

Accountability and Transparency at ICANN

An Independent Review

Summary of Interviews
January 31, 2011



Berkman

The Berkman Center for Internet & Society
at Harvard University

The statements below attempt to summarize the observations, views, and perceptions of the 45 ICANN stakeholders and experts interviewed by the Berkman team in September and October 2010. Interviewees included ICANN staff and Board members and representatives from ICANN's supporting organizations and advisory committees.

These interviews provide an important supplemental source of information because they convey observations regarding the perception and interpretation of ICANN decisions by the broader community, in addition to helping to determine the facts of each case.

These statements are a summary of the most frequently heard statements and do not represent the opinions or conclusions of the Berkman team. While the team has made every effort to remove factual inaccuracies, it does not attest to the accuracy of the observations offered by interviewees.

The interviews were conducted on the condition of confidentiality. The Berkman team has attempted to strip all identifying information from the statements below, in accordance with our interview protocol (see Appendix). Comprehensive notes were taken during the interviews and subsequently summarized for the research team. The names of the interviewees have been removed from the notes and summaries. These summaries are therefore the aggregated and anonymized version of those notes.

The following statements are summaries of the interviews and do not reflect the opinions or conclusions of the research team.

Interview Protocol

Interviews were conducted by telephone by the Berkman team using questionnaires customized for the individual interviewee. Considerable latitude was offered to interviewees to allow them to explore topics and issues that they felt were relevant and important to the Berkman Center study. The interviews were conducted on the condition of confidentiality. Comprehensive notes were taken during the interviews and subsequently summarized for the research team. The names of the interviewees have been removed from the notes and summaries.

Thus far, ICANN staff interviews have taken place as a two-step process, with the opportunity to provide written responses to our customized questionnaires, followed by a phone call with the Berkman Center team, designed to clarify, where necessary, some of the written answers and to dig deeper into written responses. In the case of the GAC, the Berkman team took a broad-based approach by distributing a written questionnaire, with the aim of following up directly, where possible, with particular members who may have had more substantial involvement in the cases.

All ICANN staff interviews and written responses to questionnaires have been coordinated by ICANN's Advisor to the President, Denise Michel. The responses to the questionnaires were collected and aggregated by ICANN prior to submission to the Berkman team. ICANN's General Counsel, John Jeffrey, has attended the phone interviews with ICANN staff members at his request.

Interview Selection

For each case study, the Berkman team identified criteria by which to select interviewees (for further details, see the “Selection Criteria and Proposed Interviewees” memo in the Midterm Report to ATRT). The proposed interview candidates who met these criteria were then cycled with ATRT members as well as Denise Michel (ICANN staff) for additional nominations. The Berkman team contacted each of these 61 candidates, followed up to ensure we had interviewees who met each of the selection criteria.

Interviewee List

Donna Austin	David Maher
Rod Beckstrom	Frank March
Doug Brent	Kieren McCarthy
Eric Brunner-Williams	Steve Metalitz
Becky Burr	Denise Michel
Vint Cerf	Margie Milam
Edmon Chung	Keith Mitchell
Mason Cole	Ram Mohan
Lesley Cowley	Milton Mueller
Steve Crocker	Peter Nettlefold
Keith Davidson	Jon Nevelt
Avri Doria	Mike Palage
Zahid Jamil	Kurt Pritz
John Jeffrey	Greg Rattray
Rodney Joffe	Kristina Rosette
Dan Kaminsky	George Sadowsky
Kathy Kleiman	Suzanne Sene
John Kneuer	Werner Staub
Konstantinos Komaitis	Jean-Jacques Subrenat
Dirk Krischenowski	Bruce Tonkin
Bertrand de La Chapelle	Karla Valente
Stuart Lawley	Antony Van Couvering
Karen Lentz	

TRANSPARENCY

General Comments

Many concerns regarding transparency and accountability may be a reflection of anger over the outcomes of decisions. A key part of addressing these perceptions is providing a way for people to be heard and to feel they have been listened to adequately even when they do not get their way.

Transparency is important, but openness might be even more important. Interviewees noted that transparency for transparency's sake is different than encouraging a culture of openness and providing information in a way people can easily consume and to which they can easily contribute.

Many interviewees felt that transparency is good on the micro level; ICANN excels at publishing small details. However, transparency is weak on the macro level; ICANN fails to clearly articulate its organizing principles, its goals, and both Board priorities and the reasoning behind them.

