

## **Comments on Proposed Recommendations of the Accountability and Transparency Review Team**

### **INTRODUCTION**

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

#### **1. GENERAL REMARKS**

##### **a. Scope of Authority, Scope of Work**

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

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

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

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

<sup>3</sup> *Id.* at ¶ 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at ¶ 9.1.

<sup>6</sup> *Id.* at ¶ 9.1(a).

ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;”<sup>7</sup>

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

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

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

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<sup>7</sup> *Id.* at 9.1(b).

<sup>8</sup> *Id.* at ¶ 9.1(c).

<sup>9</sup> *Id.* at ¶ 9.1(d).

<sup>10</sup> *Id.* at ¶ 9.1(e).

<sup>11</sup> *Id.* at ¶ 9.1 (emphasis added).

<sup>12</sup> *Id.*

## b. ATRT's Methodology

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

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

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<sup>13</sup> *Proposed Recommendations*, at 1, 3, 4, 5.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Affirmation*, at ¶ 9.1 (emphasis added).

### c. ICANN- IMPEDIMENTS TO THE ATRT REVIEW PROCESS

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

- ♦ ICANN did not approve the contract with Harvard's Berkman Center as ATRT's "Independent Expert" until August 5, 2010.<sup>18</sup> As a result, Berkman's work period was compressed into two months, between August and October, a delay that directly shaped its conceptual framework and final recommendations.<sup>19</sup>
- ♦ ICANN's general counsel, John Jeffrey, insisted on participating in all telephone interviews conducted with ICANN staff by the Berkman Center.<sup>20</sup> His participation almost certainly discouraged staff members from speaking as candidly as they would have done otherwise.
- ♦ ICANN's president, Rod Beckstrom, publicly disparaged ATRT's objectivity and suggested that ICANN's board would be free to disregard its recommendations—months before those recommendations were formulated, much less published.<sup>21</sup>
- ♦ ICANN inaugurated the review process at the end of last year by publishing a document prescribing the methodology of review teams like ATRT,<sup>22</sup> when the only authority it has with respect to review teams is to "organize"<sup>23</sup> them.

## 2. OVERARCHING RECOMMENDATION

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

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

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

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

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

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

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

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

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

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

### 3. BOARD GOVERNANCE, PERFORMANCE, AND COMPOSITION

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

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<sup>24</sup> *Proposed Recommendations*, at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Affirmation*, at ¶ 9.1.

<sup>27</sup> *Id.* at 2.

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

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

#### 4. ICANN'S RELATIONSHIP WITH GAC

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

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

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

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

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

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

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<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Affirmation*, at ¶ 6.

<sup>32</sup> *Id.*

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

<sup>34</sup> *See Proposed Recommendations*, at 32.

<sup>35</sup> *Id.*

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

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

## 5. POLICY-DEVELOPMENT PROCESSES

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

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

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<sup>36</sup> *Id.* at 33.

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 29.

<sup>40</sup> *Berkman Center Review*, at 29.

<sup>41</sup> *Id.* at 37.

<sup>42</sup> *Id.* at 4.

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

## 6. FIXING ICANN’S ACCOUNTABILITY

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

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

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

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<sup>43</sup> *Affirmation*, at ¶ 7.

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.* at ¶ 9.1 (emphasis added).

<sup>47</sup> *Id.* at ¶ 9.1(a).

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Proposed Recommendations*, at 40.

<sup>52</sup> *Proposed Recommendations*, at 44.



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

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

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

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

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

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

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *Id.*

<sup>56</sup> *Proposed Recommendations*, at 46.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Proposed Recommendations*, at 46.

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

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

## CONCLUSION

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

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<sup>61</sup> *Id.*

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**MEMORANDUM**

**To: Accountability and Transparency Review Team**

**From: R. Shawn Gunnarson**

**Date: December 3, 2010**

**Subject: ICANN's Accountability and California Law**

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**Introduction**

The Accountability and Transparency Review Team (“ATRT”) has run into a legal problem. ICANN insists that California law prohibits the board from “empower[ing] 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.”<sup>1</sup> ICANN’s legal position clearly influenced the ATRT’s Proposed Recommendations<sup>2</sup> and the Final Report of the Berkman Center<sup>3</sup> on which it relied. Given that influence, the range of available recommendations that ATRT can make in its final report now depends on whether ICANN has read California law correctly.

