

Comments on Proposed Recommendations of the Accountability and Transparency Review Team

INTRODUCTION

These comments are submitted in response to the request for public comment by the Accountability and Transparency Review Team (“ATRT”) on its Proposed Recommendations. ATRT has written that it remains open to further refining its recommendations in light of public comments.¹ The following comments have been prepared with that openness to further refinement in mind.

1. GENERAL REMARKS

a. Scope of Authority, Scope of Work

The scope of ATRT’s work is governed by the Affirmation of Commitments from which its authority is derived.² The AoC “affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent ...”³ One of those “key commitments”⁴ is that “ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decisionmaking will reflect the public interest and be accountable to all stakeholders.”⁵ To accomplish these ends, ICANN has further committed to be:

- ♦ “continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN’s present and future needs, and the consideration of an appeal mechanism for Board decisions;”⁶
- ♦ “assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by

¹ Accountability and Transparency Review Team, *Proposed Recommendations—Request for Public Comment 1* (Nov. 3, 2010) (“*Proposed Recommendations*”) (characterizing ATRT’s analysis as “not yet complete and its recommendations as “continu[ing] to be refined”).

² Affirmation of Commitments by The United States Department Of Commerce and the Internet Corporation for Assigned Names and Numbers (Sep. 30, 2009) (“*Affirmation*” or “AoC”).

³ *Id.* at ¶ 3.

⁴ *Id.*

⁵ *Id.* at ¶ 9.1.

⁶ *Id.* at ¶ 9.1(a).

ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;”⁷

- ♦ “continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);”⁸
- ♦ “continually assessing the extent to which ICANN’s decisions are embraced, supported and accepted by the public and the Internet community;”⁹
- ♦ “assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.”¹⁰

ATRT was constituted to perform “a review of [ICANN’s] execution of the above commitments” and to produce a written report by December 31, 2010 that “*shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.*”¹¹ The highlighted language is significant. ATRT’s authority is mandatory: it “shall” conduct the review as prescribed. Its mandate requires ATRT to judge whether ICANN has been “successful.” And that success must be measured in terms of whether ICANN is “acting transparently,” “accountable for its decision-making,” and “act[ing] in the public interest.”¹² These standards—transparency, accountability, and acting in the public interest—are stated in broad and unqualified terms. To take one example, ICANN’s success in being “accountable for its decision-making” is not limited by its terms to a particular period of time or to ICANN’s current commitments. Accountability, not integrity, is the standard. The relevant question under the AoC is whether ICANN is “accountable for its decision-making,” not whether it is complying with its own policies and bylaws.

ATRT’s mandate under the AoC thus authorizes, indeed requires, ATRT to review ICANN’s operations and to judge its success as measured against standards of transparency, accountability, and acting in the public interest. This mandate is manifestly intended to produce an independent review of whether ICANN is living up to these standards. ATRT’s review is especially significant because it involves a review of institutional standards for which ICANN has come under persistent criticism by a broad range of its stakeholders. Apart from the intrinsic importance of its subject matter, ATRT’s work holds particular interest as the first periodic community review to be completed under the AoC. As the first such review, ATRT’s work may set the pattern for future reviews.

⁷ *Id.* at 9.1(b).

⁸ *Id.* at ¶ 9.1(c).

⁹ *Id.* at ¶ 9.1(d).

¹⁰ *Id.* at ¶ 9.1(e).

¹¹ *Id.* at ¶ 9.1 (emphasis added).

¹² *Id.*

b. ATRT's Methodology

ATRT organized its work by dividing the commitments of paragraph 9.1 of the AoC into four parts, each of which was assigned to a working group. The working groups addressed (1) board of directors governance, performance, and composition; (2) the role of the Governmental Advisory Council (“GAC”) and its relationship with the board; (3) public input and policy development processes; (4) review mechanisms for board decisions.¹³ In carrying out its assignment, each working group “reviewed material relevant to their respective areas of review (e.g. ICANN bylaws, policies, procedures, review mechanisms etc.), analyzed public comment and input from the Community, conducted interviews and analyzed other relevant data to draft Proposed Recommendations.”¹⁴

