

# **Accountability and Transparency at ICANN**

## **An Independent Review**

Public Participation Mechanisms  
August 28, 2010



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## 1. Background

On August 5, 2010 the Berkman Center for Internet & Society entered a services agreement with the Internet Corporation for Assigned Names and Numbers (ICANN). In this agreement, individual faculty and staff 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.

As part of this process, the Berkman team is analyzing three case studies (see progress report): 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 interaction between the GAC and the Board; and 3) the DNS-CERT proposal.

In its Terms of Reference and Methodology, the ATRT outlines three lenses through which to examine ICANN’s accountability: “public sphere accountability, which deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly; corporate and legal accountability, which covers the obligations that ICANN has through the legal system and under its bylaws; and participating community accountability that ensures that the Board and executives perform functions in line with the wishes and expectations of the ICANN community.” All three are relevant to understanding the role and impact of the community and other stakeholders in ICANN’s decision-making processes.

## 2. Purpose of Document

In order to start exploring cross-sectional issues in accordance with ATRT’s methodological framework and to test the approach to fact-finding, data collection, and other relevant inputs as proposed in the services agreement, the Berkman team has drafted a series of mini-cases (“examples”) focused on the ways in which public input processes were implemented in the context of specific policy decisions.

As a draft input into the work of the ATRT, this memo presents a preliminary description of the public inputs process as it played out in the context of four policy development processes associated with the broader case studies mentioned above.

- Examples one, two and three focus on public input in the context of the gTLD case: the Draft Applicant Guidebook (DAG) and the Expression of Interest/pre-registration proposal (EOI). The memo also looks into the origins and activities of the Implementation Recommendation Team (IRT).
- The fourth example outlines ongoing public inputs into the ATRT process.

Each of these descriptions is designed to highlight the data, information, and types of inputs that the Berkman team is considering during this first round of research. Each example flows chronologically, seeking to describe at what point in the policy making process public input was solicited and through what channels and mechanisms. In the context of this initial report, the Berkman team has examined materials available on the

ICANN website, including recordings and written transcripts, public comments and their summarization by ICANN staff, and associated documents, in addition to other data.

### 3. Research Questions and Hypotheses

Preliminary research into each of the examples yielded a set of questions that can be organized into a rough outline and taxonomy of issues to consider when examining public input processes. This list is not exhaustive, but rather outlines a working framework and approach to understanding the constellation of mechanisms and activities that comprise ICANN's public inputs processes.

The research questions are divided into questions of process, how the mechanisms for public participation are implemented, and representation, which looks more broadly at the ways in which individual input is brought into the decision-making process.

#### 1. Process: How Public Inputs are Structured Across Different Policy Decisions

##### a. The Call for Public Input

- Clarity of structure and input process: What are the channels and processes for public input into this policy development process? Are they clear and accessible? Are they available to individual users?
- Timing: At what stage in the policy development process did the call for public comments occur? At what stage were those comments periods closed? When were summaries made publicly available?
- Relevant Information and Data: How much information was made available to the public regarding the decision in question? At what point? What were the opportunities for community education and learning about the particular decision? Are translations available?

##### b. Synthesis and Communication

- Summarization and the Role of the Staff: Once public comments periods are closed, how are they processed, summarized, and organized internally? Is there a consistent practice, methodology, or timetable? Are these standards evident to external participants? Do such processes vary across different types of decisions?
- Input to the Board: Does public input influence Board decision-making processes?

##### c. General Practice

- Consistency: Does there appear to be a consistent methodology for how and through what channels public input is solicited? Is there a consistent protocol regarding

what kinds of decisions might require public input, and at what stage in the decision-making process?

- Volume and Timing: How many calls for comments might be occurring simultaneously? In this particular case, were there competing opportunities for input? Were there other important decisions occurring that requested public comment?
- Cost: What are the costs for individuals to participate in the decision-making process?

## 2. Representation: Direct versus Indirect Inputs

The Berkman team seeks to assess both the direct mechanisms for community representation and indirect representation through the various supporting and advisory bodies.

### a. Participation in Supporting Organizations and Advisory Committees:

- Is there consistency across the different bodies with regard to how individuals can participate in their processes and decision-making?
- How is community participation brought into the deliberations of the various SOs and ACs? To what extent are these community inputs passed on to the Board? Is this apparent to community participants? Are the processes and mechanisms for participation transparent and clear?

### b. Participation of Supporting Organizations and Advisory Committees

- In the context of the policy decision in question, what was the role and influence of Supporting Organizations and Advisory Committees? Did certain constituencies within those bodies wield more control or engage more deeply or directly in the substance of the decision?
- In particular, what was the role and influence of the GAC? Is there a good mechanism for the Board to solicit and respond to feedback from the GAC? Does/did the timeline in this case give sufficient opportunities for input from the GAC?

### c. General

- Geographic and cultural diversity: how representative are these bodies? To what extent do they act on public inputs?

## **PUBLIC PARTICIPATION IN THE DEVELOPMENT OF THE NEW gTLD DRAFT APPLICANT GUIDEBOOK**

ICANN published the first version of the new gTLD program Draft Applicant Guidebook (DAG) on October 24, 2008. Since then, the DAG has undergone multiple iterations based on multiple rounds of public comment. It is currently in its fourth version, published on May 31, 2010. ICANN has made efforts to engage the public through multiple mechanisms, including online public comment forums, discussion of explanatory memoranda and independent studies, a wiki focused on overarching issues within the new gTLD program, public meetings and outreach events.

### ***1. Mechanisms for Public Participation***

On May 10, 2007, in an announcement titled “Have Your Say on New Top-Level Domains,” ICANN declared that it would be seeking public input on the development of the new gTLD program.<sup>1</sup> Since then, ICANN has embarked on a public participation program involving dozens of online public comment forums, discussions of explanatory memoranda and independent studies, a wiki focused on overarching issues within the new gTLD program, public meetings, and outreach events.

#### ***1.1 Online Public Comment Forums***

Since October 2008, ICANN has opened 32 public comment forums directly concerning the Draft Applicant Guidebook (DAG). Additional public comment forums have been opened to address specific issues or reports, including the gTLD program budget, economic aspects of the new gTLD program, the expression of interest proposal, root server scaling, trademark protection, and internationalized domain names.<sup>2</sup> These forums have been publicized through announcements on ICANN’s website and have drawn hundreds of comments from individuals as well as businesses, interest groups, coalitions, and associations.

ICANN staff have analyzed the comments ICANN has received in each public comment forum and published the results of these analyses (for forums directly concerning the DAG, the analyses are published in conjunction with the next draft of the guidebook). The analyses serve to summarize and categorize the comments and to explain any resulting changes ICANN staff have made to the guidebook.

#### ***1.2 Independent Studies and Explanatory Memoranda***

ICANN has published over 20 explanatory memoranda on issues ranging from the morality and public order standard to registry transition procedures. These memoranda have usually been made available for public comment in conjunction with the DAG. ICANN has also commissioned independent studies on a variety of issues, including the economic impact of the new gTLD program, vertical integration, and security and

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<sup>1</sup> ICANN, “Have Your Say on New Top-Level Domains,” May 10, 2007, <http://www.icann.org/en/announcements/announcement-10may07.htm>.

