

# **ACCOUNTABILITY AND TRANSPARENCY REVIEW TEAM PROPOSED RECOMMENDATIONS REQUEST FOR PUBLIC COMMENT**

## **Executive Summary**

In keeping with the Affirmation of Commitments (AoC), the Accountability and Transparency Review Team (ATRT) provides the following report to the ICANN community for input and comment. The ATRT specifically seeks comment on the draft proposed recommendations included below so as to produce Final Recommendations to the ICANN Board of Directors no later than December 31, 2010. The report also contains information on the background, structure and methodology of the review as well as the reports of the four working groups created by the ATRT to progress its work. Comments on the draft proposed recommendations are due 30 days after publication of this report.

## **Request for Public Comment - Draft Proposed Recommendations**

The draft proposed recommendations developed by the ATRT listed below are based on the public comment received to date, interactions with the ICANN Community at the 37<sup>th</sup> ICANN meeting in Brussels, interviews, fact-finding and analysis by the ATRT as well as consultation between the ATRT and the Berkman Center. The ATRT's analysis is not yet complete and the recommendations will continue to be refined, taking into account the public comments received. In some cases the ATRT is considering recommending specific timelines for the recommendations to be implemented. Those discussions are ongoing and indicated below with bracketed text. The recommendations are grouped according to the four work streams established by the ATRT followed by one overarching recommendation.

## **Recommendations**

### ***ICANN Board of Directors (Board) governance, performance and composition***

1. Pursuant to the advice of both the 2007 Nominating Committee Review and 2008 Board review, ICANN should establish [by INSERT DATE] formal mechanisms for identifying the collective skill-set required by the ICANN Board including such skills as public policy, finance, strategic planning, corporate governance, negotiation, and dispute resolution. Emphasis should be placed upon ensuring the Board has the skills and experience to effectively provide oversight of ICANN operations consistent with the global public interest and deliver best practice in corporate governance. This should build upon the initial work undertaken in the independent reviews and involve:

- a. Benchmarking Board skill-sets against similar corporate and other governance structures;

- b. Tailoring the required skills to suit ICANN's unique structure and mission, through an open consultation process, including direct consultation with the leadership of the SOs and ACs;
  - c. Reviewing these requirements annually, delivering a formalised starting point for the NomCom each year; and
  - d. Publishing the outcomes and requirements as part of the Nominating Committee's call-for-nominations.
2. Recognising the work of the Board Governance Committee on Board training and skills building, the Board should reinforce and review on a regular basis, (but no less than every INSERT NUMBER OF YEARS) the training and skills building programmes.
  3. Subject to the caveat that all deliberations and decisions about candidates must remain confidential, (as soon as possible but no later than the 2012 selection process,) increase the transparency of the Nominating Committee's deliberations and decision-making process by doing such things as clearly articulating the timeline and skill-set criteria at the earliest stage possible before the process starts and, once the process is complete, explain the choices made.
  4. Building on the work already done, continue to expedite reforms to Board meetings and work practices.
  5. Follow the recommendations of the Boston Consulting Group and expeditiously implement the compensation scheme for Board Directors.
  6. Clarify, (as soon as possible but no later than INSERT DATE,) 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.
  7. Develop complementary mechanisms for consultation with SOs and ACs on policy issues that will be addressed at Board level.
  8. Promptly publish all appropriate materials related to decision-making processes – including preliminary announcements, briefing provided by staff and detailed Minutes, and Directors' statements relating to significant decisions or votes. The redaction of materials should be kept to a minimum, limited to matters clearly associated with litigation and staff issues such as appointments and remuneration
  9. Produce and publish a document, (as soon as possible but no later than INSERT DATE,) that clearly defines the limited set of circumstances where materials may be redacted and that articulates the risks (if any) associated with publication of materials. These rules should be referred to by the Board, General Counsel and staff when assessing whether material should be redacted and cited when such a decision is taken.

10. Publish a detailed explanation at the conclusion of each decision-making process, including:
- why the matter was considered by the Board;
  - what consultation occurred;
  - what input was received from the ICANN community; and
  - how this input was considered and how and why it was adopted or discarded.

***B. The role and effectiveness of the GAC and its interaction with the Board***

11. The Board and the GAC, (as soon as possible but no later than INSERT DATE,) need to clarify what constitutes GAC “advice” under the Bylaws and the Board needs to exercise more discipline in asking for GAC advice on public policy issues.

12. ICANN should, (as soon as possible but no later than INSERT DATE,) establish a more formal, documented process by which it notifies the GAC of matters that affect public policy concerns to request GAC advice. As a key element of this process, the Board should be proactive in requesting GAC input in writing. At the same time, the 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. The GAC can continue to provide informal views but these would not trigger any obligation on the Board to follow such input. In establishing a more formal process, ICANN should develop an on-line tool or database in which each request to the GAC and advice received from the GAC is documented along with the Board’s consideration of and response to each advice.

13. The Board and the GAC need to work together to have the GAC advice provided and considered on a more timely basis. Instituting a more formal process for requesting opinions should help in this regard by making it clearer when the Board is seeking a GAC opinion but given that the GAC meets face-to-face only three times a year, it will need to establish other mechanisms for preparing and reaching agreement on consensus opinions in a more timely manner.

14. The Board, working with the GAC, needs to develop and implement a process to engage the GAC earlier in the policy development process.

15. The Board and the GAC should jointly develop and implement actions 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. In doing so, the Board and the GAC may wish to consider creating/revising the role of ICANN staff support to the GAC and whether the Board and the GAC would benefit from more frequent joint meetings.

16. The Board should endeavor to increase the level of support and commitment of governments to the GAC process. First, the Board should encourage member countries and organizations to participate in GAC deliberations on a timely basis and at a sufficiently authoritative level. To the extent member representatives attending GAC meetings are

prepared and authorized to speak on behalf of their countries and organizations, the process by which GAC develops and submits consensus opinions to the Board should take less time and should lead to a more authoritative work product. Second, the Board should place a particular focus on engaging nations in the developing world, paying particular attention to the need to provide multilingual access to ICANN records. Third, the Board, working with the GAC, should consider establishing a process by which ICANN engages senior government officials on public policy issues on a regular and collective basis.

***C. Public input processes and the policy development process***

17. The Board should, (as soon as possible but no later than INSERT DATE,) direct the adoption of public Notice and Comment processes that are stratified (e.g. Notice of Inquiry, Notice of Policy Making) and prioritized. Prioritization and stratification should be established based on coordinated Community input and consultation with Staff.

18. Public notice and comment processes should provide for both distinct “Comment” cycle and a “Reply Comment” comment cycle that allows Community respondents to address and rebut arguments raised in opposing parties’ Comments.

19. Timelines for public Notice and Comment should be reviewed and adjusted (as soon as is possible but no later than INSERT DATE,) to provide adequate opportunity for meaningful and timely comment. Comment and Reply Comment periods should be of a fixed duration.

20. [With recognition of Recommendation WG#1, Area 2, number 5.] The Board should, in publishing decisions, (as soon as possible but no later than INSERT DATE), adopt the practice of articulating the basis for its decision and identify the public comment that was persuasive in reaching its decision. At the same time, the Board should identify the relevant basis and public comment that was not accepted in making its decision. The Board should articulate the rationale for rejecting relevant public comment in reaching its decision.

21. The Board should ensure that access to and documentation within the PDP processes and the public input processes are, to the maximum extent feasible, provided in multi-lingual manner.

22. The Board should publish its decisions in a multi-lingual manner to the maximum extent feasible.

23. The Board should ensure that all necessary inputs have been received to the respective policy making processes are accounted for and included for consideration by the Board to ensure effective and timely policy development. The ATRT recommends that the Board consider adopting a template or checklist that can accompany documentation for Board decisions that certifies what inputs have been accounted for and are included for consideration by the Board.

24. The Board should ensure that forecasted ICANN work programs should be published and regularly updated to facilitate public input and effective and timely policy development.

***D. Review mechanism(s) for Board decisions***

25. The ICANN Board should implement (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT) Recommendation 2.7 of the 2009 Improving Institutional Confidence Implementation Plan which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms - the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms, their inter-relation, if any (i.e., do the three processes provided for a graduated review process) determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability.

26. The operations of the Office of Ombudsman should be assessed and, to the extent they are not, should be brought into compliance with the relevant aspects of internationally recognized standards for an Ombudsman function such as International Ombudsman Association<sup>8</sup> and its Standards of Practice<sup>9</sup> (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT).

27. (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT), the standard for Reconsideration requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.

28. (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT) the Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

29. The Committee of Independent Experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the IIC.

***Overarching Recommendation***

30. ICANN should establish a regular schedule of internal review (distinct from the AoC review and to facilitate the subsequent ATRT review) to ensure that transparency and accountability performance is maintained throughout the organisation and, where necessary, to propose measures for improvement. Reviews should be overseen by the Board and should assess whether: standards for the publication of briefing materials related to Board decision-making

are being met; mechanisms for redaction of materials are being appropriately utilised; the work program stemming from Board decisions is being implemented effectively and transparently; ICANN's senior staffing arrangements are appropriately multi-national and multi-lingual, delivering optimal levels of transparency and accountability to the community; appeal mechanisms provide a graduated inter-related cost-effective framework and as a whole, appropriate levels of transparency and accountability are being realised.

## **Background, Structure and Methodology of the Review**

The ATRT was established pursuant to the Affirmation of Commitments (AoC).<sup>1</sup> Paragraph 9.1 states that a review of ICANN's execution of its commitments will be performed by "volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts."<sup>2</sup> The membership of this ATRT was selected by the Chair of the ICANN Board and the Chair of the GAC<sup>3</sup> and initiated its review on April 12, 2010.<sup>4</sup>

Under paragraph 9.1 of the AoC, ICANN committed to "maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by:

- a. 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;
- b. Assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;
- c. Continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);
- d. Continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and

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<sup>1</sup> <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>2</sup> <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, para. 9.1.

<sup>3</sup> <http://www.icann.org/en/reviews/affirmation/composition-1-en.htm>

<sup>4</sup> <http://www.icann.org/en/reviews/affirmation/activities-1-en.htm>

- e. Assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.”<sup>5</sup>

To organize its review, the ATRT established four (4) Working Groups comprised of ATRT members that were tasked with reviewing specific elements of paragraph 9.1 of the AoC.<sup>6</sup> The Working Groups have 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.

The ATRT also developed the following principles to guide its review:

- Recommendations will be fact-based, far from impressions or personal opinions.
- The team will be guided by a selected number of case-studies involving review of relevant events for each case study through 17 June 2010 (the day prior to the start date of the ICANN Brussels meeting).
- The case-studies are based on cases which were suggested by the community during the ATRT meetings in Brussels, namely new gTLDs, .xxx (not including the application process) and DNS-CERT
- The case studies will be used to identify processes and decision-making that demonstrated ICANN’s accountability and transparency, as well as processes and decision-making that could be modified to enhance ICANN’s accountability and transparency.
- Recommendations would be future looking and would hence suggest improvements to the current process; recommendations are not for the purpose of altering any past decisions or influencing any ongoing processes.
- Merits/Reasons behind each recommendation would be also made public.