This memorandum seeks to assist the ATRT by analyzing ICANN’s legal position in light of California law. It demonstrates that ICANN’s reading of California law is mistaken. ICANN may resist independent and binding accountability on other grounds, but it cannot fairly claim that is compelled to avoid such accountability as a matter of law. The analysis consists of three parts. First, it recites how California law has come to influence the form of accountability that ATRT may recommend. Second, it explains how ICANN’s reading of California law is mistaken. Third, it shows that ICANN’s effort to avoid independent and binding accountability by relying on California law runs contrary to its past commitments and to the ICANN model of privatized DNS management.

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<sup>1</sup> ICANN, *Limitations on Third Party Review of Corporate Board Actions under California Law*, Aug. 31, 2010 (“*Limitations*”).

<sup>2</sup> Accountability And Transparency Review Team, *Proposed Recommendations & Request For Public Comment*, Nov. 3, 2010 (“*Proposed Recommendations*”).

<sup>3</sup> The Berkman Center for Internet & Society at Harvard University, Final Report, *Accountability and Transparency at ICANN: An Independent Report*, Oct. 20, 2010 (“*Berkman Center Report*”).

## 1. ATRT's Proposed Recommendations Are Constrained by ICANN's Interpretation of California Law.

The problem of California law arose while ATRT was carrying out its mandate under the Affirmation of Commitments (“AoC”) to “consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.”<sup>4</sup> To be precise, it cropped up during Working Group 4’s (“WG4”) “consideration of an appeal mechanism for Board decisions.”<sup>5</sup> In attempting to identify an appeal mechanism that would be binding on the board, “WG4 queried ICANN about California law governing ICANN and any implications for a possible recommendation from the ATRT.”<sup>6</sup> ICANN replied with a one-page document stating its position that under California law “the board *cannot* empower any entity to overturn decisions or actions of the board.”<sup>7</sup>

ICANN’s legal position created an impasse for WG4. Its investigation concluded that neither the Ombudsman nor the request for reconsideration were truly independent of the board and their decisions are not binding on it.<sup>8</sup> It rejected a new proposal for a community re-vote as likely to require too high a level of consensus among the SOs and ACs.<sup>9</sup> Only the Independent Review Panel (“IRP”) was found to be sufficiently independent, and its effectiveness was questioned because “its decisions and recommendations are not binding on the ICANN Board.”<sup>10</sup> Resolving the impasse caused by ICANN’s legal position was regarded by WG4 as “*critical* to establishing an appeals mechanism that is both binding and independent, and *essential* to the viability of the ICANN model itself.”<sup>11</sup> Based on these concerns, WG4 tentatively recommended that “pending further research” it would “[c]hallenge ICANN’s interpretation of California corporate governance law as it applies to ICANN policy development.”<sup>12</sup>

ATRT, acting as a whole, has taken a different tack. Its Proposed Recommendations concede that ATRT “did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability.”<sup>13</sup> Consensus broke down over whether an adequate appeals mechanism from board actions needed to be binding. “[W]hile some members of the ATRT believe that having a binding appeals process is critical to ensure accountability to the community and the long term viability of the multi-stakeholder ICANN model, other members of the ATRT raised concerns that such a standard would

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<sup>4</sup> *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers*, Sep. 30, 2009, at ¶ 9.1 (“AoC”).

<sup>5</sup> *Id.* at ¶ 9.1(a).

<sup>6</sup> *Proposed Recommendations*, at 44.

<sup>7</sup> *See Limitations* (emphasis added).

<sup>8</sup> AoC / ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)* (“Draft Findings”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Id.*

<sup>13</sup> *Proposed Recommendations*, at 46.

create a new set of accountability and transparency issues by assigning to some new, unnamed set of individuals the power to overturn Board decisions.”<sup>14</sup> Resolving this dispute was evidently elusive, despite “concern from the Community and, in part, from the Berkman Case Studies, over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority.”<sup>15</sup>

The Berkman Center report found, in turn, that “there are no binding appeal mechanisms”<sup>16</sup> but concluded “that it is not advisable to implement such a broad-reaching third-party review of any Board decisions and actions.”<sup>17</sup> One reason for that conclusion was that “it remains doubtful whether such a broad regime would hold under Californian corporate law.”<sup>18</sup>

These doubts about the validity of placing the board under a binding form of review led ATRT to make an interesting distinction. It acknowledged that ICANN may agree to binding arbitration in its commercial agreements “without running afoul of California law” but reasoned that “it is less clear and deserves further legal analysis as to what extent and through what mechanisms ICANN could agree to enter into binding arbitration more generally.”<sup>19</sup>

## 2. ICANN’s Legal Position Misstates California Law

ATRT’s final recommendations will contribute toward shaping and informing public discourse about ICANN’s accountability for the foreseeable future. Such consequential work should not be built on unresolved doubts about how far California law permits ICANN’s board of directors to be held accountable. To remove or reduce such doubts, ICANN’s legal position is analyzed below in light of the controlling statutory provisions found in the California Nonprofit Public Benefit Corporation Law.<sup>20</sup> Each statement in ICANN’s memorandum is quoted verbatim in italics, followed by analysis and discussion.