Beyond the terms set by the AoC, ATRT adopted principles to guide its review, some of which deserve particular comment. Keeping its recommendations “fact-based, far from impressions or personal opinions”¹⁵ gives ATRT’s work an empirical foundation that promises to distinguish it in solidity and usefulness from the usual rhetorical debates about ICANN. Its determination to make public the reasons behind each recommendation is equally admirable. Only by bringing ICANN’s processes into full public view can real improvements be achieved. However, ATRT’s decision to make its recommendations “future looking and ... hence suggest improvements to the current process”¹⁶ is frankly at odds with its mandate under the AoC. There ATRT is directed to “consider the extent to which the assessments and actions undertaken by ICANN *have been successful* in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.”¹⁷ Judging ICANN’s past performance in light of its AoC commitments to transparency, accountability, and acting in the public interest is precisely what the AoC directs ATRT to do. Making ATRT’s recommendations “future looking,” aimed at “suggest[ing] improvements to the current process,” shifts ATRT’s perspective away from assessing ICANN’s performance against certain fixed standards to offering suggestions for its improvement. Its shift in perspective had the effect, perhaps unanticipated, of diminishing the scope of ATRT’s authority by sacrificing its power to say where ICANN has fallen short. The AoC authorizes ATRT to judge ICANN, not merely to make suggestions. Suggestions for improvement imply perceived deficits, but they cannot tell plainly where ICANN has succeeded or failed in meeting the standards of transparency, accountability, and acting in the public interest. Without such a judgment, suggestions may offer avenues for future change without necessarily bringing ICANN closer to meeting these fixed standards. They also may lead ATRT to reiterate commitments that ICANN has already made under the AoC. The Proposed Recommendations contain both mistakes, as discussed below.

¹³ *Proposed Recommendations*, at 1, 3, 4, 5.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Affirmation*, at ¶ 9.1 (emphasis added).

c. ICANN- IMPEDIMENTS TO THE ATRT REVIEW PROCESS

ATRT's recommendations have been influenced by its sometimes conflicted relationship with ICANN. ATRT was constituted to carry out ICANN's commitments under the AoC. In some cases, however, ICANN appears to have engaged in conduct that may have had the effect of compromising ATRT's effectiveness, autonomy, and public support. Examples include:

- ♦ ICANN did not approve the contract with Harvard's Berkman Center as ATRT's "Independent Expert" until August 5, 2010.¹⁸ As a result, Berkman's work period was compressed into two months, between August and October, a delay that directly shaped its conceptual framework and final recommendations.¹⁹
- ♦ ICANN's general counsel, John Jeffrey, insisted on participating in all telephone interviews conducted with ICANN staff by the Berkman Center.²⁰ His participation almost certainly discouraged staff members from speaking as candidly as they would have done otherwise.
- ♦ ICANN's president, Rod Beckstrom, publicly disparaged ATRT's objectivity and suggested that ICANN's board would be free to disregard its recommendations—months before those recommendations were formulated, much less published.²¹
- ♦ ICANN inaugurated the review process at the end of last year by publishing a document prescribing the methodology of review teams like ATRT,²² when the only authority it has with respect to review teams is to "organize"²³ them.

2. OVERARCHING RECOMMENDATION

ATRT has offered an "overarching recommendation" for ICANN to "establish a regular schedule of internal review (distinct from the AoC review and to facilitate the subsequent

¹⁸ See *Services Agreement*, at 20 (executing the agreement for ICANN on Aug. 5, 2010), available at icann.org/en/reviews/affirmation/harvard-services-agreement-05aug10-en.pdf.

¹⁹ See, e.g., The Berkman Center for Internet & Soc'y at Harvard University, *Accountability and Transparency at ICANN—An Independent Review*, at 14 (Oct. 20, 2010) ("This report's *pragmatic approach* is not an implicit endorsement of one concept of accountability over the other, but is based on the specifics of the task assignment and takes into account the conditions under which this review has been performed, including *significant time constraints*.") (*Berkman Center Review*) (emphasis added).

²⁰ *Proposed Recommendations*, at 7 ("ICANN's General Counsel, John Jeffrey, upon his request has attended the phone interviews with ICANN staff members.")

²¹ Rod Beckstrom, *Opening Address*, ICANN Regional Meeting, Brussels (June 21, 2010) ("We recognize the right of the Review Team to publicize their views. But we also recognize the sizeable challenge they face—as a group that includes interested industry stakeholders and contracted parties—in *attempting to produce an objective and independent report* that the board and community will find useful.... We are certain the Review Team will find areas where they believe further improvement can be made. But *we stand on our long record* of pushing the edge to make ICANN as transparent and accountable as it is possible to be....") (emphasis added).

²² ICANN, *Affirmation Reviews—Requirements and Implementation Processes*, at 11-14 (Draft Proposal for Public Comment) (Dec. 26, 2009).