The ATRT selected the Berkman Center for Internet & Society at Harvard Law School (Berkman) to act as the Independent Expert for the review.<sup>7</sup> The Berkman Center was asked by the ATRT to conduct the case studies referenced above and to conduct research that addresses the areas of review under paragraph 9.1 of the AoC consistent with the above principles. Berkman commenced its work on August 5, 2010 and has provided the ATRT with a Final Report that includes case studies and consultation that support the draft proposed recommendations.<sup>8</sup>

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<sup>5</sup> <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, para. 9.1.

<sup>6</sup> <http://www.icann.org/en/reviews/affirmation/proposed-wg-structure-atrt-19jul10-en.pdf>

<sup>7</sup> <http://www.icann.org/en/announcements/announcement-10aug10-en.htm>;

<http://www.icann.org/en/announcements/announcement-16aug10-en.htm>

<sup>8</sup> See Appendix A, “Accountability and Transparency at ICANN, An Independent Review,” The Berkman Center for Internet & Society, October 20, 2010.

The Berkman team has combined a number of qualitative research methodologies. These efforts include, among other things, primary research including various structured (questionnaire-based) interviews with experts and stakeholder representatives, and secondary research of extensive Web and database searches, an exploratory literature review (English language), and the drafting of case studies. The case studies have played a particularly important role in the Berkman team's work, given its mandate according to the services agreement. The following methods have been applied in this specific context:

- **Review of materials:** Following the multi-step methodological approach outlined in the services agreement, the draft case studies are structured as qualitative, exploratory case studies and based on an extensive review of a diverse range of publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. The review started with a mapping of public submissions from January 2008 to June 17, 2010 and included, among other things, extensive Web and database searches aimed at identifying case-specific materials from various sources, including ICANN's website. Each case study provides detailed references to such specific materials in the footnotes.
- **Interviews:** In addition to publicly available sources, the draft case studies are informed by observations by a selected, diverse group of stakeholders and experts who have been interviewed in the course of developing the case examples. These interviews provide an important supplementary factual basis because they convey observations regarding the perception and interpretation of ICANN decisions by the broader community. The statements of interviewees do not reflect the opinions or conclusions of the Berkman team. The interviews were conducted on the condition of confidentiality; in case of the questionnaires to GAC members, respondents were asked to specify whether they wished their answers to remain confidential. All ICANN staff interviews have been ICANN-internally coordinated and the responses to the questionnaires aggregated by ICANN's Advisor to the President, Denise Michel. ICANN's General Counsel, John Jeffrey, upon his request has attended the phone interviews with ICANN staff members.

The review of publicly available materials, case study analysis, and interviews have been supplemented by a series of internal memorandums written by faculty members looking into public participation mechanisms, transparency issues, Corporate Governance aspects and the Independent Review Panel mechanism. All materials (except the confidential interviews) have been collected on a wiki that will be made publicly available as a resource as of December 31, 2010 to support and encourage future research efforts in the field.



## Report of Working Group 1

### Statement of Purpose

WG 1 is analysing, reviewing and reporting on ICANN's efforts to meet its commitments, set out *inter alia* in paragraph 9.1.(a) of the AoC, to continually assess and improve ICANN Board of Directors (Board) governance including an ongoing evaluation of Board performance, the Board selection process and the extent to which the Board's composition meets ICANN's present and future needs.

The purpose of ICANN committing to 9.1.(a) is set out in the opening to 9.1 which states "ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency ...to ensure the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders...."<sup>9</sup>

### Specific Areas to be considered:

WG1 has taken stock of community feedback received as part of the ATRT process to-date – most notably input from consultations at the ICANN Brussels meeting and responses from the public comments period opened on 9 July, and has concluded that its purpose is best served by focusing its deliberations on 2 broad areas:

1. The composition of the Board, skill-set requirements for the Board and the roles of the SOs and ACs and the Nominating Committee in respect to Board composition and skill-set requirements (Area 1).
2. The transparency of the Board's decision making process and the explanation of its decision to the ICANN community (Area 2).

### Area 1

#### **Background research undertaken:**

#### **Relevant bylaws:**

1. Article VI (<http://www.icann.org/en/general/bylaws.htm#VI>) deals with the composition of the Board. Sections 2 and 3 are relevant:
  - a. Section 2 requires the Nominating Committee to seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria in Section 3.
  - b. Section 3 sets out the criteria for the selection of Directors (by Supporting Organisations and Advisory Committees as well as the Nominating Committee). Those criteria are:

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<sup>9</sup> <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, para. 9.1.

- i. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
  - ii. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;
  - iii. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria in Section 3;
  - iv. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet;
  - v. Persons who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses;
  - vi. Persons who are able to work and communicate in written and spoken English.
2. Article VII (<http://www.icann.org/en/general/bylaws.htm#VII>) establishes the Nominating Committee and deals with its structure. The only sections of Article VII relevant to its work in selecting Board members are Sections 5 and 7:
- a. Section 5 refers to the geographic diversity requirement expressed in Article I Section 2 Core Value 4 (<http://www.icann.org/en/general/bylaws.htm#I-2>) and somewhat confusingly, in the context of Board selection, also refers to the Section 4 of Article VII which actually deals with the selection of Nominating Committee members.
  - b. Section 7 simply states that the Nominating Committee shall adopt such operating procedures as it deems necessary

There do not appear to be any other relevant bylaws.

**Relevant Published Policies:**

There do not appear to be any relevant published policies.

**Relevant Published Procedures:**

The Nominating Committee commenced in 2003 and each year its documents are archived on the ICANN web site.

The relevant document is generally referred to as “Nominating Committee Procedures”.

1. The 2003 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-10apr03.htm#B>) contain 2 sections of relevance:
  - a. Section B 1 deals with the committee’s role and objectives stating that “the objective of ICANNs new nominating process is to balance the Supporting Organization-based and constituency-based selection of Directors and individuals for other positions to ensure that ICANN can benefit from participants of the highest integrity and capability who place the public interest ahead of any particular interests, but who are nevertheless knowledgeable about the environment in which ICANN operates.”
  - b. Section C 8 deals with selection criteria and states inter alia:
    - i. the NomCom will apply the criteria for selection and terms of eligibility, defined in the applicable ICANN Bylaws, to identify a pool of qualified Candidates;
    - ii. To select from this pool of qualified Candidates, NomCom will take into account additional considerations, related to the roles to be filled, that it finds important as progress in the selection process is made.
2. The 2004 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-18jun04.htm>):
  - a. Section B 1 now reads
 

“NomCom is responsible for the selection of portions of the members of the ICANN Board of Directors, GNSO Council, Interim ALAC, and ccNSO Council, filling these leadership positions in a way that complements the selections made for such positions by the Supporting Organizations and Interim ALAC.

The central rationale for using a nominating committee to select a portion of the ICANN leadership bodies is to balance those who can represent particular areas of knowledge and interests with those who place the broad public interest of the global Internet community ahead of any particular interests. NomCom’s role is to select individuals of the highest integrity and capability who place the broad public interest of the global Internet community ahead of any particular interests, and who are nevertheless knowledgeable about ICANN’s mission and environment”.
  - b. Section C 8 has not materially changed.
3. The 2008 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-2008.html>) are the most up to date available as the 2009 and 2010 procedures, although referred to on the relevant pages, are not linked:
  - a. Section B 1 has not changed.

- b. Section B 8 has changed slightly and now states, inter alia (emphasis added):
- i. the NomCom will apply the criteria for selection and terms of eligibility, defined in the applicable ICANN Bylaws, to identify a strong pool of qualified Candidates;
  - ii. To select from this pool of qualified Candidates, NomCom will take into account relevant and additional considerations, related to the roles to be filled, as the selection process progresses.

**Community feedback to the ATRT:** The ATRT received a large number of comments concerning the composition and skills of the Board. They can be grouped in three categories:

- a. Some comments raise concerns about the relative weight of the stakeholder groups in the Board, i.e. "broader business expertise is essential for the ICANN Board in meeting current and future challenges"<sup>10</sup>; "business interests (in particular the trademark and domain name industries) are over-represented at ICANN"<sup>11</sup>;
- b. Some criticize the NomCom for lack of transparency<sup>12</sup> and some suggest it to be suppressed<sup>13</sup>;
- c. Some comments raise concerns about the skill set of the Board, suggesting that it "continue to work towards ensuring expertise, independence and diversity on the board of directors"<sup>14</sup>; others suggest that "more consideration be given to identifying and recruiting highly competent people"<sup>15</sup>

**ICANN activities already underway that help to meet the AoC objectives:**

Staff has provided the ATRT with a matrix entitled Affirmation of Responsibilities Tracking and Brainstorming (ARTB).<sup>16</sup>

In respect to the Board selection process, the ARTB states that the ongoing implementation of the NomCom and Board review are activities underway to meet AoC objectives.

In respect to the extent to which Board composition meets ICANN's present and future needs, the ARTB states that all multi-stakeholders groups being involved in Board elections and NomCom delegate selections helps to meet the AoC objectives.

**Other Input**

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<sup>10</sup> Comments of International Chamber of Commerce

<sup>11</sup> Comments of IP Justice

<sup>12</sup> Comments of CANNIC and Milton Mueller

<sup>13</sup> Comments of LFFS

<sup>14</sup> Comments of CIRA

<sup>15</sup> Comments of Internet Society

<sup>16</sup> [ICANN Affirmation of Commitments Inventory \(Tracking & Brainstorming\)](#)

### The Nominating Committee Review:

1. In 2007, Interisle Consulting Group conducted an independent review of the Nominating Committee. Their Final Report was published on 23 October 2007 (the Report) (<http://www.icann.org/en/reviews/nomcom/report-23oct07.pdf>). It made a number of findings and recommendations that are relevant to the work of WG1.
  - a. Findings:
    - i. Finding 1 - The central purpose of the NomCom is to find genuinely independent and unaffiliated Board....members (page 15 of the Report);
    - ii. Finding 25 - The NomCom lacks specific requirements for its annual Board...appointments and it is not clear how those requirements should be established (or by whom) (page 28 of the Report).
  - b. Recommendations:
    - i. Recommendation 3 – Recruit and select based on requirements. The Report suggests that a formal procedure is developed for discovering and understanding the requirements of the Board (page 36 of the Report);
2. After a number of public and Board committee processes, the final report of the NomCom Review Finalisation Working Group was released in January 2010 (<http://www.icann.org/en/reviews/nomcom/nomcom-review-finalization-wg-final-report-29jan10-en.pdf>). In respect to Recommendation 3 the working group states: “The WG remarks that similar recommendations are also contained in the report issued by the external reviewers of the Board of Directors which is presently under consideration by the Board Review WG. Even if not explicitly required by Bylaws, the most recent NomComs adopted the practice to consult informally with Members of the Board and Chairs of SO/ACs on skill gaps to be filled.