- a. *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.*

Actually, section 5210 says more than that:

Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Berkman Center Report*, at 2.

<sup>17</sup> *Id.* at 45.

<sup>18</sup> *Id.*

<sup>19</sup> *Proposed Recommendations*, at 46.

<sup>20</sup> Calif. Corp. Code §§ 5110-6910.

direction of the board. 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 the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.<sup>21</sup>

ICANN's misreading is evident. The principle 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"<sup>22</sup> is circumscribed by multiple exceptions that ICANN omits. Section 5210 hardly makes corporate board authority an absolute under California law.

These exceptions to corporate autonomy are substantial. They include "the provisions of this part,"<sup>23</sup> meaning part 2 of division 2 of the California Corporations Code. That part spans sections 5110 through 6910 and includes numerous qualifications on the board's power, some of which will be pointed out shortly. They also include "any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033)."<sup>24</sup> With these exceptions in view, the proviso that a delegation of corporate management or powers requires that "all corporate powers shall be exercised under the ultimate direction of the board"<sup>25</sup> is immaterial. At issue is the validity of an appeal mechanism from the board's decisions, not a delegation of its powers.

For the moment it is enough to say that section 5210's principle of board autonomy has significant exceptions that ICANN omits. To that extent alone, its reading of California law is flawed.

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

This statement packs two substantial mistakes into a single sentence.

California law does not require "all corporate powers" to be exercised under the board's "ultimate control." To cite only one contrary example, the law specifically authorizes the board to designate statutory members<sup>26</sup> who may exercise substantial corporate powers, such as the power to remove directors or amend the bylaws, and who assuredly do not act under the board's direction. (More on them shortly.)

In addition, ICANN once again confuses limitations on power with delegations of power. An independent review body, whether the IRP or another, presumably would limit the board's power by reversing or nullifying its action. But that limitation acts as a brake, not a

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<sup>21</sup> *Id.* at § 5210.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at § 5310(a) ("A corporation may admit persons to membership, as provided in its articles or bylaws....").

steering wheel. Review of a disputed board decision by an independent review board does not exercise ICANN's corporate powers any more than does an arbitration panel adjudicating a dispute under a registry agreement. Because a review body exercises only the power to curb the board and not to manage ICANN or to act in its name, any issue of the board's "ultimate direction" is legally immaterial.

*c. 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.*

Here we see the nub of ICANN's position. ICANN contends that "the board cannot empower any entity to overturn decisions or actions of the board." ICANN cites no legal authority for its absolutist understanding of corporate autonomy. In fact, California law specifically authorizes the board oversight that ICANN denies.

Board oversight of the kind ICANN denies is available through the creation of statutory members. Public benefit nonprofit corporations like ICANN "may admit persons to membership, as provided in its articles or bylaws."<sup>27</sup> "Membership" under the statute means "the rights a member has pursuant to a corporation's articles, bylaws, and this division."<sup>28</sup> Importantly, this means that members' rights and duties are not entirely spelled out by statute; the articles and bylaws may modify and enhance them. By statute alone, membership carries include "the right to elect and remove directors"; "the right to sue the directors in derivative actions, or third parties on behalf of the corporation, under certain circumstances and subject to specified limitations"; and "other rights spelled out in the statutes and in the corporation's bylaws."<sup>29</sup> In addition, members may amend the bylaws and approve (or disapprove) of amendments to most articles, on the terms prescribed by the bylaws and articles.<sup>30</sup> It is well established that "[t]hese rights can be enforced in civil court actions."<sup>31</sup>

Binding oversight also may be exercised by the California Attorney General, who is charged to oversee ICANN's corporate affairs and, if necessary, subject it to binding proceedings "to correct the noncompliance or departure" from its basic purpose or the trusts it has assumed.<sup>32</sup> Although the Attorney General's supervisory powers are established by statute and not by the board, they tend to rebut ICANN's central argument that the board is legally required to retain untrammelled autonomy.