²³ *Affirmation*, at ¶ 9.1 ("ICANN will *organize* a review of its execution of the above commitments") (emphasis added).

ATRT review) to ensure that transparency and accountability performance is maintained throughout the organisation and, where necessary, to propose measures for improvement.”²⁴ As part of this internal review, ATRT particularly recommends that the board assess whether “appeals mechanisms provide a graduated inter-related cost-effective framework and as a whole, appropriate levels of transparency and accountability are being realized.”²⁵

This recommendation bears all the flaws one would expect from untethering ATRT’s recommendations from the precise mandate of the AoC. Recommending that ICANN establish a “regular schedule of internal review ... to ensure that transparency and accountability performance is maintained” reiterates a commitment already found in the AoC. ICANN has already committed “to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decisionmaking will reflect the public interest and be accountable to all stakeholders”²⁶ This commitment to continual self-examination and self-improvement is “distinct from the AoC review,” assuming that that phrase refers to the periodic community reviews like that conducted by ATRT. It is difficult to see how this “internal review” could be distinct from ICANN’s continuing self-review obligation. Equally unclear is how adding another self-administered review to ICANN’s catalog of obligations will improve its actual performance. Reframing an existing commitment as a fresh recommendation does not seem like a step forward.

More troubling is the phrase “appropriate levels of transparency and accountability.” The terms “transparency” and “accountability” were unqualified in the AoC, as they were in the Joint Project Agreement and the Memoranda of Understanding that preceded it. Qualifying them now suggests that ICANN need no longer achieve “transparency” or “accountability” but can conduct itself satisfactorily by achieving “appropriate levels” of them. What counts as an “appropriate level of transparency and accountability”? Who will decide that question? Does this new qualification mean that the long effort to hold ICANN to objective standards of institutional conduct has been abandoned?

3. BOARD GOVERNANCE, PERFORMANCE, AND COMPOSITION

ATRT has offered several recommendations to strengthen the ICANN board’s composition as a group and to improve its performance, which appear sensible and worth trying. Under the same rubric, ATRT recommends that ICANN “[c]larify ... which issues are considered at Board level in order to improve visibility among stakeholders of the work the Board undertakes in steering ICANN’s activities.”²⁷ Identifying how and why certain issues are considered by the board is especially important. Most of the comments ATRT received were directed at this problem, and those comments “reflect a sense of concern from across the

²⁴ *Proposed Recommendations*, at 5.

²⁵ *Id.*

²⁶ *Affirmation*, at ¶ 9.1.

²⁷ *Id.* at 2.

breadth of ICANN's stakeholder community.”²⁸ ATRT is right to conclude that failing to act on this concern “could lead to disenfranchisement and disengagement.”²⁹

Clarifying the processes of board decision-making certainly would help, but it illuminates only one part of the problem. Staff decision-making deserves clarification, as well. Because many issues are presumably resolved without formal intervention by the board, the extent of the board's delegation to staff and the criteria by which staff members act under the board's authority and direction also should be codified.

4. ICANN'S RELATIONSHIP WITH GAC

ATRT delivered a harsh but accurate assessment when it found that “[t]he current Board-GAC relationship is dysfunctional and has been so for several years.”³⁰ Dysfunction mars the relationship despite the importance assigned to it by the U.S. government.³¹ It has recognized “the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.”³²

Much of the tension has centered on the following clause in ICANN's bylaws:

[I]n those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.³³

GAC complains that ICANN fails to respond to the advice it gives the board, and ICANN complains that it cannot treat not every communication from GAC as “advice” when GAC expresses a range of opinions.³⁴

Understandably, ATRT tries to identify a compromise. It recommends that ICANN “establish a more formal, documented process by which it notifies the GAC of matters that affect public policy concerns to request GAC advice” and that GAC “should agree that only a ‘consensus’ view of its members constitutes an opinion that triggers the Board's obligation to follow the advice or work with the GAC to find a mutually acceptable solution.”³⁵ Non-consensus views may be provided by GAC, but they would not trigger the board's obligation to consider it.

Attractive as this compromise might appear, it ignores GAC's character as a body of nation-state representatives. GAC's frustration with the ICANN board appears to have less to do

²⁸ *Id.* at 24.

²⁹ *Id.*

³⁰ *Id.* at 30.

³¹ *Affirmation*, at ¶ 6.

³² *Id.*

³³ Bylaws for Internet Corporation for Assigned Names and Numbers, art. 3, § 6.1(c).

³⁴ *See Proposed Recommendations*, at 32.