<sup>2</sup> ICANN, “New gTLD Program - Related Public Comments & Analysis,” <http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>.

stability within the DNS root server system. The bulk of these reports have been made available for public comment or discussion.

### **1.3 Wiki**

In April 2009, ICANN created a wiki as a “working space for individuals and groups willing to offer recommendations” on “overarching issues” related to the introduction of new gTLDs.<sup>3</sup> In order to participate on the wiki, users must e-mail [ngtld-overarching-issues@icann.org](mailto:ngtld-overarching-issues@icann.org) to request access. In its announcement of the wiki, ICANN stated that comments received before May 23, 2009 would be taken into consideration during the development of the third draft of the DAG. Only two comments have been posted directly to the wiki as of mid-August 2010; the rest of the content consists of copies of ICANN reports and links to the public comment forums on ICANN’s website.

### **1.4 Public Meetings**

Between June 2008 and June 2010, ICANN has held a number of sessions on the introduction of new gTLDs at its public meetings. Aside from the sessions listed below, ICANN has also organized more than 40 gTLD program outreach sessions around the world as well as public consultations on trademark protection, vertical integration and malicious conduct.<sup>4</sup> The outreach sessions and public consultations are free to attend, but attendees must pay for their own travel, accommodation and meals. Individual working groups and committees, including the Governmental Advisory Committee (GAC), have also held sessions at ICANN’s public meetings. Community members have also raised issues related to various aspects of the new gTLD program during the public forum held at each ICANN meeting.

- **June 2008 ICANN Meeting, Paris:** ICANN held a workshop on new gTLDs and an open session on protecting intellectual property in new gTLDs.
- **November 2008 ICANN Meeting, Cairo:** ICANN held three public sessions on new gTLDs: two introductions to new gTLDs (one in English and one in Arabic) and a workshop on “Understanding the New gTLD Applicant Guidebook.”
- **March 2009 ICANN Meeting, Mexico City:** ICANN held a question and answer session on the second version of the Draft Applicant Guidebook, a session on branding and new gTLDs, and a session on e-crime and malicious conduct in the new domain name space.

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<sup>3</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). See also: ICANN, “Collaborative Communication: New gTLD Overarching Issues IRT Meeting Notes Posted on New gTLD Overarching Issues Page (Updated),” April 2, 2009, <http://www.icann.org/en/announcements/announcement-02apr09-en.htm>.

<sup>4</sup> ICANN, “New gTLD Program – Global Events,” <http://www.icann.org/en/topics/new-gtlds/past-events-en.htm>. See also ICANN, “Global Consultation and Outreach Events,” <http://www.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>.

- **June 2009 ICANN Meeting, Sydney:** ICANN held four sessions on the new gTLD program: one on general program updates, one on vertical separation between registries and registrars, one on best practices for new registries, and one on trademark protection and malicious behavior.
- **October 2009 ICANN Meeting, Seoul:** ICANN held an overview session on the new gTLD program and sessions on two of the four gTLD “overarching issues,” malicious conduct, and trademark protection.
- **March 2010 ICANN Meeting, Nairobi:** ICANN held a panel discussion on the Expression of Interest proposal and an introductory session on new gTLDs. The High Security Zone Top Level Domain Advisory Group also held a public meeting.
- **June 2010 ICANN Meeting, Brussels:** ICANN presented an update on the gTLD program and held two sessions, one on brand management and one on reducing barriers to new gTLD creation in the developing world.

## **2. Version 1: October 24, 2008**

### **2.1 Opportunities for Public Comment**

ICANN published the first version of the DAG on October 24, 2008. ICANN opened a public comment forum to address the entire document, as well as additional forums to address each of the document’s six modules. As the materials were translated into Arabic, Chinese, French, Russian and Spanish, each translated version was also made available for comment.<sup>5</sup>

The DAG was accompanied by nine explanatory memoranda published between February 6 and December 3, 2008, as well as a timeline that indicated that ICANN intended to launch the gTLD program by mid-2009. ICANN also published a document cross-referencing the DAG to the GNSO Policy Recommendations, demonstrating how each recommendation had been taken into account in various modules of the DAG.<sup>6</sup>

The public comment forums were initially scheduled to close on December 8, 2008, but on December 3, ICANN announced that, in response to “growing interest and on-going inquiries” concerning the proposed gTLD base agreement, it was posting additional explanatory materials and extending the comment period to December 15, 2008.<sup>7</sup> One of these explanatory documents, the “Comparison between gTLD Agreements from

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<sup>5</sup> ICANN, “Welcome to the New gTLD Applicant Guidebook Public Comment Forum,” October 24, 2008, <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>.

<sup>6</sup> ICANN, “New gTLDs Policy Recommendations and the Implementation Work on the Applicant Guidebook,” October 22, 2008, <http://www.icann.org/en/topics/new-gtlds/recommendations-22oct08-en.pdf>.

<sup>7</sup> ICANN, “More Time and Additional Materials Posted for Applicant Guidebook,” December 3, 2008, <http://www.icann.org/en/announcements/announcement-03dec08-en.htm>.

2005-2007 and Draft Base Registry Agreement for New gTLDs," was an annotated comparison showing each difference between the 2005-2007 gTLD agreements and the proposed new base agreement.<sup>8</sup>

According to former ICANN Board member Michael Palage, the comment period left insufficient time for the GAC to substantively comment on the DAG. "If ICANN does not revise its aggressive timeline, the GAC and other governments will be commenting on the October 2008 Draft just as the ICANN staff is seeking new comments on the February 2009 draft," he wrote in a post on *Circle ID*.<sup>9</sup>

## **2.2 Public Comments and ICANN Response**

On February 18, 2009, ICANN published a 154-page analysis of the more than 300 comments it received in the seven public comment forums concerning the first draft of the DAG.<sup>10</sup> This analysis was published in conjunction with the second draft of the DAG. The analysis divided the comments into thirteen categories and multiple sub-categories. For each category, ICANN provided:

- A summary of the key points;
- A summary of the comments;
- A list of the main issues raised;
- An analysis of these issues; and
- Its proposed position (as reflected in the second version of the DAG, published concurrently with the analysis).

Articles and blog posts published by followers of the gTLD process during this public comment period pointed to the fact that multiple companies and the United States government opposed the expansion of new gTLDs.<sup>11</sup> ICANN responded to this criticism by pointing to the GNSO policy recommendations on new gTLDs, which underwent multiple public comment periods and discussions with a variety of stakeholders and were

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<sup>8</sup> ICANN, "Comparison between gTLD Agreements from 2005-2007 and Draft Base Registry Agreement for New gTLDs," December 3, 2008, <http://www.icann.org/en/topics/new-gtlds/draft-agreement-annotated-comparison-03dec08-en.pdf>.