Regarding the communication between the NomCom and the Board, the NomCom review finalization WG supports the recommendation of the Board review WG for a formal dialogue between the Nominating Committee and the Board about gaps and needs that have been identified in the Board’s skill-set. That dialogue could consist in a regular consultation between the respective chairs.”<sup>17</sup>

### The Board Review

1. In 2008 Boston Consulting Group/Colin Carter & Associates conducted an independent review of the Board. Their Final Report was published in November 2008 (the Report) (<http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>). The main finding of relevance to WG1 is Section C 4 ‘Broaden the Skills of the Board’ commencing on page 37 of the Report and the recommendation which states *inter alia*:

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<sup>17</sup> Review of the ICANN Nominating Committee, Final Report of the NomCom Review Finalization Working Group, p. 6.

- a. Formally define the skill and experience and independence mix required for the board to operate effectively – in the short and longer terms;
  - b. Form a view about the main gaps in skills that should be met;
  - c. Formally define the participation of the ICANN chairman and the chairman of the Governance Committee as part of the Nominating Committee’s process for choosing new board directors;
  - d. Develop a process for engaging the Supporting Organisations and Advisory Committee in a discussion about the mix of skills required.<sup>18</sup>
2. After a number of public and Board committee processes, the final report of the Board review Working Group was released in January 2010 (<http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>). In respect to the relevant parts of recommendation 4 the working group states: “This recommendation, and in particular the options 4a and 4b, is also being considered by the Board Governance Committee. With regard to 4c, the WG is of the view that it is appropriate and useful for the Chairman of the Board to have a formal meeting with the Chairman of the Nominating Committee to discuss the skill needs of the Board, and notes that informal contact already occurs.”<sup>19</sup>

A formal discussion between the Chairs should take place after a full Board discussion about necessary Board skills, and the Chairman of the Board should represent the Board position on this. If this process is followed, there is no need for the Chairman of the Board Governance Committee to meet with the Chair of the Nominating Committee. With regard to 4d, the WG recognizes the value in having input from the SOs and ACs into the Nominating Committee process. However, the WG sees little value in creating an extra formal process to capture this input. SOs and ACs are encouraged to develop proposals for ways in which their input might most effectively be incorporated into the considerations of the Nominating Committee. Any such proposals should be submitted to the BGC for consideration.”

### Questions for Review:

Do current mechanisms for determining ICANN Board composition ensure that, collectively, the Board possesses an appropriate, diverse set of skills and experience?

- Would changes in selection, composition and compensation improve results?
- Are the desired skills, background and experience adequately defined?

<sup>18</sup> Independent Review of the Board of ICANN, Main Report, November 2008, p. 44.

<sup>19</sup> ICANN Board Working Group, Final Report, January 2010, p. 14.

- For representing constituency interests
- For reflecting the public interest
- For overseeing ICANN's mission and operations
- For best practice in governance
- Could the collective skill-set of directors be improved?

Are Board selection mechanisms sufficiently transparent and accessible to stakeholders?

### **Findings**

Article VI of ICANN's Bylaws<sup>20</sup> provide for the selection of a Board of Directors that is both representative of the organisation's stakeholder community – the Advisory Committees and Supporting Organisations – and diverse in geography, culture, skills, experience, and perspective.

The Nominating Committee mechanism, initiated in 2003, was intended to further facilitate the diversification of the ICANN Board, to deliver additional transparency and accountability in the Board selection process and fill a majority of Board seats with Directors who are independent with respect to the interests and agendas of specific ICANN constituency groups.

On the whole, the 2007 independent review found that there was merit in the NomCom process, that it had contributed positively to the composition of the ICANN Board, and that it had a relevant, continuing purpose in the ICANN structure. Wholesale changes, in the form of alternative selection models, were presented, considered and largely dismissed in favour of retaining current NomCom arrangements, with most of the review's recommendations relating to refinements to the NomCom's operations to allow it to more effectively execute its responsibilities.

However, of greatest relevance to the current ATRT review process, was the independent recommendation for ICANN to recruit and select based upon clear skill-set requirements. This included the establishment of a formal procedure by which the NomCom would discover and understand the requirements of each body to which it makes appointments.

This view was shared by the reviewers tasked with undertaking an independent assessment of the ICANN Board in 2008, who once again recommended the formalisation of mechanisms to define, and consult about, the collective skill-sets required by the Board.

In short, two independent processes - one addressing improvements to the ICANN Board and the other the mechanisms for selecting a majority of the Board – made clear recommendations about improving Board skills.

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<sup>20</sup> <http://www.icann.org/en/general/bylaws.htm#VI>

However, to date, there appears not to have been active adoption of the recommendations by the ICANN Board and staff, and this is reflected in the ongoing concerns expressed by community members in response to ATRT consultations. Despite receiving general support from the NomCom Review Finalization Working Group, the recommendation for clarification of Board skill-set requirements was largely deferred to the Board Governance Committee by the Board Review Working Group.

Consecutive review processes have failed to find significant, structural failings with the way in which the ICANN Board is selected and the resultant composition of the Board. However, both noted that current mechanisms for identifying and responding to collective skill-set needs remain relatively informal and potentially unclear. As such, codifying the processes for identifying, defining and reviewing these skills requirements, as well as the mechanisms by which stakeholders are consulted, could assist in improving the Board's overall performance.

Compensation of directors is an issue closely associated with the theme of developing the ICANN Boards' experience and collective skill-set and has been the subject of independent review, Board Governance Committee discussion and ongoing Board consideration. To date, only compensation for the Board Chair has been decided. In order to help guide and structure the future process for improving the Board's operations, it is critical that the matter of remuneration be resolved promptly.

On the issue of Board structure, it is important to note that a reduction in the ICANN Board's size was a key recommendation of the 2008 Board Review process. However, this was rejected by the Board Review Working Group, citing the workload of the current Board, and the need for representational diversity. Furthermore, the Working Group recommended further consideration of Board restructure be deferred for three years. The size and structure of the Board is a key element in the consideration of all related issues – decision-making effectiveness, representation and collective skill-set. The current ICANN Board and staff should resist the tendency to maintain structural arrangements and should accept the need for significant Board structure changes, should these be proven to deliver significantly improved performance.

### **Recommendations**

ICANN should:

1. Pursuant to the advice of both the 2007 Nominating Committee Review and 2008 Board review, establish (by INSERT DATE) formal mechanisms for identifying the collective skill-set required by the ICANN Board including such skills as public policy, finance, strategic planning, corporate governance, negotiation, and dispute resolution. Emphasis should be placed upon ensuring the Board has the skills and experience to effectively provide oversight of ICANN operations consistent with the global public interest and deliver best practice in corporate governance.

This should build upon the initial work undertaken in the independent reviews and involve:



- a. Benchmarking Board skill-sets against similar corporate and other governance structures;
  - b. Tailoring the required skills to suit ICANN's unique structure and mission, through an open consultation process, including direct consultation with the leadership of the SOs and ACs;
  - c. Reviewing these requirements annually, delivering a formalised starting point for the NomCom each year; and
  - d. Publishing the outcomes and requirements as part of the Nominating Committee's call-for-nominations.
2. Recognise the work of the Board Governance Committee on Board training and skills building; reinforce and review on a regular basis, (but no less than every INSERT NUMBER years) the training and skills building programmes.
  3. Subject to the caveat that all deliberations and decisions about candidates must remain confidential, (as soon as possible, but no later than the 2012 selection process) increase the transparency of the Nominating Committee's deliberations and decision-making process by doing such things as clearly articulating the timeline and skill-set criteria at the earliest stage possible before the process starts and, once the process is complete, explain the choices made.
  4. Build on the work already done, continue to expedite reforms to Board meetings and work practices.
  5. Follow the recommendations of the Boston Consulting Group and expeditiously implement the compensation scheme for Board Directors.

## **Area 2**

### **Background research undertaken:**

#### **Relevant bylaws:**

1. Article I, Section 2 (<http://www.icann.org/en/general/bylaws.htm#I>) enshrines decision making transparency within a number of ICANN's core values, with a focus on the informed participation of stakeholders:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>21</sup>

2. Article III (<http://www.icann.org/en/general/bylaws.htm#III>) is dedicated to transparency and Section 6 specifically outlines mechanisms for solicitation of notice and comment on policy actions.

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
- c. in 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.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.<sup>22</sup>

There do not appear to be any other relevant bylaws.

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<sup>21</sup> <http://www.icann.org/en/general/bylaws.htm#I>

<sup>22</sup> <http://www.icann.org/en/general/bylaws.htm#III>

**Relevant Published Policies:**

The ICANN Board's Code of Conduct (<http://www.icann.org/en/committees/board-governance/bod-code-of-conduct-01oct08-en.pdf>) makes a broad reference to public reporting:

B. Integrity of Records and Public Reporting

Board members should promote the accurate and reliable preparation and maintenance of ICANN's financial and other records. Diligence in accurately preparing and maintaining ICANN's records allows ICANN to fulfil its reporting obligations and to provide stakeholders, governmental authorities and the general public with full, fair, accurate, timely, understandable, open and transparent disclosure.<sup>23</sup>

There do not appear to be any other relevant published policies.

**Relevant Published Procedures:**

According to its Charter (<http://www.icann.org/en/committees/board-governance/charter.htm>), ICANN's Board Governance Committee is responsible for, among other things:

- A. Assisting the Board to enhance its performance;
- H. Recommending to the Board corporate governance guidelines applicable to ICANN as a global, private sector corporation serving in the public interest.<sup>24</sup>

Within its Scope of Responsibilities, the BGC can assist the Board to enhance its performance by encouraging the development of effective tools, strategies, and styles for the Board's discussions. The BGC will also review the existing corporate governance guidelines developed by ICANN staff, be attentive to developments in corporate governance in the global context, and bring ideas and recommendations for adjustments in these guidelines to the Board for its consideration.

However, none of the publicly available Minutes of BGC meetings, dating back to 2008, record any discussion or decision regarding potential improvements to the transparency of Board decision making processes.

**Community feedback to the ATRT:**

The ATRT received a large number of comments concerning the decision-making of the Board and the explanation of its decisions to the community.

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<sup>23</sup> Board of Directors' Code of Conduct, Internet Corporation for Assigned Names and Numbers, p. 3.

<sup>24</sup> Board Governance Committee Charter, approved 6 March 2009.