In addition to these specific grants of oversight authority to statutory members and the Attorney General, California law vests nonprofit corporations with broad powers to structure their internal affairs by amending the articles and bylaws. "California law

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<sup>27</sup> *Id.* at § 5310(a).

<sup>28</sup> *Id.* at § 5057.

<sup>29</sup> Edmund G. Brown, Jr., California Attorney General's Guide for Charities 24 (2005) ("Guide for Charities").

<sup>30</sup> See Calif. Corp. Code at §§ 5150(b) (bylaws); 5812(a) (articles).

<sup>31</sup> Guide for Charities, at 25.

<sup>32</sup> Calif. Corp. Code at § 5250.

permits a non-profit corporation like ICANN to limit its powers in its Articles of Incorporation *without qualification*.”<sup>33</sup> This testimony during the *ICM Registry* case by Harvard Law School Professor Goldsmith is supported by sections 5131 and 5140. The former provides that “articles of incorporation may set forth a further statement *limiting the purposes or powers* of the corporation,”<sup>34</sup> while the latter provides that a corporation has the powers of a natural person “[s]ubject to *any limitations* contained in the articles or bylaws.”<sup>35</sup> Unless doing so would violate a super-majority voting requirement, “[t]he articles or bylaws may *restrict or eliminate* the power of the board to adopt, amend or repeal any or all bylaws ....”<sup>36</sup> And “[b]ylaws may also provide that repeal or amendment of those bylaws, or the repeal or amendment of specified portions of those bylaws, may occur only with the approval in writing of a specified person or persons *other than the board or members*.”<sup>37</sup>

Taken together, these provisions mean that ICANN’s position rests on a misinterpretation of California law. A fair reading of the relevant statutory provisions shows that the law authorizes the board to institute members with the powers to elect and remove directors, bring a derivative action against the corporation, and amend the bylaws to deny the board itself power to alter the bylaws. Any of these devices might be used to reverse objectionable board actions. The law contains no provision qualifying the board’s power limit its own power, even if such limitations reduce the corporation’s powers. Contrary to ICANN’s legal position, none of these broadly-worded statutory provisions is qualified by the supposed requirement of preserving corporate autonomy. Instead, they permit ICANN to do what it says California law forbids: empower some entity to exercise binding review of the board.

On this critical point of law, ICANN simply got it wrong.

- d. *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.*

Fiduciary duties do not excuse the board from its duty to be accountable to the community whose activities it regulates. To be sure, California law places ICANN’s directors under obligations of loyalty, care, inquiry<sup>38</sup> and adherence to prudent investment standards<sup>39</sup> to ICANN as an institution. So much is uncontested.

But ICANN’s legal position implies a false choice between fidelity to these duties and its subjection to independent and binding review. If the board would not unlawfully “abdicate” its authority by creating statutory memberships, with extensive powers over the board, it is

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<sup>33</sup> Expert Report of Jack Goldsmith, *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 50 117 T 00224 08, at 11 & n.27, Jan. 22, 2009 (emphasis added).

<sup>34</sup> Cal. Corp. Code § 5131 (emphasis added).

<sup>35</sup> *Id.* at § 5140 (emphasis added).

<sup>36</sup> *Id.* at § 5150(c) (emphasis added).

<sup>37</sup> *Id.* at § 5150(d) (emphasis added).

<sup>38</sup> *Id.* at § 5231(a) (“A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”).

<sup>39</sup> *See id.* at § 5240.



hard to see how it could abdicate its authority by adopting a form of binding review with presumably lesser powers.

- e. *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.*

Waivers are not the issue, statutory authority is. ICANN's legal position is that California law precludes the board from accepting binding review of its decisions. Its prior course of conduct in its contractual dealings is irrelevant to whether the law permits an entity to overturn board decisions for purposes other than resolving contractual disputes. Its contractual arrangements do tend to show, however, that ICANN does not regard the board's autonomy as non-negotiable for all circumstances—only when it is convenient.

Three of the Internet's most popular TLDs—.com, .info, and .org—have registry agreements with ICANN whose current terms dictate binding arbitration as a form of dispute resolution.<sup>40</sup> Each agreement contains the identical clause at section 5.1(b):

Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved through binding arbitration conducted as provided in this Section 5.1(b) pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC").<sup>41</sup>

Binding arbitration produces decisions that may compel the board to act or refrain from acting. ICANN implicitly acknowledges this fact in agreeing that an arbitration award issued under the registry agreements, if confirmed, entitles the prevailing party "to enforce a judgment ... in any court of competent jurisdiction."<sup>42</sup> To that extent, ICANN has implicitly acknowledged that it understands California law to allow the board to be reversed or overturned under certain circumstances.