³⁵ *Id.*

with the ambiguities of the bylaws and more with the fact that its members as government representatives are accustomed to a more respectful approach than they sometimes receive. Dictating to GAC what should qualify as “advice” could be understood as disrespectful of GAC’s autonomy. A more respectful approach would be for ATRT to recommend that the ICANN board should consult with GAC as to a sharper definition of “advice” that its members can accept, thereby facilitating a more defined process of communication. But it should be acknowledged that, ultimately, it is up to GAC what counts as “advice”—not up to the board.

Timing presents a distinct challenge for the relationship between GAC and the board. An especially welcome recommendation is that ICANN’s board should “engage the GAC earlier in the policy development process.”³⁶ Taking advantage of GAC’s public policy expertise early on would improve ICANN’s policy-making by avoiding needless delays and policy dead-ends.³⁷ For a more active engagement with GAC to work, however, the board needs to “ensure that the GAC is fully informed as to the policy agenda at ICANN and that ICANN policy staff is aware of and sensitive to GAC concerns.”³⁸ In particular, the time-lag between the board’s policy endeavors and GAC’s schedule needs to be reduced, to end the current pattern of GAC “attempt[ing] to provide comments intersessionally and/or ... one cycle behind the rest of the ICANN community ...”³⁹ Perhaps a requirement for the board to distribute its written proposals and draft documents to GAC no less than 45 days before each ICANN meeting might be helpful.

5. POLICY-DEVELOPMENT PROCESSES

As the Berkman Center pointed out, “Public participation is central to ICANN’s identity.”⁴⁰ Yet ATRT is correct that “significant improvements could be made in both the nature and structure of the public input and policy making processes within ICANN.”⁴¹ Codifying a stratified and prioritized public notice-and-comment process, with reply comments, would substantially improve the capacity of stakeholders to participate and to follow ICANN’s policy-making in progress.

ATRT falters, however, in recommending that ICANN “adopt the practice of articulating the basis for its decision and identify the public comment that was persuasive in reaching its decision,” as well as “the relevant basis and public comment that was not accepted in making its decision.”⁴² Its mistake lies once again in presenting an AoC commitment as a fresh recommendation. ICANN has already committed to “provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration” and “a thorough and reasoned explanation of decisions taken, the rationale

³⁶ *Id.* at 33.

³⁷ *Id.* (“All parties would benefit if the supporting organizations and other constituencies could receive public policy input as early in the policy development process as possible.”).

³⁸ *Id.*

³⁹ *Id.* at 29.

⁴⁰ *Berkman Center Review*, at 29.

⁴¹ *Id.* at 37.

⁴² *Id.* at 4.

thereof and the sources of data and information on which ICANN relied.”⁴³ Adopting an exclusively future-oriented approach to its recommendations disables ATRT from stating the obvious, namely that ICANN has fallen short of its AoC commitments with regard to articulating “how comments have influenced the development of policy consideration.”⁴⁴

6. FIXING ICANN’S ACCOUNTABILITY

Accountability is the most important area of ATRT’s review, but it is unfortunately where ATRT’s recommendations are the most disappointing. ICANN’s accountability deficit affects its institutional confidence more profoundly than any other issue.⁴⁵ ATRT’s broad mandate to “consider the extent to which the assessments and actions us undertaken by ICANN have been successful in ensuring that ICANN ... is accountable for its decision-making ...”⁴⁶ carries the most serious implications for ICANN’s future development. Surprisingly, ATRT’s recommendations manage to confuse rather than clarify and diminish the meaning of accountability itself.

The ATRT process on this issue showed promise early on. Working Group 4 (“WG4”) was assigned to review ICANN’s establishment of “an appeal mechanism for Board decisions.”⁴⁷ Its investigation concluded that neither the Ombudsman nor the request for reconsideration were truly independent of the board and their decisions are not binding on it.⁴⁸ It rejected the proposed community re-vote as likely requiring too high a level of consensus among the SOs and ACs.⁴⁹ Only the Independent Review Panel (“IRP”) was found to be sufficiently independent, and its suitability was questioned because “its decisions and recommendations are not binding on the ICANN Board.”⁵⁰ This conclusion was confirmed by the many comments ATRT received expressing “concerns about the lack of an accountability mechanism that was sufficiently independent of the ICANN Board and that could issue binding decisions”⁵¹

In struggling to determine whether the IRP could be modified to issue binding decisions, or indeed whether some other form of binding review could be devised, “WG4 queried ICANN about California law governing ICANN and any implications for a possible recommendation from the ATRT.”⁵² ICANN replied with a one-page document stating its position that under California law “the board *cannot* empower any entity to overturn decisions or actions of the

⁴³ *Affirmation*, at ¶ 7.