<sup>9</sup> Michael Palage, "ICANN's gTLD Proposal Hits a Wall: Now What?," *Circle ID*, December 23, 2008, [http://www.circleid.com/posts/icann\\_gtld\\_proposal\\_hits\\_wall\\_now\\_what/..](http://www.circleid.com/posts/icann_gtld_proposal_hits_wall_now_what/)

<sup>10</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>11</sup> Joel Hruska, "ICANN plan for new TLDs comes under barrage of criticism," *Ars Technica*, December 16, 2008, <http://arstechnica.com/security/news/2008/12/icann-plan-for-new-tlds-comes-under-barrage-of-criticism.ars>. See also Michael Palage, "ICANN's gTLD Proposal Hits a Wall: Now What?," *Circle ID*, December 23, 2008, [http://www.circleid.com/posts/icann\\_gtld\\_proposal\\_hits\\_wall\\_now\\_what/..](http://www.circleid.com/posts/icann_gtld_proposal_hits_wall_now_what/)



approved by a supermajority within the GNSO. Annex A of ICANN's Bylaws, which governs the GNSO policy development process, states that "the Board shall adopt the policy according to the GNSO Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN."<sup>12</sup> In addition, ICANN commits in its Bylaws to "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."<sup>13</sup> While certain corporations and governments were opposed to the introduction of new gTLDs, a large number of potential applicants exist, and ICANN argued that Internet users may benefit from the increased competition an expansion of the DNS namespace may provide.

### 2.2.1 Overarching Issues

ICANN's analysis identified four "overarching issues" requiring additional discussion before changes could be made to the DAG: 1) Security and Stability; 2) Malicious Conduct; 3) Trademark Protection; and 4) Demand/Economic Analysis. In its analysis, ICANN staff pledged to solicit additional feedback from a variety of sources and conduct additional research before proposing any solutions:

- **Security and Stability:** The ICANN Board asked the Security and Stability Advisory Committee and Root Server System Advisory Committee to jointly conduct a study analyzing the impact to security and stability within the DNS root server system of the proposed gTLD expansion.
- **Malicious Conduct:** ICANN pledged to "actively solicit[] feedback...over the next 60 days" on the potential for malicious conduct (specifically criminal conduct: phishing, pharming, malware, botnets) in the new DNS namespace.
- **Trademark Protection:** 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. *Note: For more information about public participation with respect to ICANN's handling of trademark protection issues in the new gTLD program, please see the Implementation Recommendation Team public participation memo.*
- **Demand/Economic Analysis:** ICANN pledged to release two studies, one on the "[economic] dynamics of the domain system in broad" and one on the economic impact of the gTLD expansion, and to post these studies for public comment prior to the third draft of the DAG.

As part of their efforts to solicit feedback on the "overarching issues," ICANN staff created a wiki in April 2009 focused on these topics.<sup>14</sup> The wiki was open to any group or individual who wanted to participate, provided

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<sup>12</sup> ICANN, "Bylaws," <http://www.icann.org/en/general/bylaws.htm>.

<sup>13</sup> ICANN, "Bylaws," <http://www.icann.org/en/general/bylaws.htm>.

<sup>14</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). See also: ICANN, "Collaborative Communication: New gTLD Overarching Issues IRT Meeting Notes Posted on New gTLD Overarching Issues Page (Updated) ," April 2, 2009, <http://www.icann.org/en/announcements/announcement-02apr09-en.htm>.

they first e-mailed ICANN staff to request access. Only two comments have been posted directly to the wiki as of mid-August 2010; the rest of the content consists of copies of ICANN reports and links to the public comment forums on ICANN’s website.

## 2.2.2 Substantial Changes to the DAG

In response to the comments it received, ICANN focused on several “major areas of change” between the first and second versions of the DAG: compliance, registry/registrars separation, annual registry fees, geographical names, auctions as a last resort contention resolution, and the general communications/timeline. Substantial changes included:

- **Vertical Integration:** In response to the level of public interest in registry/registrars separation, ICANN commissioned an independent report by Charles River Associates (CRA) and held two public consultations in mid-December 2008 on the issue. After considering a number of models proposed via the public comment system and weighing the CRA report, ICANN decided to propose a “limited lifting of restrictions on registry-registrars cross-ownership” in the second draft of the DAG.
- **Geographical Names:** Public comments on the issue included those made by the ccNSO, which was concerned that new gTLDs may be easily confused with ccTLDs; by potential applicants concerned with how ICANN would decide which applicant would receive the gTLD for a common city name (theoretical example: Lawrence, Massachusetts versus Lawrence, Kansas); by .NYC representatives, who argued that the existing grounds for objection in the first draft of the DAG were not sufficient to protect the interests of local and national governments, and by Chuck Gomes of VeriSign, who pointed out that the GNSO recommendations included a dispute process for handling geographic names and that extensive protection over geographical terms would go “beyond what [he] believe[d] the GAC requested.” ICANN amended the second version of the DAG to require “evidence of support, or non-objection from the relevant government or public authority” for applicants for geographic name-based gTLDs. ICANN also pledged to hold further discussions with the GAC, the ccNSO and others.

## 2.2.3 Timeline

In response to comments that the proposed timeline was too aggressive given the unresolved “overarching issues,” ICANN extended the expected application launch date from September 2009 to December 2009.

## 3. *Version 2: February 19, 2009*

### 3.1 *Opportunities for Public Comment*

The second draft of the DAG was published on February 19, 2009 and made available for public comment until April 13, 2009. Seven public comment forums existed: one for the entire document and one for each of

its six modules. As materials were translated into Arabic, Chinese, French, Russian and Spanish, they were made available for comment as well.<sup>15</sup>

In addition to the DAG, ICANN also published the review of comments mentioned above, five explanatory memoranda, and ‘redline’ versions of the DAG and each of its modules highlighting the changes that had been made between the first and second drafts.

### **3.2 Public Comments and ICANN Response**

On May 31, 2009, ICANN staff published an analysis of comments on the second draft of the DAG. This analysis was published concurrently with a series of revised excerpts from the DAG; in the analysis, ICANN promised to publish the third draft of the DAG after its June 2009 meeting. As with the first analysis of comments, ICANN staff separated the comments into categories and provided a list of key points, a summary of input, an analysis of the major issues raised, and a proposed position for each category.<sup>16</sup>

#### **3.2.1 Overarching Issues**

In its analysis of public comments, ICANN pledged that the third version of the DAG would include solutions (based on the feedback it had promised to solicit from various experts, ICANN constituencies and the general public) to the four “overarching issues” identified after the first round of DAG public comments. It also promised to focus on these issues at the June 2009 ICANN meeting and to hold regional events in the Americas, Asia and Europe focusing on trademark protection (one of the four overarching issues). Michael Palage released a statement arguing that ICANN had “simply kicked the can down the road” on how to minimize the impact of abusive domain name registrations, which he considered to be the biggest concern.<sup>17</sup> Julian Sanchez of Ars Technica wrote that security and stability concerns were similarly delayed.<sup>18</sup>

#### **3.2.2 Substantial Changes to the DAG**

In response to the comments it received, ICANN made several substantial changes to certain modules of the DAG (revised excerpts of these modules were published along with the analysis of public comments). These changes included:

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<sup>15</sup> ICANN, “Welcome to the New gTLD Applicant Guidebook Version 2 (V2) Public Comment Forum,” February 19, 2009, <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm>.

<sup>16</sup> ICANN, “New gTLD Draft Applicant Guidebook - Version 2: Analysis of Public Comment,” May 31, 2009, <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>.

<sup>17</sup> Michael Palage, “Palage Statement on ICANN’s Second Draft gTLD Guidebook,” Progress & Freedom Foundation, February 19, 2009, <http://www.pff.org/news/news/2009/021909advisorypalageICANN.html>.