Most of these comments consider that “Board’s decisions should be better justified and explained to the community.”<sup>25</sup> They consider that “ICANN could improve the process of analyzing the input it has received from the community and explaining the reasoning behind its decision-making<sup>26</sup>”:

- a. Some comments raise concerns about the summary of public comments and the briefings produced by the staff: they suggest making transparent how the community inputs received are considered and publishing all briefing materials; some noted that “[o]n a few occasions when those reports have become known, they appeared to contain false statements”<sup>27</sup>.
- b. Examples of occasions where the explanation of decisions was judged insufficient are the EOI process<sup>28</sup> and re-delegation decisions<sup>29</sup>;
- c. Some ask for more transparency of the Board meetings: they suggest all meetings should be public<sup>30</sup> or that transcripts and recordings be made available to the Community<sup>31</sup>;
- d. Some recommend a more formalised decision-making process and explanation of decisions: “ICANN should institutionalise transparency by establishing clear written guidelines for conducting its business.... These guidelines should include full ‘Administrative Procedure Act’ notice and comment procedures for public consultation and decision-making<sup>32</sup>”; and the Board “should provide an analytical component of its decisions that clearly explains how stakeholders, staff, and experts’ comments were taken into consideration, and how and why such inputs were or were not followed in a final decision”<sup>33</sup>.

### **ICANN activities already underway that help to meet the AoC objectives:**

Staff has provided the ATRT with a matrix entitled Affirmation of Responsibilities Tracking and Brainstorming (ARTB).<sup>34</sup>

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<sup>25</sup> Comments of International Chamber of Commerce

<sup>26</sup> Comments of ATT

<sup>27</sup> Comments of Avri Doria

<sup>28</sup> Comments made at the Brussels meeting with the Commercial Stakeholder Group of the GNSO

<sup>29</sup> Comments made at the Brussels meeting with the ccNSO

<sup>30</sup> Comments of Kieran McCarthy

<sup>31</sup> Comments of CADNA and LFFS

<sup>32</sup> Comments of ATT

<sup>33</sup> Comments of Network Solutions

<sup>34</sup> [ICANN Affirmation of Commitments Inventory \(Tracking & Brainstorming\)](#)

One of the core commitments (Section 3.a.) in the AoC is to transparency and openness of decision making:

3. This document 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;

The ARTB document advises that changes to Board processes are being explored by the Board Governance Committee, however BGC meeting Minutes from 2010 do not record specific discussions or decisions on transparency of Board decision making.

Some of the preliminary ideas being considered by staff include:

- Provide Board statements with each vote on reasons for decisions and address concerns raised by community.
- Create metrics to track impact of Board & SO decisions on the public interest.

Paragraph 4 of the AoC states:

“To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.”<sup>35</sup>

The ARTB document advises that only two of the ideas being considered by staff could broadly relate to Board decision-making transparency:

- Enhance public comment periods and translations on all PDPs and Board actions.
- Provide statement of impact before and after Board decisions.

In Paragraph 7 of the AoC ICANN commits to adhere to:

“responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration. . . In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.”<sup>36</sup>

The ARTB document advises that efforts underway include:

- All Board, SO and AC statements and decisions are publicly posted.
- Background currently is provided publicly on all decisions; several new gTLD processes

<sup>35</sup> <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, para. 4.

<sup>36</sup> Id., para. 7.

considered a model by the community.

- Background currently is provided publicly on all decisions.

Ideas under consideration by staff include:

- Consider publicly posting recordings of Board meetings.
- Provide Board members with template explanation to complete for each decision, collate and publicly post.
- Improvements to the web site to provide better access to posted information
- Consider development of template or matrix on how comments have been considered and where / how these have influenced the final outcome.
- Ensure comments are summarized in a timely fashion and note which influenced the development of a policy and how.
- Consider Board statements to accompany each vote.
- Develop indicators of success in each area that are qualitative, rather than quantitative, and publish evaluation regularly
- Develop more metrics to track against bylaws, responsibilities, strategic and operating plans.

In Paragraph 9.1 of the AoC ICANN commits:

“to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.”<sup>37</sup>

The ARTB document advises that efforts underway include:

- Conducting bottom-up policy, planning, and budget efforts, and carrying out management actions with extensive public input and visibility.
- Ongoing BGC work, with second Board performance assessment underway

## **Other Input**

### **The Board Review:**

3. In 2008 Boston Consulting Group/Colin Carter & Associates conducted an independent review of the Board. Their Final Report was published in November 2008 (the Report) (<http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>). Despite the fact Recommendation #8 related to clarifying the Board’s accountability, no mention was made of procedures for transparency in decision making.

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<sup>37</sup> Id., para. 9.1.

4. Building upon this independent advice, the Board Review Working Group released its own report in January 2010 (<http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>). This document also does not address transparency of decision making.
5. However, one of the submissions to the BRWG, from the International Chamber of Commerce, addressed accountability procedures for the Board and specifically commented upon the need for methodical decision making processes:

The Board must continue efforts to enhance the transparency of its deliberations. These should include:

- Transparency of the agendas and comprehensive minutes of the Board are important for the community. The comprehensive minutes should be maintained.
- Board decisions should be based on methodical decision-making processes in order to promote a sense of due process and fairness in Board actions. They should include an analytical component of decisions that explains how stakeholders', staff's, and experts' comments were taken into consideration and how and why such inputs were or were not followed in a final decision.
- The Board input documents [except for those dealing with personnel matters] should routinely be posted to the fuller ICANN community, including staff briefing materials.
- Outputs and delegation of work or authority to different constituencies or groups in the community are essential.
- Further discussion is needed in the context of the Improving Institutional Confidence consultation process on this matter as well.

ICC urges ICANN to substantiate its commitment to transparency by incorporating all relevant changes within its Bylaws.

#### **Questions for Review:**

Do current ICANN processes deliver transparency and accountability with regard to:

- How issues are chosen for Board consideration;
- How decisions are taken, and on what grounds; and
- How these decisions are communicated to stakeholders?

Could stakeholder engagement and support be improved by the introduction of codified mechanisms for taking and communicating Board decisions such as:

- The timely release of relevant, detailed Board materials: briefing documents, preparatory materials and transcripts of decisions;
- Explanation of how community inputs are received and considered;

- Published rationale for Board decisions, including the advice on which the decisions was based;
- Formalised mechanisms (a section of the ICANN website, direct letters to relevant SOs/ACs, public announcements, public sessions at ICANN meetings) to communicate decisions and reasons to stakeholders.

## **Findings**

As the peak decision-making entity within ICANN, ultimate responsibility for ensuring the highest possible levels of transparency and accountability must necessarily reside with the Board. Not only must it set an example through its own consultation and decision-making, but the Board must also ensure transparency is maintained throughout all parts of the organisation, including SOs and ACs, Board sub-committees, independent reviews and staff.

ICANN's Bylaws emphasise the need for transparency in the Board's processes, stipulating the informed participation of stakeholders, neutrality, objectivity, responsiveness and evidence-based decision-making. Similarly, the need for transparency and openness in the way the ICANN Board takes decisions is re-stated prominently in the Affirmation of Commitments.

However, the Bylaws provide only broad guidance about the mechanisms ICANN must use in notifying stakeholders of pending policy actions and gathering subsequent feedback. These include the 21-day notice rule, the need to provide "reasonable" opportunity for comment and a requirement for due consideration of GAC advice on matters of public policy.

With only a few exceptions, the vast majority of the Board's deliberations are based upon organisational conventions. Significant policy issues are identified and determined based upon the practices established over time, not according to codified procedures or requirements.

Perhaps as a direct result, a large proportion of comments received as part of the ATRT's consultation process related to the way in which issues were identified for Board consideration, how and why particular decisions were taken and how these outcomes were conveyed to stakeholders. These comments reflect a sense of concern from across the breadth of ICANN's stakeholder community. The absence of clear, codified guidelines, procedures or processes relating to Board decisions only serves to escalate stakeholders' concerns and could lead to disenfranchisement and disengagement.

Despite this sentiment, the recently-concluded independent review of the ICANN Board, and subsequent Board Review Working Group, did not address the issue of transparency in decision-making.

ICANN staff has indicated that, in response to the AoC, a large number of projects, related to improved decision-making, are being considered. These include:

- The provision of Board statements on each vote taken;



- Statements-of-impact before and after decisions;
- Improvements to how announcements are made and decisions promoted on the ICANN website; and
- The development of a template to explain how community input has been factored and considered.

These proposed improvements are an appropriate first step, though constitute only one part of a significant exercise in refining organisational practices. As such, this work should be coordinated under the auspices of dedicated actions, involving all stakeholders, with the single aim of delivering clear, published guidelines for ICANN’s decision-making processes.

## **Recommendations**

ICANN should:

1. Clarify, (as soon as possible, but no later than INSERT DATE) which issues are considered at the Board level in order to improve visibility among stakeholders of the work the Board undertakes in steering ICANN’s activities.
2. Develop complementary mechanisms for consultation with SOs and ACs on policy issues that will be addressed at Board level.
3. Promptly publish all appropriate materials related to decision-making processes – including preliminary announcements, briefing provided by staff and detailed Minutes, and Directors’ statements relating to significant decisions or votes. The redaction of materials should be kept to a minimum, limited to matters clearly associated with litigation and staff issues such as appointments and remuneration
4. Produce and publish a document, (as soon as possible, but no later than INSERT DATE) that clearly defines the limited set of circumstances where materials may be redacted and that articulates the risks (if any) associated with publication of materials. These rules should be referred to by the Board, General Counsel and staff when assessing whether material should be redacted and cited when such a decision is taken.
5. Publish a detailed explanation at the conclusion of each decision-making process, including:
  - a. why the matter was considered by the Board;
  - b. what consultation occurred;
  - c. what input was received from the ICANN community; and
  - d. how this input was considered and how and why it was adopted or discarded.

6. Establish a regular schedule of internal review, distinct from the AoC review and to facilitate the subsequent ATRT review, to ensure that transparency and accountability performance is maintained throughout the organisation and, where necessary, to propose measures for improvement. Reviews should be overseen by the Board and should assess whether:
- standards for the publication of briefing materials related to Board decision-making are being met;
  - mechanisms for redaction of materials are being appropriately utilised;
  - the work program stemming from Board decisions is being implemented effectively and transparently;
  - ICANN’s senior staffing arrangements are appropriately multi-national and multi-lingual, delivering optimal levels of transparency and accountability to the community; and
  - as a whole, appropriate levels of transparency and accountability are being realised.

## Report of Working Group 2

### Statement of Purpose.

Working Group 2 (WG2) is evaluating whether ICANN (i) is adequately assessing the role and effectiveness of the Governmental Advisory Committee (GAC) and its interaction with the Board and (ii) is “making recommendations for improvements to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS.”<sup>38</sup> As part of this evaluation, WG2 is conducting an independent evaluation of the interaction between the GAC and the Board

### **Background Statement**

*Relevant Provisions of the Bylaws.* Article XI, Section 2 of the ICANN bylaws establish the Governmental Advisory Committee whose role is to “consider and provide advice on the activities of ICANN as they relate to the concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”<sup>39</sup> Membership in the GAC is open to all national governments. Each member country appoints one accredited representative to the GAC who must hold a formal official position in the member’s government.

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<sup>38</sup> Affirmation of Commitments, paragraph 9.1 (b).

<sup>39</sup> ICANN Bylaws, Article XI, Section 2 (1) (a).