According to some interviewees, ICANN generally has to reach a “breaking point” before things are truly transparent—for example, with the Implementation Recommendation Team for trademark protection in new gTLDs, meetings were not public, minutes were not published, and records were never released. Interviewees noted that there was a public outcry, and only then were the meetings of the subsequent Special Trademark Issues working group recorded and published.

Some interviewees felt that ICANN's processes are as transparent as they need to be. They noted that ICANN meetings, including live streaming, are open and transparent to public.

Transparency efforts are seen by some interviewees as either a smokescreen or as something the U.S. government is enforcing via the Affirmation of Commitments, rather than something to which ICANN is truly committed.

Board and Staff

According to many interviewees, public aspects of Board meetings are “stage managed”; very few decisions are made in public, but some interviewees saw this as necessary and understandable. They stated that forcing Board deliberations to be more transparent would mean that more substantive conversations would take place in secret, outside of formal structures. These interviewees felt that the Board needs a certain level of opacity to do its work.

According to some interviewees, staff reports to the Board on policy issues are not made available to the people they concern. These interviewees feel that ICANN's policymakers (i.e., the GNSO) need to know what is being communicated to the Board about policy. Many interviewees

stated that while certain Board processes and deliberations—regarding fiscal issues, staff hiring, etc.—should be confidential, briefings about policy implementation need to be public.

Some interviewees stated that staff analyses of public comments transparently show that comments have been read and analyzed. With respect to the new gTLD process, interviewees pointed out that published drafts of guidebooks contain footnotes explaining how public comments have been incorporated; redline drafts are published; explanatory memoranda also exist.

Many interviewees expressed the opinion that the Board fails to simply and clearly explain the rationale behind its decisions.

“Information Overload”

Many interviewees believe that ICANN does not allow for casual involvement: interested parties have to immerse themselves completely in order to keep up with what is happening.

Many interviewees feel that documents are too long. Some stated that staff feel obliged to produce long reports but noted that too much information kills transparency.

Some interviewees stated that when ICANN’s transparency is challenged, it responds by publishing an overwhelming volume of documents. This creates obscurity rather than transparency.

Many interviewees believe that ICANN’s transparency problems lie not with availability of information, but with that information’s understandability and simplicity.

Additional Comments

Some interviewees stated that ICANN’s web site is challenging to navigate; important documents can be buried under a chain of links and hard to find through the built-in search function.

The Nominating Committee is seen as very opaque by some interviewees. Community members believe that no one knows how ICANN’s leadership is selected.

Interviewees stated that ICANN is unclear as to which issues are considered closed and which are still open for debate. Community members are not given clear schedules; they often feel lost in ICANN processes. Interviewees suggested that ICANN should issue regular progress reports: clear statements of what is happening, where ICANN stands in different processes, what has been agreed, and what the next steps are.

Some interviewees believe that ICANN is not transparent about how issues are selected for public comments. These interviewees feel that there are cases in which public comment should be solicited but is not.

Some interviewees stated that ICANN cannot possibly be transparent when the biggest stakeholders are the U.S. and other governments, particularly when GAC meetings are mostly closed.

According to many interviewees, current translations are often messy and incorrect. Interviewees suggested that community members should help with translation, rather than outsourcing to translators who do not understand ICANN structure and processes. Translations should be published at the same time as English documents—ICANN is making progress, but there is often a time gap.

ACCOUNTABILITY

General Comments

Many interviewees believe that ICANN tries to substitute participation for accountability. They stated that ICANN needs to be held accountable for its inaction as well as for its actions.

Many interviewees said that ICANN lacks a clear, coherent understanding of to whom it is accountable.

Some interviewees expressed worries that existing accountability is driven mostly by fear of lawsuits, rather than by a desire to be responsible.

Many interviewees emphasized that accountability should not come only at the end of the process. It should be embedded in each stage, by involving the wider community in each level of decision making. This would allow the community to react at different levels of the decision-making process, ideally avoiding anger or distrust after a decision has already been finalized.

According to some interviewees, there is a perception among certain stakeholders that ICANN has more power than it actually does. In some cases ICANN does not have the power to act and therefore cannot be held accountable for certain outcomes, but interviewees feel this is ignored by some observers.

Board Decisions

According to many interviewees, the ICANN Board is not sufficiently accountable to anyone. Existing mechanisms to question or appeal a Board decision (via a request for reconsideration, the office of the Ombudsman, or the Independent Review Panel (IRP)) are not sufficiently independent from the input of the Board. However, some interviewees noted the dangers associated with adding extra mechanisms or strengthening current mechanisms for review of Board decisions, in that they could prevent the Board from ever taking decisive, final action.