<sup>18</sup> Julian Sanchez, “ICANN report: new gTLD program riddled with problems, delayed,” Ars Technica, February 22, 2009, <http://arstechnica.com/tech-policy/news/2009/02/icann-releases-new-gtld-guidelines.ars>.

- **Geographical Names:** Public comments on the geographical names issue indicated a need for more clarity as to what constituted a geographical name. Comments also criticized ICANN for requiring applicants to obtain government approval for each regional, state or city-level gTLD — “ICANN seems not to know how government works,” said DotAfrica representatives. Representatives of the Internet Commerce Association demanded to know why ICANN had chosen the recommendations of the GAC over those of the GNSO, echoing earlier comments made by Chuck Gomes of VeriSign. In response, the ICANN analysis stated that the section on geographical names was drafted “in the context of the points raised by the GAC, the ccNSO and the GNSO policy recommendations” and pointed to ICANN’s Bylaws, which require the ICANN Board to explain to the GAC any policy deviation it makes from the GAC’s advice.
- **Dispute Resolution Procedures:** In response to public comments seeking more clarity about the dispute resolution procedure, ICANN added an attachment to the DAG describing how disputes over new gTLDs will be handled.
- **Registry Agreement Specifications:** ICANN instituted a ‘thick’ Whois requirement for all new gTLD registry operators, which would make the name, address and phone number of domain name registrants publicly available. In accordance with a GAC report clarifying its desired protections for geographic names,<sup>19</sup> ICANN also added a requirement that registries reserve country and territory names at the second level.

### 3.2.3 Timeline

ICANN pushed back the timeline for a second time, announcing that the third version of the DAG would be published in early September 2009, with applications beginning in the first quarter of 2010. Public comments expressed concern that ICANN was creating an “artificial” timeline before thoroughly addressing important issues, that the existing timelines were overly vague (i.e., providing an expected launch date but excluding dates for specific steps of the process such as the publication of new DAG drafts, the opening and closing of comment periods, and public meetings), and that the existing timeline was unreliable.

## 4. Revised Excerpts: May 31, 2009

### 4.1 Opportunities for Public Comment

On May 31, 2009, ICANN released a number of revised excerpts from the DAG for public comment. These excerpts were from Modules 2-5 of the DAG, concerning evaluation procedures, dispute resolution

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<sup>19</sup> Janis Karklins, Letter to Paul Twomey, May 26, 2009, (<http://www.icann.org/correspondence/karklins?to?twomey?29may09?en.pdf>).

procedures, string contention procedures, and transition to delegation. ICANN opened a public comment forum through July 20, 2009 for each of the four modules.<sup>20</sup>

## **4.2 Public Comments and ICANN Response**

ICANN published an analysis of the comments it received on the revised excerpts of the DAG on October 4, 2009, in conjunction with the third draft of the DAG.<sup>21</sup> These comments included specific criticisms of the way ICANN was incorporating public participation in the development of the new gTLD program:

The staff-created and staff-centric approach is not working; it is elevating the role of staff compared to the level of the public and is top-down instead of bottom up. (G. Kirikos)

It is...not clear how end users' opinions are being considered. (A. Al-Zoman)

In their analysis of these comments, ICANN staff responded by highlighting the "bottom-up, multi-stakeholder policy development process" involved in creating the GNSO policy recommendations for new gTLDs.

### **4.2.1 Substantial Changes to the DAG**

Because this round of public comment focused on excerpts from the DAG, rather than on the guidebook as a whole, ICANN did not highlight any major areas of change. However, the issues of trademark protection, geographical names and objection standards (including community objection standards and the morality and public order standards) drew a considerable number of comments.

## **5. Version 3: October 4, 2009**

### **5.1 Opportunities for Public Comment**

Version three of the DAG was released on October 4, 2009. As with previous public comment rounds, ICANN opened seven public comment forums to discuss the overall document and each of its six modules.<sup>22</sup> The comment period closed on November 22, 2009.

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<sup>20</sup> ICANN, "Welcome to Revised Excerpts of New gTLD Applicant Guidebook (DAG) Public Comment Forum," May 31, 2009, <http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm>.

<sup>21</sup> ICANN, "Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda," October 4, 2009, <http://www.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf>.

<sup>22</sup> ICANN, "Welcome to the New gTLD Applicant Guidebook Version 3 (V3) Public Comment Forum," October 4, 2009, <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>.

## **5.2 Public Comments and ICANN Response**

ICANN published an analysis of the public comments on version three of the DAG on February 15, 2010.<sup>23</sup>

### **5.2.1 Timeline**

Public comments indicated that the recurring delays in the launch of the new gTLD program were threatening ICANN's credibility, though some commentators expressed a need for more time to sufficiently address the overarching issues and "minimize adverse consequences, especially in today's economy." In their analysis, ICANN's analysis of these comments pointed to the difficulties of reaching consensus and resolving the "overarching issues" as the reason for delay and noted that the development of the Expression of Interest proposal was in response to these concerns.

## **6. Additional Materials: February 15, 2010**

### **6.1 Opportunities for Public Comment**

On February 15, 2010, ICANN published a list of additional materials and explanatory memos related to the gTLD program. These documents were available for public comment until April 1, 2010 and included materials on trademark and community protections, internationalized domain name (IDN) issues, registry operations and agreement, and malicious conduct.<sup>24</sup> Several of these papers were the outcome of various Working and Advisory Group proposals and studies, including efforts by the High Security Top Level Domain Advisory Group, the Zone File Access Advisory Group, and the GNSO's Registry Stakeholder Group.

### **6.2 Public Comments and ICANN Response**

Separate analyses were published for each public comment forum (10 in all) on May 28, 2009.<sup>25</sup> Antony von Couvering of Minds + Machines highlighted several key areas of change in version four of the DAG that raise questions related to public participation:

- At the March 2010 ICANN meeting in Nairobi, the ICANN Board voted to maintain vertical separation between registries and registrars. This is reflected in the fourth version of the DAG, though it is subject to change in accordance with the recommendations of the GNSO working group on vertical integration. Von Couvering points out that this working group consists "almost wholly of registrars and registries aiming

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<sup>23</sup> ICANN, "New gTLD Draft Applicant Guidebook Version 3: Public Comments Summary and Analysis," February 15, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>.

<sup>24</sup> ICANN, "New gTLD Program Makes Available New Documents for Community Discussion," February 15, 2010, <http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>.

<sup>25</sup> ICANN, "Public Comment Summaries & Analyses," May 28, 2010, <http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm>.

competing proposals at each other,” with few proposals that take consumer interests into account. A summary of these proposals can be found on the GNSO vertical integration working group wiki.<sup>26</sup>

- The background check for gTLD applicants has been expanded. Among the things that can disqualify an applicant (corruption, bribery, terrorism, etc.) are “intellectual property violations.” Von Couvering questions the DAG’s equation of intellectual property violations with terrorism and suggests that the IP constituency is behind this addition.<sup>27</sup>

ii.