The GAC may “put issues to the Board, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”<sup>40</sup> However, ICANN shall “request the opinion<sup>41</sup> of the GAC” in any case where a policy action “affects public policy concerns.”<sup>42</sup> In such cases, ICANN shall “take duly into account any advice timely presented by the GAC on its own initiative or at the Board’s request.”<sup>43</sup> The notification is to be made by the Board to the Chair of the GAC “in a timely manner.”<sup>44</sup> Specifically, if the ICANN Board determines to take an action that is not consistent with the GAC advice “it shall so inform the Committee and state the reasons why it decided not to follow that advice.”<sup>45</sup> At that point, the GAC and the Board are obligated to “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”<sup>46</sup> If no such solution can be found, the ICANN Board “will state in its final decision the reasons why the GAC advice was not followed.”<sup>47</sup>

The Bylaws do not provide any definition or direction as to what is “advice” from the GAC. In practice, “GAC members have worked on the basis that any explicit advice, in any written form, constitutes the kind of advice foreseen in the bylaws.”<sup>48</sup> The GAC adopts a communiqué when it meets in conjunction with the three yearly regular meetings of the ICANN Board. Intersessionally, the GAC Chair sends letters to the Board and/or ICANN staff, as needed.

While the Board imitates periodic reviews of the Supporting Organizations, Advisory Committees and other ICANN structures, the Bylaws expressly exclude the Board from reviewing the performance and operation of the GAC. Instead, the GAC “shall provide its own review mechanisms.”<sup>49</sup>

*GAC Operating Principles:* The GAC has a set of Operating Principles which it periodically updates. The last amendment was made at the GAC Nairobi meeting in March 2010. At the GAC Brussels meeting in June 2010, the GAC established an *ad hoc* working group to review the Operating Principles.

The Operating Principles do little to provide additional clarity or definition on the Bylaw provisions and in fact, seem to expand the concept of “advice” to a very broad concept. For example, the Principles do not require that GAC advice represent a consensus, stating that “where consensus is not possible, the Chair shall convey the full range of view[s] expressed by

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<sup>40</sup> ICANN Bylaws, Article XI, Section 2 (1) (i).

<sup>41</sup> ICANN Bylaws, Article III, Section 6 (1) (c). The Bylaws use the terms “opinion” and “advice” in referring to input from the GAC. For purposes of this report, the term “advice” will be used to refer to either advice or opinions submitted by the GAC which triggers the obligations on the Board set forth in Articles III and XI.

<sup>42</sup> ICANN Bylaws, Article XI, Section 2 (1) (h).

<sup>43</sup> ICANN Bylaws, Article III, Section 6 (1) (c).

<sup>44</sup> ICANN Bylaws, Article XI, Section 2 (1) (h).

<sup>45</sup> ICANN Bylaws, Article XI, Section 2 (1) (j).

<sup>46</sup> ICANN Bylaws, Article XI, Section 2 (1) (j).

<sup>47</sup> ICANN Bylaws, Article XI, Section 2 (1) (k).

<sup>48</sup> ICANN/GAC JWG Draft Report, Objective 1

<sup>49</sup> ICANN Bylaws, Article IV, Section 3 (2)

Members to the ICANN Board.”<sup>50</sup> Nor do the Principles limit what constitutes advice as they indicate that the “GAC may deliver advice on any other matter within the functions and responsibilities of ICANN, at the request of the ICANN Board or on its own initiative.”<sup>51</sup> The Operating Principles do however, stipulate that a quorum (defined as one third of the representatives of the current membership) is necessary for a meeting at which a decision (s) is made.<sup>52</sup>

*Summary of GAC Activities:* To date, the GAC has adopted 38 communiqués and has submitted 19 letters to the Board. In addition, the GAC has also adopted the following principles: GAC Principles Regarding gTLD Whois Services; GAC Principles Regarding new gTLDs; Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains; and GAC Operating Principles. Principles and letters generally represent consensus while the form and structure of the communiqués allow for differing GAC member view points, to the extent they exist, to be presented. There are instances where the GAC also adopts issues documents including interim issues documents. It is not uncommon for the GAC to offer advice in stages for the purpose of clarifying, revising or reiterating views as an ICANN policy development process unfolds.<sup>53</sup>

*Summary of ICANN Outreach to GAC:* ICANN, in the form of the Board Chair, management or staff, has to date sent 25 letters to the GAC on various topics. In only three specific instances has ICANN proactively, via correspondence, sought input from GAC related to the public policy aspects of an issue. The first instance, on December 1, 2004, sought GAC input on a multitude of issues and the second, on May 4, 2006, requested advice regarding the .xxx stld application. A third instance was on March 17, 2009 when ICANN staff sent a letter to the GAC identifying implementation issues associated with GAC advice related to the treatment of geographic names at the top-level. In addition, 13 other Board resolutions include references to GAC input but generally in the context of GAC and other supporting organizations and advisory committees.

*Relevant Information from the Berkman Case Studies:* The GAC plays a prominent role in two of the case studies undertaken by the Berkman Center: the expansion of generic top-level domain names (gTLDs) and the review of the .xxx top-level domain.<sup>54</sup>

In the new gTLD case study, Berkman lists multiple instances of advice provided by the GAC on this issue, including the 2007 GAC Principles on new gTLDs, the various letters the GAC sent to the Board as well as the multiple references in GAC communiqués. The GAC provided specific advice on the need to conduct appropriate economic studies; stability and security (i.e., root scaling); vertical integration; the expression of interest (EOI) proposal; trademark protection;

<sup>50</sup> GAC Operating Principles, Principle 47

<sup>51</sup> GAC Operating Principles, Principle 48

<sup>52</sup> GAC Operating Principles, Principle 40

<sup>53</sup> ICANN/GAC JWG Draft Report, Objective 1

<sup>54</sup> See Appendix A, “Accountability and Transparency at ICANN, An Independent Review,” The Berkman Center for Internet & Society, October 20, 2010, pp. 60 – 89 and 90 - 124.

and public order and morality. The case study also highlights the challenges the GAC has in providing timely advice on a topic given that each successive version of the draft applicant guidebook (DAG) was often released three weeks prior to a meeting, making it nearly impossible for GAC members to consult in advance and come with clear and approved positions. The cumulative result of this process has been that the GAC often attempts to provide comments intersessionally and/or is one cycle behind the rest of the ICANN community in discussions. The Berkman case study also points out the apparent failure of the ICANN Board and staff to respond to GAC advice, starting with the 2007 GAC Principles on new gTLDs.

The .xxx case study developed by Berkman also provides insights into the GAC – Board relationship. It highlights the lack of timeliness on the part of the GAC at the outset in providing advice to the Board as the original request for input in December 2004 was not answered until April 2005. In addition, a number of governments sent letters directly to ICANN raising concerns with the ICM Registry application. While the Bylaws require the Board to explain why it does not accept the advice of the GAC, no such requirement exists for input or advice from individual governments or intergovernmental organizations.

*Board Action to Assess GAC Role and Effectiveness:* On June 26, 2009, at the request of the GAC, the Board established a joint Board-GAC working group and directed it to perform the following activities:

- Review the GAC’s role within ICANN;
- Consider measures to enhance support of the GAC’s works, including interpretation of meetings, translation of documents, extension of travel support for GAC members from the Least Developed Countries, and remote participation at GAC meetings; and,
- Propose better ways for governments to be informed about ICANN and for enhanced opportunities for the GAC to meet with the ICANN Board and community.

The working group is co-chaired by the GAC chair and by a Board member selected by the Board Governance Committee. The joint working group has met during all ICANN meetings, namely Seoul, Nairobi and Brussels since its formation and expects to conclude its work by the Cartagena meeting with the submission of its report to the Board. The JWG aims to finalize the report in Colombia and further JWG discussion is anticipated on ways that the Bylaws could formally acknowledge methods for the ICANN constituencies, including the GAC, to provide inputs into the policy development process at an early stage and as the process develops.<sup>55</sup>

*Public Input to the ATRT on the Board-GAC Relationship:* During the Brussels meeting, the ATRT met with the GAC-Board working group as well as separately with the GAC and with the Board. The following issues were raised in these discussions:

- The bylaws do not define what constitutes GAC “advice.” GAC submits a variety of documents to the ICANN Board, including communiqués and letters from the GAC chair.

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<sup>55</sup> <http://gac.icann.org/system/files/Brussels-communique.pdf>

GAC believes all of these materials are “advice” triggering the Board’s obligation to adopt it or explain to the GAC why it does not accept the advice, but it is not clear that the Board agrees with this broad notion of what constitutes “advice.”

- GAC first seeks to develop a consensus view of a particular issue. If it cannot do so, it will present the full ranges of views to the Board. GAC members are concerned that requiring a consensus view for all advice will impair its ability to provide advice in a timely manner, but Board members are equally concerned that the Board cannot follow “advice” that may be a compendium of competing and conflicting views of GAC members.
- Although the bylaws require ICANN to request the advice of the GAC whenever the Board is considering an action for adoption that affects public policy concerns, there is no formal mechanism by which such requests are made or recorded. The GAC chair attends Board meetings as a non-voting liaison and it appears that the Board views that as putting the GAC on notice of every action the Board is considering whether or not it formally requests an opinion.<sup>56</sup>
- GAC members expressed concern that the Board is not providing feedback to the GAC on the advice it does provide to the Board. One GAC member commented that the GAC regularly has to repeat its advice in subsequent communiqués because the Board does not supply any response to the GAC that it is taking the GAC advice into account in its decision-making.
- The bylaws set forth a formal process for the GAC to provide its input only at the Board level. However, given that policy frameworks are formulated at the level of the supporting organizations long before a matter reaches the Board for decision, some participants suggested that ICANN should make provision, including changing the bylaws, if necessary, to allow for GAC input at earlier stages of the policy development process.

In the public comment process, the ATRT posed two questions to the public regarding the role of the GAC and the Board-GAC relationship:

- What is your assessment of the role of the GAC and its interaction with the Board?
- Are additional steps needed to ensure effective coordination by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS?

About ten of the comments submitted in the public input process responded to these questions. One commenter noted that the GAC “has consistently produced some of the best

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<sup>56</sup> Transcript from ATRT meeting with GAC in Brussels. See: <http://brussels38.icann.org/node/12437>

advice and input into ICANN processes.”<sup>57</sup> However, others commented that the Board has not paid enough attention to the suggestions of the GAC and that there was no oversight mechanism to ensure the ICANN Board follows the GAC recommendations.<sup>58</sup> Most commenters agreed that the GAC has a fundamental<sup>59</sup> and important<sup>60</sup> role to play on issues related to the public interest, but others opined that the GAC was not the “sole representative of the public interest”<sup>61</sup> and that “all constituencies should have a role in representing the public interest.”<sup>62</sup>

Few commenters offered concrete suggestions as to additional steps that could be taken to improve effective coordination of GAC input by the Board. AT&T suggested that the “focus should be on improving coordination within the current advisory process as opposed to fundamentally changing the role or structure of the GAC.”<sup>63</sup>

### Questions for Review.

Is ICANN adequately assessing the role and effectiveness of the GAC?