A comparison of these registry agreements with the bylaws governing the IRP confirms that it is ICANN's own decision, not California law, which determines whether ICANN's board is subject to reversal by an external authority. When dealing with its contracting partners, ICANN agrees to be subject to binding arbitration and specifically provides for the enforcement of any confirmed arbitration award by a court of law. But when dealing with the question of whether a board action is "inconsistent with the Articles of Incorporation or Bylaws,"<sup>43</sup> ICANN reserves power for the board to accept or reject the

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<sup>40</sup> See .com Registry Agreement between ICANN and VeriSign, Inc., Mar. 1, 2006, at § 5.1(b) ("Disputes arising under or in connection with this Agreement ... shall be resolved through binding arbitration ..."); .info Registry Agreement between ICANN and Afilias Limited, Dec. 18, 2006, at § 5.1(b) (same); .org Registry Agreement between ICANN and Public Interest Registry, Dec. 8, 2006, at § 5.1(b) (last visited on Oct. 28, 2010) ("org Agreement") (same).

<sup>41</sup> .org Agreement, at § 5.1(b).

<sup>42</sup> *Id.*

<sup>43</sup> ICANN, Bylaws, art. IV § 3(1).

IRP's findings.<sup>44</sup> ICANN's board thus accepts the authority of binding arbitration for the purpose of its contractual agreements but rejects it for the purpose of resolving disputes over the validity of its actions.

This distinction is unknown to the relevant California statutes. Neither section 5240 that ICANN cites, nor any other statutory section reviewed above, conditions the validity of binding arbitration or other binding review of the board's actions on the purpose for which it is used. ATRT's concern with the distinction between arbitration-for-contracts and arbitration-for-other-purposes is needless.<sup>45</sup> It can reasonably disregard a distinction the law does not make.

ICANN's acceptance of binding arbitration in its registry agreements does not prevent it from arguing against giving IRP (or some other entity) binding review over its decisions. But because the purpose of using binding arbitration is irrelevant to its legal validity, ICANN's use of arbitration to resolve contractual disputes does preclude it from arguing consistently that California law, and not its institutional preference, stands in the way of establishing an independent and binding review of board actions.

In several ways, then, ICANN's legal position is mistaken. It exaggerates the requirement of corporate autonomy and disregards the inconsistency between its acceptance of binding arbitration to resolve contractual disputes and its rejection of binding arbitration to compel the board's fidelity to the articles and bylaws. That ICANN's opinion of the board's autonomy during the ATRT review process is exaggerated should come as no surprise to anyone familiar with the IRP determination that ICANN's assertions of autonomy in its dispute with ICM Registry likewise found no support in California law.<sup>46</sup>

ICANN's legal position deserves to be rejected, not only because it is wrong, but because it lends support to ICANN's apparent retreat from its institutional commitment to due process. The history of that commitment reveals how seriously ICANN's legal position threatens to compromise its future viability as the global manager for the Internet DNS.

### **3. ICANN Has an Historic and Fundamental Commitment to Binding Review of Its Decisions as an Essential Element of Its Institutional Character.**

WG4 made it clear that in its judgment, independent and binding review is "*essential* to the viability of the ICANN model itself."<sup>47</sup> Its judgment is supported by the history of the DNS Project, the long effort to "transition the coordination of DNS responsibilities, previously

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<sup>44</sup> See *id.* at art. IV §§ 3(8)(c) & (15) (granting the IRP authority to "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP" and directing the board "[w]here feasible" to "consider the IRP declaration at the Board's next meeting"). The nonbinding nature of an IRP declaration was recently affirmed in the .xxx case. See *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, Int'l Centre for Dispute Resolution, ICDR Case No. 50 117 T 00224 08, at 61 ("*ICM Registry*") ("[T]he intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.").

<sup>45</sup> See *Proposed Recommendations*, at 46.

<sup>46</sup> *ICM Registry*, at 32 ("ICANN's reliance on the 'business judgment rule' and the related doctrine of 'judicial deference' under California law is misplaced ....").