## **7. Version 4: May 31, 2010**

### **7.1 Opportunities for Public Comment**

ICANN published the fourth draft of the DAG on May 31, 2010. The new gTLD program budget was also made available for comment in conjunction with the DAGv4. The public comment forums closed on July 21, 2010.<sup>28</sup>

### **7.2 Public Comments and ICANN Response**

ICANN has not yet published its analysis of public comments on the fourth version of the DAG. The public comment forum for the guidebook as a whole contains 125 e-mails, while the six individual module forums contain a total of 25 additional e-mails.<sup>29</sup>

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<sup>26</sup> ICANN, “Vertical Integration PDP,” [https://st.icann.org/vert-integration-pdp/index.cgi?https\\_st\\_icann\\_org\\_vert\\_integration\\_pdp\\_index CGI\\_resources](https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index CGI_resources).

<sup>27</sup> Antony von Couvering, “Latest Version of ICANN’s Applicant Guidebook – DAG4,” Minds + Machines, June 1, 2010, <http://www.mindsandmachines.com/2010/06/latest-version-of-icanns-applicant-guidebook-dag4/>.

<sup>28</sup> ICANN, “Welcome to the New Generic Top-Level Domains (gTLDs) Draft Applicant Guidebook, Version 4 Public Comment Forum,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm>.

<sup>29</sup> ICANN, “Welcome to the New Generic Top-Level Domains (gTLDs) Draft Applicant Guidebook, Version 4 Public Comment Forum,” <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm/>.

## **PUBLIC PARTICIPATION AND THE EXPRESSION OF INTEREST PROPOSAL**

At the October 2009 ICANN meeting in Seoul, Korea, prospective gTLD applicants expressed frustration at the delays in the development of the new gTLD process. They put forth the idea of an Expression of Interest (EOI) model in order to advance the process. The ICANN Board subsequently directed ICANN staff to solicit public input on the form an EOI model might take and to submit a draft model to the Board at the December 2009 meeting. After several rounds of public comment, the ICANN Board voted against implementing an EOI model, claiming it would cause unnecessary confusion and delay and that it would take resources away from other critical issues.

### **1. Introduction**

The idea of an Expression of Interest (EOI) model was advanced at the October 2009 ICANN meeting in Seoul by prospective applicants who were frustrated at the delays in the development of the new gTLD program and concerned that the process, which was becoming increasingly expensive, may be put off indefinitely.<sup>30</sup> Following an open meeting about new gTLDs in which these concerns were expressed, the ICANN Board resolved to direct ICANN staff to submit a draft EOI model based on public inputs for Board consideration at the December 2009 meeting.<sup>31</sup>

The draft EOI model, announced on December 18, 2009, 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.

### **2. Public Comment Forum: November 11 – December 11, 2009**

On November 11, 2009, ICANN announced it was seeking “information, advice and proposed models” as it considers how best to solicit expressions of interest in new gTLDs. It opened a public comment forum in which participants were encouraged to “1) propose EOI models; and 2) offer support or criticism for the concept overall.” The forum was open through December 11, 2009, but participants were notified that in order for their comments to be considered during the December 2009 Board meeting, they should be submitted by November 27, 2009.<sup>32</sup>

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<sup>30</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>.

<sup>31</sup> ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

<sup>32</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>.



Former ICANN Board member Michael Palage noted that this *de facto* shortening of the comment period was perhaps in violation of ICANN’s Bylaws, which require ICANN to “provide a reasonable opportunity for parties to comment...to see the comments of others, and to reply to those comments, prior to any action by the Board” in cases where the Board is considering the adoption of new policies that would “substantially affect the operation of the Internet or third parties.”<sup>33</sup> Palage also expressed concerns that ICANN’s analysis of these comments violated the 2009 Affirmation of Commitments, in which ICANN pledged to “perform and publish analyses of the positive and negative effects of its decisions on the public,”<sup>34</sup> by failing to provide enough context. Finally, Palage argued that by introducing the idea of an EOI after the Governmental Advisory Committee’s October 2009 meeting and proposing a vote on the EOI proposal before the Committee’s next in-person meeting, ICANN was in violation of Article III, Section 6 of its Bylaws, which require ICANN to consult the Governmental Advisory Committee (GAC) “in those cases where the policy action affects public policy concerns.”<sup>35</sup>

## **2.1 Review of the comments**

ICANN received 92 comments in response to its request for public input on the EOI proposal.<sup>36</sup> ICANN’s analysis of the public comment forum, published on January 4, 2010, broke the comments into the following categories:<sup>37</sup>

### **2.1.1 Process Concerns**

Trademark Association (INTA), the Coalition for Online Accountability (COA, a group of nine copyright industry organizations), and .NYC representative Thomas Lowenhaupt. Other participants expressed concerns that ICANN staff should not create the EOI without further discussion among the community, the GNSO, the ccNSO, the GAC and the ALAC; the COA worried that the EOI proposal was premature given the number of other outstanding issues with the gTLD program.

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<sup>33</sup> ICANN, “Bylaws for Internet Corporation for Assigned Names and Numbers,” amended August 5, 2010, <http://www.icann.org/en/general/bylaws.htm>.

<sup>34</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>35</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>36</sup> ICANN, “[eoi-new-gtlds] Chronological Index,” <http://forum.icann.org/lists/eoi-new-gtlds/>.

<sup>37</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>.

### 2.1.2 Opposition to EOI

Opponents to the EOI included the INTA, Eric Brunner-Williams (Chief Technology Officer of Core Internet Council of Registrars), Microsoft, and several gTLD consulting firms. Their arguments included concerns that the EOI would be counterproductive, cause unnecessary delays, distract from more important issues and pose a threat to competition by forcing potential applicants to disclose their TLD ideas.

### 2.1.3 Support for EOI

Supporters of the EOI included a number of Internet marketing companies, TLD consulting firms, self-identified potential gTLD applicants (including business and civil society organizations), and GoDaddy. Proponents of the model 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 supporters of an EOI model:

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 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>38</sup>

### 2.1.4 EOI – Suggested Approaches, EOI Requirements and Potential Changes to the DAG

Comments in the “EOI – Suggested Approaches,” “EOI Requirements” and “Potential Changes to the DAG” categories included discussions over the potential EOI fee and possible refunds for unsuccessful applications, as well as the need for an extensive public outreach campaign regarding the final EOI decision. Comments also focused on what information would be collected from potential applicants and what of this would be made public, as well as proposals for a multi-stage EOI process and a discussion of whether certain sections of the Draft Applicant Guidebook should be finalized before the launch of an EOI.

### 2.1.5 EOI Benefits

The gTLD Registries Stakeholder Group (RySG), the EOI Working Group, representatives from Dot Eco, Michael Palage, and Antony von Couvering (CEO of TLD consulting service Minds + Machines) highlighted the

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<sup>38</sup> Stephen Ruskowski, “EOI,” November 17, 2009, <http://forum.icann.org/lists/eoi-new-gtlds/msg00009.html>.

potential value of the EOI to reduce economic and trademark violation risks as well as the possible risks associated with root scaling and to collect information about the number and type of potential applications.

### **2.1.6 EOI Potential Risks**

Microsoft highlighted the potential reputational (accusations of an “insider bias”) and financial (litigation-related) risks to ICANN. RySG and several others pointed out that the success of the EOI depended on a successful EOI design. Multiple participants raised the question of further delays in the gTLD process.