Do the activities of the JWG constitute an adequate assessment of the role and effectiveness of the GAC on the part of ICANN?

Is ICANN adequately making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS?

Would effective consideration of the public policy aspects of ICANN issues be improved by:

- Defining more specifically what constitutes a GAC advice under the bylaws? Issues to be considered include what form such advice must take to trigger Board obligations to follow it or engage in mediation process whether to require a consensus, what obligations the Board has, if any, with respect to other forms of GAC “advice.”
- Defining more specifically the process by which the Board seeks advice from the GAC on public policy issues? Issues to be considered include what form of notice the Board should give, whether the process is one-time or iterative, how the Board should track this process, either through a database or otherwise.
- Defining more specifically how the Board considers and responds to GAC advice.

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<sup>57</sup> Comments of Kieran McCarthy.

<sup>58</sup> Comments of CNNIC. Comments of the Coalition Against Domain Name Abuse.

<sup>59</sup> Comments of the European Telecommunications Network Operators Association (ETNO).

<sup>60</sup> Comments of Leap of Faith Financial Services.

<sup>61</sup> Comments of AT&T; Comments of ETNO.

<sup>62</sup> Comments of the International Chamber of Commerce.

<sup>63</sup> Comments of AT&T.

- Facilitating the GAC, through bylaw changes or otherwise, to engage with supporting organizations and other constituencies early in the process to ensure that public policy input is provided and considered in a manner to help shape the formulation of ICANN policies.
- Having ICANN provide more support to the GAC. Issues to be considered include preserving the independence of the GAC and ensuring that ICANN policy staff is fully aware of GAC issues and concerns.
- Enabling the GAC to work intersessionally in order to more quickly respond to public policy changes proposed by ICANN?

### Findings and Recommendations

The current Board-GAC relationship is dysfunctional and has been so for several years. While the Bylaws limit the Board's ability to evaluate the performance and operation of the GAC, the Board should have acted long before now to engage the GAC to resolve the ambiguities in the Bylaws and to build a more productive working relationship with the GAC. The joint Board-GAC working group established in 2009 offers an appropriate vehicle for these issues to be considered and recommendations developed. But for this process to produce a result that demonstrates that ICANN is adequately assessing the GAC, the Review Team strongly recommends that the following issues be resolved by the conclusion of the working group effort.

First, both the Board and the GAC, (as soon as possible, but no later than INSERT DATE) need to clarify what constitutes GAC "advice" under the Bylaws and the Board needs to exercise more discipline in asking for GAC advice on public policy issues. The GAC notion that any communication it has with the Board constitutes GAC advice has proven to be unworkable as there has likely been confusion as to which pieces of Board input have triggered the Board's obligations to follow GAC advice. Similarly, the Board position that it does not need to formally request a GAC opinion because the GAC is "on notice" as to all matters before the Board has also confused the process envisioned in the Bylaws by which the Board more formally solicits GAC advice.

A reasonable outcome would be for ICANN, (as soon as possible, but no later than INSERT DATE) to establish a more formal, documented process by which it notifies the GAC of matters that affect public policy concerns to request GAC advice. As a key element of this process, the Board should be proactive in requesting GAC input in writing. At the same time, the 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. The GAC can continue to provide informal views but these would not trigger any obligation on the Board to follow such input. In establishing a more formal process, ICANN should develop an on-line tool or database in which each request to the GAC and advice



received from the GAC is documented along with the Board's consideration of and response to each advice.

Second, both the Board and the GAC need to work together to have the GAC advice provided and considered on a more timely basis. Instituting a more formal process for requesting opinions should help in this regard by making it clearer when the Board is seeking a GAC opinion but given that the GAC meets face-to-face only three times a year, it will need to establish other mechanisms for preparing and reaching agreement on consensus opinions in a more timely manner.

Third, the Board, working with the GAC, needs to develop and implement a process to engage the GAC earlier in the policy development process. 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. Such a process would also reduce the delay associated with requesting GAC input only after an issue has been submitted to the Board for its consideration and approval and should reduce the back-and-forth between the Board and the GAC that has not served either party well in the specific cases of .xxx and gTLDs. As a related matter, the Board and the GAC should jointly develop and implement actions 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. In doing so, the Board and the GAC may wish to consider creating/revising the role of ICANN staff support to the GAC and whether the Board and the GAC would benefit from more frequent joint meetings.

Fourth, the Board should endeavor to increase the level of support and commitment of governments to the GAC process. First, the Board should encourage member countries and organizations to participate in GAC deliberations on a timely basis and at a sufficiently authoritative level. To the extent member representatives attending GAC meetings are prepared and authorized to speak on behalf of their countries and organizations, the process by which GAC develops and submits consensus opinions to the Board should take less time and should lead to a more authoritative work product. Second, the Board should place a particular focus on engaging nations in the developing world, paying particular attention to the need to provide multilingual access to ICANN records. Third, the Board, working with the GAC, should consider establishing a process by which ICANN engages senior government officials on public policy issues on a regular and collective basis.

## **Report of Working Group 3**

### Statement of Purpose.

Working Group 3 is evaluating the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet

community; the policy development process to facilitate enhanced cross community deliberations and effective and timely policy development.

### Background Statement.

#### *Relevant Provisions of the Bylaws.*

Article III, Section 6 of the ICANN bylaws requires ICANN to provide Notice and Comment “with respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges.”<sup>64</sup> The bylaws also state that, “[a]s appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.”<sup>65</sup> Article III also contains provisions calling for the maintenance of a website by ICANN, a Manager of Public Participation, Meeting Notices and Agendas and Minutes and Preliminary Minutes of the meetings of the Board, Supporting Organizations and Councils thereof.<sup>66</sup>

The GNSO Policy Development Process (PDP) procedures (including Public Comment) are addressed in Annex A of the bylaws.<sup>67</sup> The ccNSO Policy Development Process (PDP) procedures (including Public Comment) are addressed in Annex B of the bylaws.<sup>68</sup>

#### *Recent Public Comment Periods and Policy Development Processes*

The Berkman Center conducted research on 3 separate Public Comment opportunities conducted by ICANN. Berkman reviewed, within the context of the newTLD round, Public Comment processes concerning the DAG, the Expression of Interest and the IRT. Berkman also reviewed the Public Comment process conducted by the ATRT.

*Board action to assess the process by which ICANN seeks to improve public participation and the manner in which it receives public input, including adequate explanation of decisions taken and the rationale thereof.*

- Board Public Participation Committee – much activity has taken place within and at the initiation of the Board Public Participation Committee (PPC). The PPC has developed a web page as well as short and long-term reports to improve public participation in ICANN and the conduct of ICANN meetings on a number of fronts. The PPC recommended the implementation of the requirement to post documents 15 days prior to ICANN meetings. The PPC asks ICANN Staff for 6 month and 12 month draft working plans to prepare for public participation needs. The PPC also solicits feedback from the ICANN Community

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<sup>64</sup> ICANN Bylaws, Article III, Section 6.

<sup>65</sup> ICANN Bylaws, Article III, Section 7.

<sup>66</sup> ICANN Bylaws, Article III, Sections 2, 3, 4 and 5.

<sup>67</sup> ICANN Bylaws, Annex A.

<sup>68</sup> ICANN Bylaws, Annex B.

concerning the organization of ICANN meetings to propose better, more efficient, more friendly, safer and more conversational meetings. The PPC introduced linguistic services and general policy for interpretation as well as expanded remote participation.<sup>69</sup>

*Community action to improve the processes by which Policy Development Processes are conducted within ICANN.*

- New GNSO Policy Development Process - The PDP Work Team issued an Initial Report on May 31, 2010 with 45 recommendations and a number of considerations that are put forward to enhance community confidence in the new PDP processes.<sup>70</sup>
- Cross Community Deliberation – Recent examples of cross community deliberations that are contributory but not limited to formal PDP's within ICANN SO's are the Cross Community WG formed to discuss and make recommendations on the ccTLD IDN Fast Track process; the Recommendation 6 Cross Community Work Group that explored implementation recommendations regarding aspects of the new GTLD Application Guidelines; and the Joint DNS Security and Stability Analysis Working Group (DSSA-WG); In general such cross community deliberations, are Work Groups (or similar structures) that address matters of common interest to the participating Supporting Organisations (SOs), Advisory Committees (ACs) and others.

*Public Comment to the ATRT on public input, the public and Internet community embrace of ICANN decisions, policy development process and cross community deliberations*

“There are at least three fundamental problems with ICANN’s public comment process. The first is the sheer volume of the comment periods. As of July 7, there were 20 open public comment periods. Public comment deadlines for eight of these were bunched between July 18 and July 27.... Second, there have been several instances in the past year in which ICANN has done no more than go through the motions of seeking public comment on issues on which it had already decided upon at least the next step in a course of action. Three of these instances were summarized in a comment filed by COA on February 9, 2010.”

<http://forum.icann.org/lists/affrev-draft-processes/msg00016.html> “Third, as ATRT members heard from the participants in the Commercial Stakeholders Group (CSG) meeting in Brussels last month, it is common for public comments received by ICANN to be digested by it in an incomplete and sometimes misleading fashion. It seems very likely that no one at ICANN, other than a very restricted number of staff charged with reviewing and summarizing public comments, ever reads more than a handful – if that many – of the actual comments submitted. Everyone else depends on the staff-generated summary to learn what the public had to say about a particular issue. This includes senior ICANN staff and Board members, to the extent that they are aware of the contents of submitted public comments at all, and most members of the public. Thus, concerns about problems with these summaries must be taken seriously.”

<sup>69</sup> <http://www.icann.org/en/committees/participation/>; interview with Jean Jacques Subrenat.

<sup>70</sup> <http://forum.icann.org/lists/gnso-ppsc-wg/pdfUwIxdLnA8H.pdf>.

*Coalition for Online Accountability*

“ICC members are concerned that transparency in some cases is equated with the posting of voluminous materials and information. ICANN has made significant progress in transparency in decision-making, and future strengthening efforts should focus on the link between information-posting transparency and how the community can be truly informed about decision-making. First, in addition to the initial act of soliciting comments, it is critical to ensure an adequate amount of time for stakeholders to reply (30 or 60 days, depending on the complexity of the topic). Second, it is critical at the end of a consultation to summarize the range of substantive positions submitted and to provide the ICANN rationale for why certain views from constituencies were either accepted or rejected in determining ICANN’s decision. Third, it is also essential that an adequate range of input is in fact received from the community, which in several instances has not been the case, most likely because of the volume of parallel processes and work items.” *International Chamber of Commerce*

“It's undeniable that ICANN has made a great deal more information available online in recent years, But (sic) one of the recurring criticisms leveled by community members is the opacity of how ICANN staff digests community comments and comes up with policy implementation plans. It is now impossible for stakeholders to learn whether and how their working group reports and comments were factored into staff reports and board decisions. In a bottom-up consensus body, the ability of stakeholders to track their promised impact on the process is critical. At the time of the JPA midterm review, this answer was not possible to know. Today, ICANN has yet to establish a mechanism to address this oft-voiced concern.” *Net Choice*

“The ASO Policy Development Process is indeed complex, as a global policy must be submitted to all Regional Internet Registries and discussed at regional level, respecting all different PDPs. The process requires the proposer to attend all regional meetings worldwide. The proposed policy must be approved in the same terms by all regional bodies, before it can be endorsed by the ASO council, and then approved by the ICANN Board, after a public comment period at ICANN level. ETNO believes that the absence of a forum for discussion of such issues at ICANN level and the absence of cross community open discussion at that level lacks transparency and makes the process even more complex. While respecting the necessity to discuss such issues at regional level, ETNO believes that some improvement is needed as regards cross-community deliberations.” *ETNO*

**Questions for Review.**

Is ICANN support for the policy development process adequate to ensure effective and timely policy development?