Some interviewees feel ICANN should have an independent judiciary, with clearly defined rules regarding the issues and decisions over which it could act. This might help the Board in situations where it is faced with political pressure from the GAC.

According to some interviewees, ICANN creates independent panels and committees as a way to abnegate its responsibility for decisions.

According to some interviewees, the IRP is expensive and non-binding. The Ombudsman is useful for minor complaints, but less useful for major disputes.

Some interviewees believe important Board decisions should require a two-thirds majority instead of a simple majority.

A perception exists that the Board is beholden to the U.S. Department of Commerce (DoC). Interviewees suggested that ICANN should manage its public relations in such a way as to make it clear that Board is not “toeing the DoC line.”

PUBLIC PARTICIPATION

General Comments

Some interviewees believe ICANN does a good job of trying to encourage participation. Remote participation opportunities have improved (for ICANN meetings, etc.). The groups that need to be involved in ICANN are fairly well represented. Opportunities to participate exist, and voices are heard.

Some interviewees expressed worries that the cost of participation is high, in terms of both the time required to fully engage and the resources needed to travel to meetings. According to these interviewees, global meetings are not working. Everyone operates in silos, the meetings are expensive, and the local community rarely participates.

Many interviewees noted that casual participants do not see the value in participating, especially when the barriers to entry seem high. Little incentive exists for people whose principle business does not involve ICANN or the DNS.

According to some interviewees, the public participation budget has largely gone toward travel and meetings, rather than other forms of participation.

Online Public Comment Forums

Some interviewees stated that the public comment process is very professional. The ICANN staff members are making an effort to read and analyze public comments. These interviewees say that while people still complain that they are not being heard because their views are not represented in final decisions, this is not the fault of ICANN staff. Public comment forums are effective, even if they are not fully used.

According to many interviewees, following all of the public comment periods is impossible for anyone who is not participating in ICANN as a full-time job. For example, there were 25 simultaneous comment periods in July 2010.

According to interviewees, there are no clear standards governing public comment processes: no clear rules for how to summarize comments, how to handle e-mail petitions, or how to weigh opinions from different people or organizations. Staff analyses of public comments are sometimes inaccurate, and some comments are omitted. These documents are often mere summaries, rather than analyses or responses.

Some interviewees suggested that ICANN's public comment software needs an upgrade: aesthetically, functionally and technically. Non-ASCII characters are often garbled. A threaded comment system should be implemented. The system should allow people to comment on or annotate specific sections of ICANN documents, rather than be a simple e-mail repository.

Some interviewees feel that public comment forums are passive and one-way. Interviewees suggested that ICANN should turn the public comment forums into a conversation with staff.

The reliance on public comment forums may mean that a few very active voices are taken as mainstream views.

According to some interviewees, the public comment forums are often used incorrectly, hindering summary and analysis. Some users post comments to the wrong forums. Other comments consist of long documents on a number of topics which are sent in to the general forum; these would be more useful if they were split up and submitted to specific topic forums.

According to some interviewees, staff are often responsible for summarizing public comments in response to documents that were not produced by staff (i.e., independent reports solicited by ICANN and posted for public comment under ICANN's auspices). It is unclear who is responsible for responding to these comments: staff or the documents' authors.

Relationship between Board, Staff, and Community

A perception exists that ICANN does not care what is happening in the community outside the ACs and SOs.

A perception exists that ICANN staff believe the community is not sufficiently informed in order to provide valuable input and therefore do not take public comments seriously. This perception affects some community members, who decide not to contribute.

According to some interviewees, when the community fails to come to a consensus, it gives up and turns to the Board, then complains about the Board's decision.

Some interviewees believe that the Board looks to ACs and SOs for decisions but at times receives conflicting advice. Often, the community does not understand the rationale of Board decisions when a decision is reached in these circumstances.

Additional Comments

Some interviewees feel that compared to the .com and .net registry agreements, the new gTLD process has been much more consultative.

According to some interviewees, some people in working groups do not actually participate (because they are too busy or because they do not care), but their names on the list of members or listserv subscribers are used as proof that a particular group or constituency participated.

THE INTRODUCTION OF NEW GTLDS

Delays

Some interviewees believe that delays in the gTLD process may be due to the influence of powerful stakeholders who are fundamentally opposed to the widespread expansion of the domain name space. One example given of this type of stakeholder group was trademark holders in the GNSO Intellectual Property Constituency (IPC).

Some interviewees believe that delays in the gTLD process may be due to the over-consideration of public input or to the Board's indecisiveness when faced by a lack of public consensus. Some issues (for example, the morality and public order standard for governmental objections to new gTLDs), were perceived or even explicitly marked as closed, but were subsequently reopened for discussion.