### **2.1.7 Economic Demand**

Andrew Alleman of the Domain Name Wire blog argued that the EOI would not help estimate economic demand for new TLDs, but rather highlight demand from new gTLD applicants.

## ***2.2 ICANN response to the comments***

At the December 9, 2009 Board meeting, Rod Beckstrom stated that the three main issues surrounding the EOI were “fees (is there a fee; if so, how much, and is it refundable); will the EOI be a queuing device or opening of the new gTLD round; and will the data be public or private?” ICANN Chief Operating Officer Doug Brent highlighted three options – required participation in a “firm” EOI, optional and low-cost participation in a “soft” EOI, or no EOI – and stated that the staff recommended a “firm” EOI, as it would provide ICANN with the most information regarding potential gTLD applications. After some discussion, the Board unanimously resolved that:

ICANN staff shall summarize: a) the public comments resulting from the publication of the risks and considerations considered by the board, b) ICANN Board’s determinations on the EOI process model, and c) the additional staff analysis undertaken; and present that summary to the ICANN Board. Further, along with that summary ICANN staff shall present a proposed EOI process model for approval at the ICANN Board’s February 2010 meeting.<sup>39</sup>

In the EOI draft published after the comment period closed, ICANN staff acknowledged and responded to each of the categories of comments above. Their main points:

### **2.2.1 Process Concerns**

ICANN staff stated that while the initial public comment period was short, public discussion of the EOI proposal would continue via public comments on the draft model itself.

### **2.2.2 Opposition to EOI**

ICANN staff stated that opponents to the EOI proposal were in the minority of those who submitted comments on the proposal.

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<sup>39</sup> ICANN, “Minutes of the Special Board Meeting,” December 9, 2009, <http://www.icann.org/en/minutes/minutes-09dec09-en.htm>.

### 2.2.3 EOI – Suggested Approaches and EOI Requirements

ICANN staff determined that the full benefits of the EOI process would be best attained by requiring applicants to participate in the EOI.

### ***3. Public Comments on the Draft EOI Model: December 18, 2009 – January 27, 2010***

On December 18, 2009, ICANN staff 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>40</sup> ICANN opened a second public comment period on this model through January 27, 2010.

#### ***3.1 Review of the comments***

Arguments against the proposed model clustered around four main points: cost, effectiveness, possible favoritism toward ICANN insiders, and its potential to create a secondary market for TLDs.<sup>41</sup> As summarized by ICANN staff, these comments were:

##### **3.1.1 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>42</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. Michael Palage suggested charging a nominal fee of \$100. 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

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<sup>40</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>41</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>42</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>.

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.

### 3.1.2 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 unnecessarily delayed the application process and pulled attention away from other, more serious issues such as vertical integration. Supporters argued the EOI model would “illuminate” the gTLD landscape, helping avoid conflicting applications and better informing potential applicants of any serious threats to their applications.

### 3.1.3 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>43</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>44</sup> In its analysis of the public comments, ICANN staff 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>45</sup>

### 3.1.4 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 submitting multiple EOIs, then 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

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<sup>43</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>44</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>45</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>.

will actually be obtained, so the likelihood that someone will decide the possible advantages outweigh the financial risks is quite small.<sup>46</sup>

### **3.2 ICANN response to the comments**

Overall, ICANN received approximately 370 comments during its two public comment forums on the EOI proposal.<sup>47</sup> In its analysis of the comments, ICANN staff noted that “Many responses expressing opposition actually state the EOI is acceptable if conducted in a certain way. In general there was broad support for the ‘information-gathering’ aspect of the proposal.” However, ICANN staff acknowledged that certain “overarching issues” would need to be addressed before the implementation of an EOI, meaning the EOI would not launch until the publication of the fourth draft of the DAG.

## **4. Final Decision**

ICANN held a public meeting and panel discussion on the EOI proposal during the March 2010 ICANN meeting in Nairobi. The panel was comprised of Board member Bruce Tonkin, Avri Doria of the Non-Commercial Stakeholders Group, Bertrand de La Chapelle (representing the French government), Zahid Jamil of the Domain Name Dispute Resolution Center, Olivier Crepin-Leblond (At-Large), potential applicant Richard Tindal, and Antony Van Couvering.<sup>48</sup> Among the concerns expressed at this panel was that ICANN was attempting to “solve the old process, the not-working process, by inventing yet a new process.”<sup>49</sup>

At the Nairobi meeting, the Board voted against implementing an EOI model, claiming it would cause unnecessary confusion and delay and that it would take resources away from other critical issues.<sup>50</sup>

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<sup>46</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>47</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>48</sup> ICANN, “New gTLD Update and EOI Panel Discussion,” March 8, 2010, <http://nbo.icann.org/node/8877>.

<sup>49</sup> ICANN, “Transcript: New gTLD Update and EOI Panel Discussion,” March 8, 2010, <http://nbo.icann.org/meetings/nairobi2010/transcript-new-gtld-update-eoi-panel-08mar10-en.txt>.

<sup>50</sup> ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

## **PUBLIC PARTICIPATION AND THE IMPLEMENTATION RECOMMENDATION TEAM**

After the release of the first gTLD Draft Application Guidebook in October 2008, the ICANN staff identified four “overarching issues” among the comments and submissions they received. Among these issues was trademark protection. The Implementation Recommendation Team (IRT) was established by the ICANN Board, via a March 6, 2009 resolution, to address these concerns.<sup>51</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 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>52</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 directed the IRT to deliver its final report for community discussion at the June 2009 ICANN meeting in Sydney, Australia. The IRT report proposed the following mechanisms for trademark protection:

- establishment of an IP Clearinghouse, Globally Protected Marks List (and Associated Rights Protection Mechanisms), and standardized pre-launch rights protection mechanisms;
- universal implementation of a Uniform Rapid Suspension System for infringing content;
- creation of post-delegation dispute resolution;
- stringent Whois requirements for new gTLDs; and

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<sup>51</sup> ICANN, “Adopted Board Resolutions | Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>52</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>.

- algorithm use in string confusion review during the initial evaluation phase.<sup>53</sup>

## **1. Draft Report: April 24, 2009**

### **1.1 Opportunities for Public Participation**

In early April, ICANN established a wiki focused on the four “overarching issues” related to new gTLDs. In order to participate, members of the public were required to e-mail ICANN staff to request access. As of August 2010, one comment on trademark protection issues has been submitted.<sup>54</sup>

The IRT draft report was published on April 24, 2009 and made available for public comment through an online forum until May 24, 2009. In its announcement of the public comment period, ICANN stated that “those wishing to have the IRT consider their comments in connection with its final report should submit comments by 6 May, 2009.”<sup>55</sup> The announcement also stated that the IRT would be conducting an open discussion of its proposal at the June 2009 ICANN meeting in Sydney.

Several individual community members who had submitted substantive comments and proposals during the earlier portion of the draft report public comment round were invited to participate in an in-person IRT meeting held on May 11, 2009 in San Francisco.