Does the existing policy development process adequately facilitate enhanced cross community deliberations?

Are the Policy Process Steering Committee-Policy Development Process and the Policy Process Steering Committee-Working Group efforts adequately addressing timely and effective policy development?

Does the level of multilingualism in the policy development process and Board decision-making offer sufficient access and opportunity to participate for the global ICANN Community?

Would public input be improved if ICANN's Notice and Comment process had stratified categories? (e.g. Notice of Inquiry, Notice of Proposed Policy Making)

Would cross community deliberations be improved through the establishment of procedures for cross community deliberations (e.g. normal and "fast track") and the establishment of explicit mechanisms to trigger cross community deliberations?

Would public and Internet community embrace of ICANN Board resolutions be improved if the resolutions articulated the rationale for the decision taken including the reasons various public input was accepted or rejected in reaching the decision?

## **Findings**

The timeliness and effectiveness of policy making is a serious concern among participants in ICANN processes. The numerous changes in projected completion dates for newTLD round preparatory work were a source of concern that led to a specific proposal (i.e. the Expression of Interest) from some members in the Community. An often cited concern is the sheer volume of open public comments. The ATRT takes into account the fact that the volume of open proceedings is affected by the actions of constituent bodies within ICANN and is not uniquely influenced by ICANN Staff or the Board. While efforts to prioritize policy making are underway and could assist in addressing some concerns, it appears that significant improvements could be made in both the nature and structure of the public input and policy making processes within ICANN.

Article III, Section 6 of the Bylaws provides, in part, that ICANN should provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board. Presently, the comment cycles are not structured to provide unique "Reply" comment cycles that could add efficiencies and value to the receipt of community input.

## **Recommendations**

1. The Board should (as soon as possible, but no later than INSERT DATE,) direct the adoption of public Notice and Comment processes that are stratified (e.g. Notice of Inquiry, Notice of Policy Making) and prioritized. Prioritization and stratification should be established based on coordinated Community input and consultation with Staff.
2. Public notice and comment processes should provide for both distinct “Comment” cycle and a “Reply Comment” comment cycle that allows Community respondents to address and rebut arguments raised in opposing parties’ Comments.
3. Timelines for public Notice and Comment should be reviewed and adjusted (as soon as possible, but no later than INSERT DATE,) to provide adequate opportunity for meaningful and timely comment. Comment and Reply Comment periods should be of a fixed duration.
4. [With recognition of Recommendation WG#1, Area 2, number 5.] The Board should, in publishing decisions, (as soon as possible, but no later than INSERT DATE,) adopt the practice of articulating the basis for its decision and identify the public comment that was persuasive in reaching its decision. The Board should identify the relevant basis and public comment that was not accepted in making its decision. The Board should articulate the rationale for rejecting relevant public comment in reaching its decision.
5. The Board should ensure that access to and documentation within the PDP processes and the public input processes are, to the maximum extent feasible, provided in multi-lingual manner.
6. The Board should publish its decisions in a multi-lingual manner to the maximum extent feasible.
7. The Board should ensure that all necessary inputs have been received to the respective policy making processes are accounted for and included for consideration by the Board to ensure effective and timely policy development. The ATRT recommends that the Board consider adopting a template or checklist that can accompany documentation for Board decisions that certifies what inputs have been accounted for and is included for consideration by the Board.
8. The Board should ensure that forecasted ICANN work programs should be published and regularly updated to facilitate public input and effective and timely policy development.

## **Report of Working Group 4**

**Statement of Purpose:** Working Group 4 is evaluating one element of Board Governance, specifically undertaking “the consideration of an appeal mechanism for Board decisions,”<sup>71</sup>

### ***Factual Statements***

#### **Relevant Provisions of the Bylaws:**

The ICANN Bylaws provide for three mechanisms that provide for the appeal of Board decisions. These are described in the bylaws as “creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN’s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms.”<sup>72</sup> The three mechanisms are:

1. Office of the Ombudsman: The Office of the Ombudsman acts as “a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board, or an ICANN constituent body has treated them unfairly.”<sup>73</sup>
2. Reconsideration: Reconsideration provides “a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.”<sup>74</sup>
3. Independent Review of Board Actions: The Independent Review of Board Actions (IRP) provides “a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”<sup>75</sup>

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<sup>71</sup> Affirmation of Commitments, Sec. 9.1(a): <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>72</sup> ICANN Bylaws, Article IV, Section 1: <http://www.icann.org/en/general/bylaws.htm#IV>

<sup>73</sup> ICANN Bylaws, Article V, Section 2: <http://www.icann.org/en/general/bylaws.htm#V>

<sup>74</sup> ICANN Bylaws, Article IV, Section 2.1: <http://www.icann.org/en/general/bylaws.htm#IV>

<sup>75</sup> ICANN Bylaws, Article IV, Section 3.1: <http://www.icann.org/en/general/bylaws.htm#IV>

## Uses of the Review Mechanisms

Each review mechanism has been employed at least once by members of the ICANN community to appeal Board decisions or actions. Some have been more frequently employed than others. The Independent Review mechanism has been invoked on only one occasion.

Office of Ombudsman - The Office of the Ombudsman has been used frequently receiving over 2,000 complaints over the previous 5 years. A vast majority of those complaints were rejected on jurisdiction and the remainder were addressed through a variety of means including, but not limited to, resolution, referral, system improvement or self-help.

Reconsideration - Since 1999, there have been 44 requests for Reconsideration raised to the BGC and its predecessor committee. Of these, 32 (72.7%) were rejected or denied, or recommended that the Board take no action. In two cases, the complainant withdrew the request, and one case was declared to be groundless. Nine cases (20.4%) were approved by the BGC and adopted by the Board. One request is currently pending.

Several Reconsideration requests looked at by WG4 did not include sufficient published documentation for WG4 to determine whether or not the Board reconsidered them, requiring further investigation by ICANN Staff.

IRP - The IRP has been used once by ICM Registry in the .xxx decision review. At the end of the process the Panel declared that “[f]irst, the panel determined that the holdings of the IRP are advisory in nature and, thus, do not constitute binding arbitral awards. Second, the IRP panel determined that ‘the actions and decisions of the ICANN Board are not entitled to deference whether by application of the “business judgment rule” or otherwise; they are to be appraised not deferentially but objectively.’ Finally, the IRP Panel also determined that ‘the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .xxx TLD met the required sponsorship criteria.’ The IRP noted that although there ‘is a measure of ambiguity in the pertinent provisions of the Bylaws,’ the use of the phrase ‘to declare whether an action or inaction of the Board was inconsistent’ supported an interpretation that IRP decisions were intended to be advisory, and not binding on the ICANN Board. In particular, the IRP likened this to a recommendation rather than a binding order.”<sup>76</sup>

## Community Feedback

The ATRT received numerous comments from the community during the Public Comment period and during the June 2010 ICANN meeting in Brussels.<sup>77</sup> Many comments expressed concerns about the lack of an accountability mechanism that was sufficiently independent of the ICANN Board and that could issue binding decisions:

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<sup>76</sup> See Appendix A, “Accountability and Transparency at ICANN, An Independent Review, The Berkman Center for Internet & Society, October 20, 2010, pp. 122-123.

<sup>77</sup> Community Feedback for the AoC/ATRT: <http://forum.icann.org/lists/atrt-questions-2010/>



“Establish a Board of Review with authority to adjudicate disputed decisions of the board of directors and to reverse them if repugnant to the charter or bylaws.” [S. Gunnerson] <http://forum.icann.org/lists/atrt-questions-2010/msg00001.html>

“It [External Accountability] consists of an oversight or appeals process conducted by an independent entity with the authority to reverse the organization’s decisions or impose sanctions on it for failure to comply with agreed rules.” [M. Mueller] <http://forum.icann.org/lists/atrt-questions-2010/msg00002.html>

“ICANN’s current accountability mechanisms, including the Ombudsman, Board reconsideration procedure, and the Independent Review Panel provide some level of accountability within ICANN and are each important tools. However, all are merely advisory and ICC believes that ICANN needs strengthened and independent accountability mechanisms.” [ICC] <http://forum.icann.org/lists/atrt-questions-2010/msg00004.html>

“...it is advised that ICANN set up a permanent establishment, which should be independent in ICANN and in collaboration with all present accountability mechanisms, to inspect the major works from all levels and to establish a comprehensive accountability framework.” [CNNIC] <http://forum.icann.org/lists/atrt-questions-2010/msg00005.html>

“ICANN should give serious consideration to adopting review mechanisms that occur prior to final decisions being taken, and should improve its organizational structure to adequately represent the interest of the public within its governance model.” [IPC] <http://forum.icann.org/lists/atrt-questions-2010/msg00019.html>

“The business community, in particular, requested that ICANN establish new mechanisms for redress where an ICANN Board decision adversely affected a company or industry. While ICANN has implemented and expanded some review processes, none of those processes provide any potential for relief outside of the Board deciding to reverse its own decision.” [NetChoice] <http://forum.icann.org/lists/atrt-questions-2010/msg00020.html>

### **The Berkman Center Case Study of the IRP**

The Berkman Center undertook a case study of the IRP review of the .xxx matter. The case study observations concerning the IRP included the following:

“With regard to process in general and looking at the high cost and duration of the proceedings in particular, several interviewees questioned whether the IRP process provides a generally applicable means for reviewing and appealing ICANN decisions. In the interviews, some stated that the high cost of the proceedings meant that it offers a venue for only the wealthiest of

participants and is not a viable option for the vast majority of ICANN stakeholders. Others asserted that the cost, risk and duration of the IRP will mean that no others will be likely to appeal ICANN decisions via this mechanism, even among those with the financial resources to do so.

In addition to the questions raised about the likely limited merits of the IRP process as an accountability mechanism, others questioned how ICANN's interpretation of the IRP process reflects on ICANN's commitment to accountability. Some of those interviewed expressed the belief that ICANN's position to the IRP – that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the decision should not be binding – was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.