Some interviewees believe that delays in the gTLD process are the result of ICANN proceeding with implementation of the GNSO recommendations before thoroughly responding to community concerns over the necessity for a gTLD expansion. These interviewees believe ICANN has created controversies that could have been avoided.

Some interviewees believe that delays in the gTLD process are partly the fault of the GAC, who often provides its advice too late in the decision-making process.

Some interviewees believe that delays in the gTLD process are a necessary part of the bottom-up, multi-stakeholder approach to which ICANN is committed.

Trademark Issues

Some interviewees believe that the independent creation of a team of experts for the Implementation Recommendation Team (IRT), selected from a subset of the GNSO constituency to address trademark issues related to the implementation of new gTLDs was not consistent with ICANN's commitment to a bottom-up, multi-stakeholder approach to policy making. These interviewees would have preferred greater emphasis on the multi-stakeholder approach.

Some interviewees stated the STI working group was an example of the bottom-up, multi-stakeholder model of policy development to which ICANN is committed. According to some interviewees, ICANN should have formed the STI working group in response to initial concerns over trademark protection, rather than delegating these issues to the IRT.

Some interviewees believe that while the IRT was officially tasked with developing recommendations relating to the implementation of the trademark protection policies developed by the GNSO, its work also included policy development.

According to some interviewees, trademark issues should have been referred to the GNSO once substantial concerns had been raised by the community. According to other interviewees, ICANN was right to consult experts for advice on implementing the GNSO's policy recommendations.

THE .XXX DOMAIN CASE AND ICANN DECISION-MAKING PROCESSES

The Role of the GAC

Many interviewees suggested that a clash of institutional cultures inhibited communication between the GAC and the ICANN Board during the evaluation of the .xxx application.

Some interviewees felt that a lack of appreciation on the part of the ICANN Board regarding the role of the GAC and the difficult political challenges faced by an intergovernmental body is partly responsible for overall poor communication between the Board and the GAC.

Some interviewees felt that the schedule of the policy-making process did not allow sufficient time for GAC to offer advice to the ICANN Board in the .xxx application.

Some interviewees suggested that the lack of established Board-GAC procedures and the unspecific nature of those described in the ICANN Bylaws contributed to poor Board-GAC communications throughout the decision-making process in the .xxx application.

Some interviewees felt that the GAC was given sufficient notice of the Board's intention to vote on .xxx, but failed to offer timely advice on the .xxx application.

The Independent Review Panel (IRP) Process

Many interviewees felt that the IRP does not provide an accessible and widely applicable means for reviewing the ICANN Board's decisions. They noted that it is so costly that it only offers a venue for the wealthiest of participants and is not a viable option for the vast majority of ICANN stakeholders.

Many stakeholders noted that the financial costs, risks, and duration of the IRP will discourage stakeholders from using it to appeal ICANN decisions, even by those with the financial resources to do so. The "non-binding" nature of IRP decisions coupled with the high costs makes litigation in the U.S. courts an attractive alternative, effectively rendering the mechanism moot.

ICANN's interpretation of whether the Board is required to follow IRP decisions was inconsistent with ICANN's mandate to ensure that it is accountable to its stakeholders. On the other hand, some interviewees noted that ICANN was bound by California corporate law, which prohibits ICANN from utilizing a mechanism that overrides Board decisions. In this sense, some interviewees felt that the IRP was the best it could be under the circumstances.

THE DNS-CERT PROPOSAL

Some interviewees believe that DNS security and stability is central to ICANN's values and mission. As part of that mandate, therefore, these interviewees suggest that ICANN has the potential to successfully facilitate a bottom-up decision-making process among its full range of stakeholders, particularly with respect to assessments of current threats to DNS security and the development of multi-stakeholder solutions.

Some interviewees felt that a lack of clarity regarding ICANN's motivations and its overall handling of the DNS-CERT proposal process undermined an otherwise legitimate idea that could have led to productive collaborations between ICANN and the DNS security community.

Many interviewees perceived a lack of openness in the process of developing and presenting the DNS-CERT proposal. According to some, stakeholders were not informed that Mr. Beckstrom would be making remarks related to DNS security issues prior to the Nairobi meeting; they suggested that this revealed a lack of multi-stakeholder, bottom-up process surrounding the DNS-CERT proposal. Other interviewees noted ICANN's involvement of the DNS community in the early stages of the idea's development but acknowledged that insufficient transparency and communication may have led to the perception that the process was insufficiently consultative and participatory.