### **1.2 Review of Public Comments**

On June 5, 2009, ICANN staff published a summary of the comments it received on the IRT draft report.<sup>56</sup> The comments center around six specific areas: the timeline and IRT’s processes in general; the IP Clearinghouse, Globally Protected Marks List (GPML), and Watch Service; the Uniform Rapid Response System (URS); the Post-Delegation Dispute Resolution Mechanism; Whois; and the algorithm to help review string confusion issues. Among the most common criticisms were that the IRT’s recommendations were “outside the scope of trademark law and outside scope of ICANN.”

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<sup>53</sup> ICANN, “Public Comment: Trademark Protection (IRT Final Report),” May 29, 2009, <http://www.icann.org/en/announcements/announcement-4-29may09-en.htm>.

<sup>54</sup> ICANN, “New gTLD Overarching Issues: Trademark Protection,” [https://st.icann.org/new-gtld-overarching-issues/index.cgi?trademark\\_protection](https://st.icann.org/new-gtld-overarching-issues/index.cgi?trademark_protection).

<sup>55</sup> ICANN, “Public Comment: Trademark Protection Draft Report,” April 24, 2009, <http://www.icann.org/en/announcements/announcement-24apr09-en.htm>.

<sup>56</sup> ICANN, “IRT Draft Report (April 24, 2009): Public Comments Summary,” June 5, 2009, <http://forum.icann.org/lists/irt-draft-report/pdfCaT4zgja11.pdf>.



The ALAC released a statement on May 12, 2009 expressing concerns over the short timeline for public comment and the overall “undue haste of the process.” The ALAC also raised privacy concerns vis a vis the Whois requirements for new TLDs.<sup>57</sup>

## **2. Final Report: May 6, 2009**

### **2.1 Opportunities for Public Participation**

The IRT posted its final report on ICANN’s website on May 29, 2009. An online public comment forum was opened until June 29, 2009 (this period was later extended to July 6, 2009).<sup>58</sup> ICANN also announced that the community would have further opportunity to discuss the IRT draft and proposal in an open forum at the June 2009 ICANN meeting in Sydney, as well as in public consultations to be scheduled in July and August 2009.

### **2.2 Review of Public Comments**

ICANN staff released a 15-page summary and analysis of public comments on the final IRT report on October 4, 2009.<sup>59</sup> This summary included both comments received through the online forum and comments made during public sessions on the IRT’s proposed Post-Delegation Dispute Mechanism held in Sydney, New York and London. The IRT process was criticized as being overly hurried and exclusionary, to the extent that some commentators questioned whether the process was “controlled” by intellectual property interests.

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. The statement also claimed that “in the case of the IRT Report, we had neither transparency nor openness “ and announced ALAC and NCUC’s formal opposition to the GPML, Uniform Rapid Suspension System and thick Whois proposals.<sup>60</sup>

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<sup>57</sup> ALAC, “Statement on the IRT Draft Report: Response of the ALAC to the Public Comment Period on the IRT Draft Report,” May 12, 2009, <http://www.atlarge.icann.org/files/atlarge/alac-statement-draft-irt-report-12may09-en.pdf>.

<sup>58</sup> ICANN, “**Public Comment: Trademark Protection (IRT Final Report),**” May 29, 2009, <http://www.icann.org/en/announcements/announcement-4-29may09-en.htm>.

<sup>59</sup> ICANN, “Comment and Analysis on IRT Report: Post-Delegation Dispute Mechanism and Other Topics,” October 4, 2009, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-irt-final-report-04oct09-en.pdf>.

<sup>60</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).

Kathy Kleiman, posting to the public forum on behalf of the NCUC, outlined several concerns regarding the IRT's final draft and process.<sup>61</sup> Among the NCUC's concerns was the fact that the views of registrants, be they individual, noncommercial or commercial in nature, had been "noticeable [sic] absent" during the IRT. The NCUC characterized the IRT's process as "Masonic," pointing out that the IRT had provided no information about its meetings and no updates on the progress of its work. The NCUC also argued that the implementation of the IRT recommendations would fall beyond ICANN's technical mandate and scope.

### **3. ICANN Response**

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>62</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 report representing tradeoffs and compromises among positions. Its December 11, 2009 report<sup>63</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>64</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 Draft Applicant Guidebook 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>65</sup> No resolution was made on the Whois requirement, though on July 26, ICANN issued a call for "independent experts, law enforcement representatives and global policy experts"

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<sup>61</sup> NCUC, "Comments on Procedural Aspects of the IRT Final Report – A Suggested Roadmap for Moving Forward," July 6, 2009, <http://forum.icann.org/lists/irt-final-report/pdfYaEzv0si9f.pdf>.

<sup>62</sup> GNSO, "Letter from Rod Beckstrom & Peter Dengate Thrush to GNSO Council," October 12, 2009, <http://gns0.icann.org/correspondence/beckstrom-to-gns0-council-12oct09-en.pdf>.

<sup>63</sup> GNSO, "Special Trademark Issues Review Team Recommendations," Special Trademark Issues Work Team, December 11, 2009, <http://gns0.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>.

<sup>64</sup> GNSO, "GNSO Council Minutes," December 17, 2009, <http://gns0.icann.org/meetings/minutes-council-17dec09-en.htm>.

<sup>65</sup> ICANN, "Adopted Board Resolutions --- Nairobi," March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

to conduct a Whois policy review in line with its obligations under the Affirmation of Commitments. Selection of the review team's members will be conducted by the CEO of ICANN and the Chair of the GAC; the review is expected to be completed in October 2010.<sup>66</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 may file objections to gTLD applications in accordance with the draft WIPO Rules for New gTLD Dispute Resolution.

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<sup>66</sup> ICANN, “Call for Independent Experts, Law Enforcement Representatives and Global Policy Experts – WHOIS Policy Review (AoC),” July 26, 2010, <http://www.icann.org/en/announcements/announcement-26jul10-en.htm>; ICANN, “WHOIS Policy Review,” June 1, 2010, <http://www.icann.org/en/reviews/affirmation/review-4-en.htm>.

## **PUBLIC PARTICIPATION AND THE ACCOUNTABILITY AND TRANSPARENCY REVIEW TEAM**

The Accountability and Transparency Review Team (ATRT) is one of four review teams established to carry out ICANN's obligations under the Affirmation of Commitments (AoC) to conduct periodic reviews of key ICANN objectives. The review teams are composed of both independent experts and members of ICANN's Supporting Organizations and Advisory Committees. The teams take a participatory approach to evaluation, in which stakeholders are directly involved in developing and implementing the evaluation process.

The ATRT has committed to operating transparently, publishing recordings, minutes and transcripts of its teleconferences and face-to-face meetings online. It has also pledged to maintain a website containing these materials as well as affirmations and/or disclosures of ATRT members under its conflict of interest policy and input from the public. The ATRT also committed to issuing a call for public comments, reviewing these comments during the June 2010 ICANN meeting, and subsequently requesting further community input.<sup>67</sup>

### ***1. Opportunity for Public Comment***

#### ***1.1 Initial Public Comment Forum: May 18 – July 1, 2010***

The ATRT issued a call for public comments on May 18, 2010, which was posted in the announcements section of ICANN's website.<sup>68</sup> The announcement included a short explanation of the background and purpose of the *Questions to the Community on Accountability and Transparency within ICANN*, as well the questions themselves, which were posted as a PDF.<sup>69</sup> A link to the ATRT section of ICANN's website containing other reference materials was posted as well.<sup>70</sup> The announcement provided contact information for the staff responsible for this process.