⁴⁴ *Id.*

⁴⁵ R. Shawn Gunnarson, *A Fresh Start for ICANN*, at 13-16 (June 1, 2010) (statements by governments, registries and registrars, and trade associations and businesses criticizing ICANN for its weak accountability), available at http://www.techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf.

⁴⁶ *Id.* at ¶ 9.1 (emphasis added).

⁴⁷ *Id.* at ¶ 9.1(a).

⁴⁸ AoC / ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)* (“Draft Findings”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Proposed Recommendations*, at 40.

⁵² *Proposed Recommendations*, at 44.

board.”⁵³ WG4 regarded the impasse caused by ICANN’s legal position as “*critical* to establishing an appeals mechanism that is both binding and independent, and *essential* to the viability of the ICANN model itself.”⁵⁴ Based on these concerns, WG4 tentatively recommended that “pending further research” it would “[c]hallenge ICANN’s interpretation of California corporate governance law as it applies to ICANN policy development.”⁵⁵

WG’s recommendation to challenge ICANN was abruptly rejected by ATRT. It conceded that it “did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability.”⁵⁶ Consensus broke down over whether an adequate appeals mechanism from board actions needed to be binding. “[W]hile some members of the ATRT believe that having a binding appeals process is critical to ensure accountability to the community and the long term viability of the multi-stakeholder ICANN model, other members of the ATRT raised concerns that such a standard would create a new set of accountability and transparency issues by assigning to some new, unnamed set of individuals the power to overturn Board decisions.”⁵⁷ Resolving this internal dispute was evidently elusive, despite “concern from the Community and, in part, from the Berkman Case Studies, over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority.”⁵⁸

Doubts about whether California law permits ICANN’s board to be subject to binding review influenced both ATRT’s review and the Berkman Center’s analysis on which it relied.⁵⁹ These doubts led ATRT to make an interesting distinction. It acknowledged that ICANN may agree to binding arbitration in its commercial agreements “without running afoul of California law” but reasoned that “it is less clear and deserves further legal analysis as to what extent and through what mechanisms ICANN could agree to enter into binding arbitration more generally.”⁶⁰

The attached memorandum offers such further analysis. It demonstrates that California law does not prevent ICANN’s board of directors from adopting a binding form of appellate review and that the distinction that has troubled ATRT between binding review for resolving disputes under commercial agreements and for other purposes has no legal basis. It also explains why establishing binding review of board decisions is necessary for the ICANN model of DNS management to remain sustainable.

Apart from the question of California law, ATRT’s reversal of WG4’s position on the necessity of binding review deserves reconsideration. Effectively, ATRT offers no useful recommendation at all on the critical question of binding review. It neither judges ICANN

⁵³ See ICANN, *Limitations on Third Party Review of Corporate Board Actions under California Law*, Aug. 31, 2010 (“*Limitations*”) (emphasis added).

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.*

⁵⁶ *Proposed Recommendations*, at 46.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Proposed Recommendations*, at 46.

for failing to establish a genuinely independent and binding form of appeal nor suggests how it might do so. Referring the problem of binding accountability to the expert panel called for by the Improving Institutional Confidence Implementation Plan simply punts the issue to another body rather than deciding it. And it seems incorrect to say that making ICANN's board subject to a binding form of review "would create a new set of accountability and transparency issues by assigning to some new, unnamed set of individuals the power to overturn Board decisions."⁶¹ New accountability and transparency issues would not be created if a court of law overturned the board following a binding arbitration. Making the IRP a binding review of the board's fidelity to the bylaws and articles would do no more. It is difficult to understand how the ATRT could regard the power to reverse the board in that instance as any more problematic than binding arbitration, a form of relief that ICANN's contracting partners already enjoy. The entire Internet community deserves the greater security that a binding review would provide. If there are concerns about frivolous challenges to board decisions, they can be resolved without abandoning the principle of binding review altogether.

More worrisome still is ATRT's apparent acceptance of a diluted definition of accountability. WG4 had it right. The issue of accountability goes to the heart of ICANN's role in privatizing DNS management. Its overall global management of the Internet DNS gives ICANN enormous power. Leaving that power unsecured by some form of compulsory review would be unwise.

CONCLUSION

Further refinements to the Proposed Recommendations are respectfully requested in light of the discussion above.

⁶¹ *Id.*