<sup>47</sup> *Draft Findings* (emphasis added).

performed by the U.S. government or on behalf of the U.S. Government, to the private sector so as to enable industry leadership and bottom-up policy making.”<sup>48</sup>

In the *DNS White Paper* the U.S. government considered it essential to delegate DNS management functions to an organization with formal accountability,<sup>49</sup> including “due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices.”<sup>50</sup> By these requirements and processes the government meant that “[e]ntities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and *appealing if adversely affected*.”<sup>51</sup>

In WG4’s view, establishing independent review of board decisions goes to the foundation of ICANN’s authority over the Internet DNS. Accepting the need for such review was a principal condition for ICANN to receive U.S. government approval of its proposal to take responsibility for DNS management.<sup>52</sup> Nor did that condition abate after ICANN began carrying out its management responsibilities. ICANN agreed in its first Memorandum of Understanding “that the mechanisms, methods, and procedures developed under the DNS Project ... will ensure *sufficient appeal procedures* for adversely affected members of the Internet community.”<sup>53</sup> That agreement survived six amendments, as well as the Joint Project Agreement (“JPA”), none of which modified or repealed ICANN’s agreement to “ensure sufficient appeal procedures.”<sup>54</sup> Succeeding the JPA was AoC, which reiterated the understanding that “assessing and improving ICANN Board of Directors (Board) governance” included “the consideration of *an appeal mechanism for Board decisions*.”<sup>55</sup>

Ensuring “sufficient appeal procedures” for the review of board decisions is one of ICANN’s most basic and consistent institutional commitments. Its apparent retreat from that commitment now puts in question whether ICANN has the capacity to carry out its technical mission with “transparency, equity and fair play in the development of policies or practices.”<sup>56</sup> If ICANN were to continue relying on a mistaken interpretation of California law to resist binding review, serious doubts would arise about its willingness to be

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<sup>48</sup> NTIA, Notice of Inquiry, *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System*, 74 Fed. Reg. 18688, 18689 (Apr. 24, 2009) (“NOI”).

<sup>49</sup> Nat’l Telecom. & Information Agency, Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741, 31742 (June 10, 1998) (“As Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an *ad hoc* basis by entities or individuals that are not *formally accountable* to the Internet community.”) (emphasis added).

<sup>50</sup> *Id.* at 31747 (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> See Jonathan Weinberg, *The Problem of Legitimacy*, 50 Duke L.J. 187, 228-29 (2000) (explaining that ICANN’s original bylaws provided for independent review of board decisions in ICANN’s “sole discretion,” but the U.S. demanded an amendment to the bylaws that subjected the board to external review before it would agree to the ICANN proposal).

<sup>53</sup> Memorandum Of Understanding Between The U.S. Department Of Commerce And Internet Corporation For Assigned Names And Numbers, Nov. 25, 1998, at § V(A)(2).

<sup>54</sup> *Id.*

<sup>55</sup> AoC ¶ 9.1(a) (emphasis added).

<sup>56</sup> *DNS White Paper* at 31747.

sufficiently accountable and, with them, questions about the sustainability of ICANN's authority as global manager of the Internet DNS. Regardless of how the question of binding review is ultimately decided, it should be made with a full understanding of the legal landscape and DNS history.

Relying on a mistaken view of California law to discourage even the discussion of binding review is inconsistent with ICANN's self-description as "a multinational institution working for the common good."<sup>57</sup> California law's "rigorous framework of legal accountabilities"<sup>58</sup> should be used to ensure ICANN's accountability to its global constituency—not to defeat it.

## **Conclusion**

California law does not prevent ICANN's board from accepting a binding review of its actions. To the contrary, the law authorizes the board to create statutory members with substantial powers over the board or permit another entity to exercise binding review of the board's actions. ICANN's use of binding arbitration in its registry agreements demonstrates that ICANN itself does not view the board's autonomy as an absolute principle. Absent a legal distinction between the use of arbitration for contractual disputes and other purposes, ICANN can fairly maintain only that it prefers to avoid independent and binding review of the board's actions, not that the law requires it to do so.

This review of California law strongly supports WG4's recommendation to challenge ICANN's legal position. Challenging ICANN on this point is imperative, as ATRT's recommendations are put into final form. It would be a shame for ATRT's hard work over several months to be permanently distorted by a legal mistake.

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<sup>57</sup> Rod Beckstrom, Opening Address, ICANN Regional Meeting, Brussels, June 21, 2010.

<sup>58</sup> ICANN, *Accountability & Transparency: Frameworks and Principles*, at 16 (Jan. 2008).