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<sup>67</sup> ATRT, "Terms of Reference and Methodology," <http://www.icann.org/en/reviews/affirmation/atrt-terms-and-methodology-09jun10-en.pdf>.

<sup>68</sup> ICANN, "Public Comments Opens Today: Questions to the Community on Accountability and Transparency within ICANN," May 18, 2010, <http://www.icann.org/en/announcements/announcement-18may10-en.htm>.

<sup>69</sup> ATRT, "Affirmation of Commitments Accountability and Transparency Review Team Questions for the ICANN Community," May 18, 2010, <http://www.icann.org/en/reviews/affirmation/community-questions-18may10-en.pdf>.

<sup>70</sup> ICANN, "Activities of the Accountability and Transparency Review Team," <http://www.icann.org/en/reviews/affirmation/activities-1-en.htm>.

The public comment period was open for 45 days (May 18 to July 1, 2010). As with previous ICANN public comment forums, participants were encouraged to submit comments via the email address published in the announcement. All submitted comments were made available on ICANN's website.

The announcement was posted in English and does not appear to have been translated into other languages. The announcement linked only to the English version of the ATRT questions, though translations in Arabic, Chinese, French, Russian and Spanish were posted on the ATRT's website. The announcement was unclear as to whether comments could be submitted in other languages than English.

The questionnaire consisted of eleven main questions on the following topics: ICANN's accountability to its stakeholders, its accountability measures, the transparency of its decision making processes, its commitment to the interests of the global internet users, the governance of its Board of Directors, its public input processes, the GAC and its interaction with the Board, the provision of adequate explanation and rationale of ICANN's decisions, the acceptance of ICANN's decisions by the community, and ICANN's policy development process. Each of the questions contained additional sub-questions, which went into more detail and asked for specific examples.

At the end of the public comment period, which was extended to July 14, 2010, 28 comments had been submitted. Thirteen comments were submitted by private individuals, and fifteen comments were received from associations, coalitions, interest groups and businesses.

### ***1.2 Additional Public Comment Opportunities: July 9, 2010 – Present***

On June 29, 2010, the ATRT issued a statement updating the public on its activities during the June 2010 ICANN meeting in Brussels. In the statement, the ATRT pledged to post "a separate link to allow the Community to provide inputs and suggestions at any point during the ATRT review."<sup>71</sup> On July 9, 2010, the ATRT opened a public comment forum to solicit community feedback. The forum has no specified ending date. In addition, the ATRT published an e-mail address to which community members could send private feedback.<sup>72</sup> This is a departure from ICANN's traditional operation of public comment forums, in which all submissions are posted on ICANN's website.

As of August 26, 2010, the public forum had received 20 comments.<sup>73</sup>

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<sup>71</sup> ATRT, "Brussels Statement from the Accountability and Transparency Review Team," June 29, 2010, <http://www.icann.org/en/announcements/announcement-29jun10-en.htm>.

<sup>72</sup> ICANN, "Accountability and Transparency Review – Community Feedback," July 9, 2010, <http://www.icann.org/en/public-comment/#atrt-community-feedback>.

<sup>73</sup> ICANN, "[atrt-public-input] Chronological Index," <http://forum.icann.org/lists/atrt-public-input/>.

### **1.3 Public Meetings**

The ATRT held its first meeting on May 5-6, 2010 in Marina del Rey, California. This meeting included the elections of the ATRT Chair and Vice-Chair, public discussions of the ATRT's methodology, timetable and definitions of key terminology, and a discussion of the questions to be posed to the ICANN community, as well as a private meeting with ICANN staff.<sup>74</sup>

The ATRT also held several meetings with members of the ICANN community in Brussels from June 20-25, 2010 to request further input from the community.<sup>75</sup> These meetings included sessions with the GNSO Council, the GAC, the ALAC, Registries and Registrars, the NCSG, the CSG, and the ccNSO, as well as public sessions.

The ATRT published the agendas, transcripts and audio recordings of both the May and June meetings on its website.

### **1.4 Conference Calls**

In addition to the public comment forums and the public meetings, ATRT has held nine conference calls between April and August 2010. These calls are open to the public, and the ATRT has published the agendas, transcripts and audio recordings on its website.

## **2. Review of Public Submissions**

On August 10, 2010, the ATRT published a 20-page summary of the public comments it received during the initial public comment forum.<sup>76</sup> The summary begins with a hyperlinked list of the commentators. The structure of the summary follows the structure of the questionnaire, matching shortened comments with specific questions. The summary is detailed and thorough, but it is not always evident whether a statement has been summarized or rephrased or quoted in its original form. On August 20, 2010, the ATRT also published an index mapping public comments against its working groups and indicating the main points made by each commentator.<sup>77</sup>

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<sup>74</sup> ATRT, "A&T RT Meeting Agenda," May 5-6, 2010, <http://www.icann.org/en/reviews/affirmation/agenda-atrt-f2f-meeting-5-6may10-en.pdf>.

<sup>75</sup> ATRT, "Brussels Statement from the Accountability and Transparency Review Team," June 29, 2010, <http://www.icann.org/en/announcements/announcement-29jun10-en.htm>.

<sup>76</sup> ATRT, "Summary of Public Comments on the Questions to the Community on Accountability and Transparency within ICANN," August 10, 2010, <http://forum.icann.org/lists/atrt-questions-2010/pdfEt8zX6yFW1.pdf>.

<sup>77</sup> ATRT, "Public Comments Index Against ATRT Work Teams and Highlights," August 20, 2010, <http://www.icann.org/en/reviews/affirmation/index-of-public-comments-20aug10-en.pdf>.

The substance of the public comments varies widely. Some comments focused on single issues, while others include answers to all of the ATRT questions posted online. One submission includes an entire white paper titled “A Fresh Start for ICANN.”

While some commentators acknowledge that ICANN has taken efforts to improve accountability, other submissions state that different and improved mechanisms are needed to hold the organization – and the Board – accountable for its actions. Some state that ICANN is not equally accountable to all stakeholders but rather mostly to its contracting partners and governments. Several commentators argue that mechanisms are needed to prevent the capture of ICANN by some interest groups. Others suggest that governments, contracting parties or “the independent private sector” are too powerful within the organization.

One of the most common criticisms concerns a lack of transparency of ICANN’s decision making and of the Board’s deliberations. Some submissions call for better explanations of Board decisions and the rationale behind them. Other comments state that it is unclear whether ICANN staff have considered the community’s comments or how ICANN decides to weight various comments. With respect to ICANN’s use of public input, one commentator states, “There are no explanations as to which comments are heeded, which are disregarded, and why. Who gets to decide what is included and how?”

With regard to the public submission process itself, many commentators call for longer comment periods, noting that multiple issues and documents tend to be open for comments simultaneously. A sample comment: “Judging from the information volume on its website, ICANN is transparent, but transparency must be seen towards effectiveness. Synthesis is needed to help stakeholders understand the issues and participate.” Another line of criticism states that in some cases, ICANN has moved forward with decisions before the public has a chance to comment on an issue (one example is with the EOI proposal, which was made before the close of the initial public comment period).