the light of accountability requirements and technological progress.<sup>132</sup> Therefore, the Berkman team will also compare and contrast ICANN’s practices with other case examples and state-of-the-art best practices where applicable. These standards will include – not because of legal necessity but again because of ICANN’s self-perception<sup>133</sup> – public sector examples.

We aim to provide a series of recommendations that suggest changes to ICANN’s practices or to more fundamental policy changes.

#### **5. Specification of the Berkman Team’s Draft Working Hypotheses**

This section seeks to clarify the Draft Working Hypotheses that were submitted on August 26, 2010 as part of the progress report prior to the ATRT’s Beijing meeting.

##### *5.1 Need for a Comprehensive Concept of Transparency*

This hypothesis seeks to evaluate the need of a cross-sectional approach to transparency and its application to tangible and measurement improvements in performance: What can and should be changed to improve the active communication activities of ICANN? What can be done to improve access to ICANN’s documents and information? What can be done to “informationally” enrich those procedures where the public participates in ICANN’s decision making?

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<sup>130</sup>

Ibid.

<sup>131</sup>

Ibid.

<sup>132</sup>

*Supra* n. 2 at p. 26. *See also* ICANN Bylaws, Art. III, Section 1.

<sup>133</sup>

Ibid. at p. 7.

## 5.2 Overall Improvements<sup>134</sup>

ICANN may have to further improve its information and document handling practices by adopting procedures from public sector and corporate practices. For example, incoming and internally-generated documents could be tagged to denote their level of public accessibility (classification). These tags would then be regularly reviewed within the life cycle of each document. This would facilitate the flow and accessibility of information in the context of all three types of transparency.

ICANN might be advised to fundamentally upgrade and redesign its web interface to the general public and its constituencies in a way that takes into account all categories of transparency interests (active, passive, participatory). This may include improvements such as: document tagging techniques; clear indications of documents provided upon ICANN's initiative; documents that are structured in a user-friendly manner; clarify and better communicate the procedures for requesting and obtaining unpublished information (flow-chart like description of the conditions and procedures, including review procedures (see also above normative changes); a diagrammatic *general description* of decision-making related participatory procedures, as well as a specific flow chart with an up-to-date map of the participatory procedures that are currently under way. Upgrading the web interface is not only a question of design; it is a precondition to effective transparency.

### 5.3 Active Transparency

The overall changes, particularly the redesign would transform active transparency from a mere fulfillment of obligations and substantially enhance the usability of information actively provided by ICANN.

### 5.4 Passive Transparency and Appropriate Review

ICANN's website does not provide clear information on the alternatives methods of obtaining information from ICANN. In particular, there is no clear description of the conditions and procedures to access information at ICANN which ICANN has not otherwise published or made available.

Secondly, the Berkman team hypothesizes, based on a preliminary assessment, that the review mechanisms currently in place – the Independent Review Process and Request for Reconsideration – are not well suited to address information requests that have been denied.

### 5.5 Participatory Transparency

Procedures in which the public is invited to comment could be designed in a clearer, more obvious way that maps the stages at which participants can contribute. One possible recommendation to ICANN might be not only to serve as a collector of public information that aggregates public commentary at the end of a process, but to become more engaged *during the*

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<sup>134</sup> For changes regarding EXEMPTIONS see Section 5.6 *infra*

*process.* For example, this might include actively asking questions and commenting on comments.

### *5.6 Transparency Exemptions*

Although ICANN's hybrid form differentiates it from public entities, ICANN's practices and procedures for deciding which information to actively share with the public or denying information requests can still be compared to other transparency regimes including a set of representative Freedom of Information laws (i.e., United States federal, Canada federal, Australia (Commonwealth), European Union). This is not meant to imply that such laws apply in the same legal manner as they would apply to public or governmental entities. Rather, ICANN, the GAC, and external observers have agreed that the public sector provides a useful *model* for evaluating ICANN's information policies. The specific corporate (legal) character of ICANN may then be recognized in the particular design of the exemptions to required information disclosure.

### *5.6 Transparency Audits*

Due to the fundamental importance of transparency, a regular transparency audit should be made mandatory in the information policies, and eventually be codified in the Bylaws. Categories of information pertinent to such an audit should also be expressly listed in the respective policy documents.