Perceptions also vary with regard to the ultimate effectiveness of the IRP as an accountability mechanism in this specific case. Among those interviewed, some asserted that this process demonstrated accountability, given that an applicant for a new TLD was able to initiate the review process and argue their case on the merits before independent arbitrators, and in doing so compelling ICANN to defend the basis for their actions. Moreover, the decision of the arbitration panel appears to have convinced ICANN to reverse its decision. Other interviewees expressed the opinion that the absence of a binding resolution from the IRP process is indicative of the fundamental lack of accountability at ICANN.”<sup>78</sup>

### **Relevant Efforts to Address Independent Review**

ICANN's President's Strategic Committee (PSC) was formed in 2005 to provide observations and recommendations concerning strategic issues facing ICANN, and contributing to ICANN's strategic planning process, which occurs in consultation with the Community.<sup>79</sup>

The Improving Institutional Confidence (IIC) consultation was announced by ICANN's Chairman, Peter Dengate Thrush, on Thursday 28 February 2008 at the U.S. Government's Department of Commerce Midterm Review of the Joint Project Agreement (JPA) between it and ICANN. The Chairman asked the PSC to outline a plan for developing a transition framework. On 27 February 2009, the PSC published its draft Implementation Plan for Improving Institutional Confidence, which had gone through three public comment periods, to the global Internet community for information and discussion during ICANN's Mexico City meeting.

Among the recommendations in the IIC draft Implementation Plan were the following:

“Recommendation 2.7: Seek advice from a committee of independent experts on the restructuring of the review mechanisms to provide a set of mechanisms that will provide for

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<sup>78</sup> See Appendix A, “Accountability and Transparency at ICANN, An Independent Review, The Berkman Center for Internet & Society, October 20, 2010, pp. 123-124.

<sup>79</sup> <http://www.icann.org/en/psc/>

improved accountability in relation to individual rights and having regard to the two proposed further mechanisms in RECOMMENDATIONS 2.8 and 2.9 immediately below.

Recommendation 2.8: Establish an additional mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees. For the Governmental Advisory Committee, a consensus statement from all the members present at a physical meeting shall suffice.

Recommendation 2.9: Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.”<sup>80</sup>

### **ATRT Request for Information (RFI) to ICANN Staff**

WG4 sent a request for information to ICANN staff concerning the IIC recommendations. The RFI stated the following:

“The 2009 report entitled “Improving Institutional Confidence: The Way Forward” proposed two new methods of accountability for the ICANN Board. These include a Community Re-Examination Vote and the formation of a standing Independent Review Body. The ATRT requests that ICANN provide an update on the status of these recommendations, including:

- (a) Were the recommendations adopted?
- (b) If so, were they adopted in the state proposed in the report, or were modifications made?
- (c) If adopted, what is the procedure and time frame to implement these recommendations?
- (d) If adopted, how will ICANN communicate these changes to the larger community?
- (e) If the recommendations were not adopted, what is the reasoning that led to ICANN disregarding these recommendations?”

ICANN Staff replied to the WG4 RFI as follows:

“In July 2009, ICANN posted for public comment proposed Bylaws amendments setting out the Community Re-Examination Vote and the modification of the Independent Review Process to create a standing Independent Review Body. See <http://www.icann.org/en/public-comment/public-comment-200909.html#iic-bylaws>. Both of these Bylaws changes were proposed through the Improving Institutional Confidence (IIC) report. To allow for community input on the formation of the recommendations, the public comment period remained open for four months.

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<sup>80</sup> Draft Implementation Plan for Improving Institutional Confidence, p.7. <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>

ICANN’s Summary of Comments received is available at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00020.html>. Most commenters were opposed to ICANN proceeding with the implementation of the new accountability mechanisms as drafted. There were various concerns raised, including a consensus that alterations of the current Independent Review Process would be premature prior to the resolution of the then-pending ICM Independent Review Proceeding, and an opportunity to evaluate the lessons to be learned from the inaugural use of the Independent Review mechanism. For the Community Re-Examination Vote, commenters raised multiple concerns, such as the binding nature of the process as well as the required thresholds for calls for Re-Examination. As noted in the Summary, no commenters were in support of the adoption of the proposed Bylaws as written.

Because of the strong community opposition to the proposals as drafted, staff recommended that no further implementation action be taken on the two accountability mechanisms until the recommendations and the processes to reach those recommendations could be revised. One of the intervening events – the action based on the Independent Review Panel’s Declaration in the ICM IRP – is still ongoing. Further, since the July 2009 posting of the proposed Bylaws, the Affirmation of Commitments was signed, and this review team was empanelled to review community engagement and inputs, among other topics. In light of the ATRT’s work, this review team may assist in identifying what additions or modifications to accountability mechanisms may be most beneficial and appropriate for the community.

ICANN strived for accountability to the community in *not* implementing the mechanisms that were clearly identified as deficient and lacking in transparency in process. ICANN has not ‘disregarded’ the recommendations, but is instead listening to the community in terms of the proper consideration of these new accountability mechanisms.”<sup>81</sup>

### **Overarching Issue – Binding Appeal as the Standard for Accountability**

In addressing the question regarding the possibility that independent review mechanism of ICANN Board decisions could issue binding decisions, WG4 queried ICANN about California law governing ICANN and any implications for a possible recommendation from the ATRT. ICANN staff provided the following response:

#### **“Limitations on Third Party Review of Corporate Board Actions under California Law**

-- California law requires that the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board of directors. See Cal. Corp. Code § 5210.

-- The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that all corporate

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<sup>81</sup> [Staff Responses to ATRT WG 4 Questions](#)

powers shall be exercised under the ultimate direction of the board. *Id.*

-- Although the board is broadly empowered to delegate certain management functions to officers, employees, committees and other third parties, the board cannot empower any entity to overturn decisions or actions of the board because that would result in that entity indirectly controlling the activities and affairs of the corporation and thus usurping the legal duties of the board.

-- In order to exercise its fiduciary duties to the corporation under California law, the board may not abdicate its ultimate authority to exercise all corporate powers.

-- Entering into binding arbitration clauses for certain actions within contractual agreements would be acceptable, but cannot be used as a catch-all waiver of a California corporation board's legal rights and obligations to have final responsibility for actions of the organization."<sup>82</sup>

### ***Questions for Review***

Are the three existing accountability review mechanisms in ICANN (i.e. Office of the Ombudsman, Reconsideration, and the IRP) and their inter-relationship, in some cases, clear and well understood?

Are the processes and decisions (or recommended actions) of the three existing accountability review mechanisms adequately publicized?

Has ICANN sufficiently reviewed and assessed the three existing accountability review mechanisms and potentially new accountability review mechanisms as called for in the IIC draft Implementation Report?

Would the Office of the Ombudsman be improved if its framework were reviewed vis-à-vis internationally accepted standards?

Would the Reconsideration mechanism be improved by reviewing publication practices of the Reconsideration process?

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<sup>82</sup> ICANN Memorandum: "Limitations on Third-Party Review of Corporate Board Actions under California Law," <http://icann.org/en/reviews/affirmation/third-party-review-of-board-actions-31aug10-en.pdf>

## ***Findings***

While there was 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, the ATRT did not reach consensus on whether binding authority was the standard upon which to judge ICANN's accountability. The ATRT also discussed the possible scope and application of California law and focused on the nature of the various decisions that the ICANN Board is obligated to make under the law. The ATRT discussed both the question of desirability of a binding third-party review and ICANN's recitation of California law with the Berkman Center during its face-to-face meetings in Boston, in order to better understand the merits and demerits of such an approach, its scope and possible application in the context of a possible independent review mechanism. It has taken into account the respective considerations and recommendations as summarized in the Berkman final report.

In the course of broad consultations, ATRT received feedback to the effect that ICANN could enter into agreements with parties that called for binding arbitration without running afoul of California law. While this latitude could apply in a contractual context, 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. To the extent that this might limit the availability of such a mechanism to contracting parties, the ATRT recognized the possibility that such a mechanism could have limited utility from a Community point-of-view.

In summary, while 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. The ATRT did agree however that ensuring existing review mechanisms were either sufficiently independent of the Board or adequately structured was critical to ensuring accountability.

The ATRT noted that work by ICANN and the Community to address recommendations of the IIC was underway. Public Comment had been received on proposed bylaw changes but implementation work did not advance for reasons stated in ICANN staff's response to WG4's Request for Information. The ATRT recognizes that exploration by ICANN staff and the Community of revised, new mechanisms under Recommendation 2.8 and Recommendation 2.9 of the IIC, may continue. With respect to the AoC review, the ATRT identified specific issues with respect to the three existing review mechanisms that should be addressed by ICANN in conjunction with a committee of independent experts.

With regard to the Office of the Ombudsman, the ATRT received community feedback regarding the effectiveness of the Office of the Ombudsman, and conducted two interviews with the Ombudsman. The Ombudsman is not perceived by the community to be a fully independent accountability mechanism for accountability of the ICANN Board. Questions have

been raised about inconsistencies between the structure and operation of ICANN's Office of the Ombudsman and internationally accepted standards for Ombudsman.

The ICANN bylaws charge the Board Governance Committee (BGC) with the management of Reconsideration requests. Because the BGC is comprised exclusively of existing Board members, it is therefore not independent.

With regard to Reconsideration requests, the grounds that must be satisfied to sustain a Reconsideration request is seen by some as constraining the ability of the Community to use this process. Additionally, the history of Reconsideration request resolution and the publication of the proceedings and decisions do not reflect sufficient clarity and consistency to satisfy transparency expectations.

Last, the IRP is viewed as potentially costly and too long in duration to provide a broad based and timely review mechanism for the broader ICANN Community. Some members of the ATRT concluded that the IRP was inaccessible to most segments of the community and is not necessarily an attractive alternative to courts as a review mechanism.

### ***Recommendations***

The ICANN Board should implement (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT) Recommendation 2.7 of the 2009 Improving Institutional Confidence Implementation Plan which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms - the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms, their inter-relation, if any (i.e., do the three processes provide for a graduated review process) determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability. The specific issues identified by the ATRT with respect to the review mechanisms should be addressed in this context.

The operations of the Office of Ombudsman should be assessed and, to the extent they are not, should be brought into compliance with the relevant aspects of internationally recognized standards for an Ombudsman function such as International Ombudsman Association<sup>83</sup> and its Standards of Practice<sup>84</sup> (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT).

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<sup>83</sup> International Ombudsman Association: <http://www.ombudsassociation.org>

<sup>84</sup> IOA Standards of Practice: [http://www.ombudsassociation.org/standards/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/standards/IOA_Standards_of_Practice_Oct09.pdf)

( as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT), the standard for Reconsideration requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.

( as soon as possible, but no later than - DATE WILL BE INSERTED IN THE FINAL REPORT) the Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

The Committee of Independent Experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the IIC.



**APPENDIX A**

**“Accountability and Transparency at ICANN, An Independent Review”  
The Berkman Center for Internet & Society  
October 20, 2010**