

Summary of Public Comments on the Accountability and Transparency Review Team’s Final Recommendations

This document provides an overview of the public comments¹ received in response to the [Final Recommendations](#), issued by the Accountability & Transparency Review Team (ATRT), which features twenty-seven final recommendations. The comments are grouped per recommendation addressed and working groups. Responses without such references are summarized under "General Comments". The summary does in no way substitute for the original contributions, which should be consulted for complete information. The number of comments submitted on this paper tallies up to eleven, including one off-topic entry. The comments are hyperlinked below for easy access and available at: <http://forum.icann.org/lists/atrt-final-recommendations/>

Contributions provided by:

Association for Competitive Technology	ACT	Frank Fowlie	FF
At-Large Advisory Committee	ALAC	Lizbeth Web Marketing Consultant	LWMC (off-topic)
Country Code Names Supporting Organization Council	ccNSO	Netchoice	NET
International Chamber of Commerce	ICC	Nominet	NOM
International Trademark Association	INTA	2011 Nominating Committee	NomCom
		Shawn Gunnarson	SG

RECOMMENDATION/CONCLUSION	SUMMARY OF COMMENTS
<u>General Comments</u>	ACT: The ATRT has exceeded expectations in bringing the inaugural AoC review to a successful conclusion. The final product of the ATRT represents the perfect ICANN document because it synthesizes an incredibly diverse set of inputs into a clear, actionable set of recommendations. It is perhaps a bit myopic: there is more to accountability and transparency than mechanisms. ACT applauds the ATRT recommendations regarding metrics, which are essential to be truly transparent

¹ The public comment period ran from 31 December 2010 to 14 February 2011.

and accountable. Now that the ATRT has produced consensus recommendations, the burden falls to ICANN to implement those recommendations without prejudice and in a timely fashion. The AoC is unequivocal about the Board's responsibility: *the Board will take action within six months of receipt of the recommendations*. In Cartagena, Rod Beckstrom seemed to indicate that the Board and staff would pick and choose which recommendations to implement and when, based on constraints of time and budget. While later comments by ICANN leadership seemed to back away from this assertion, the episode only furthered the impression that ICANN is not fully committed to the ATRT process. If ICANN fails to implement the changes developed by a community-driven process that it helped create, it will raise questions as to whether the organization is capable of demonstrating real accountability to anyone. ICANN's detractors are following the review process with great interest. Should ICANN fail to rise to the challenge of implementing the ATRT recommendations, detractors will use that failure in their efforts to see greater control over ICANN. The ATRT paper demands a commitment to continued dialogue, community engagement and improvement – ICANN must now take up the baton and demonstrate its commitment to strengthening its processes.

ALAC: very much appreciates the work of the ATRT. The thoroughness of their approach to the review is evident in the Final Recommendations. ALAC, however, requests feedback on how section (d) and (e) of the Affirmation of Commitments paragraph 9.1 will be addressed in the context of the ATRT's final recommendations – *please refer to the AoC: <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>* –. The ALAC also seeks assurance from the ICANN Board that the matters raised in these sections will be a priority of the next ATRT.

ccNSO: welcomes the opportunity to comment and recognizes the thorough and exhaustive efforts of the ATRT. The AoC set ambitious deadlines for this work and the ccNSO Council applauds the ATRT for successfully undertaking a comprehensive review process within these challenging timeframes. The ccNSO Council recognizes the willingness of ATRT members to critically question and analyze ICANN's existing mechanisms for consultation, policy development and decision-making and to develop an appropriately challenging, ambitious and wide-ranging set of recommendations. The implementation of these recommendations will deliver considerable improvement. The ccNSO Council endorses these recommendations in their entirety and calls upon the ICANN Board, with appropriate support from staff, to adopt the ATRT's recommendations

within the AoC timeframes. The process (including staff briefing) by which the Board takes decisions and action on each recommendation should be completely transparent to stakeholders. Should the ICANN Board determine not to implement any of the recommendations, as they would impose unreasonable costs or prohibitive resource constraints, the Board should provide a detailed explanation of the decision.

ICC: appreciates the ATRT's substantive efforts, welcomes the final recommendations and is pleased to see the progress made to integrate specific timelines for action and implementation of the recommendations. ICC continues to encourage careful consideration of the recommendations by the Board and ICANN leadership and urges prompt movement towards implementation particularly of those recommendations, which the ATRT identified as cases where ICANN should already have taken action. The ATRT recommendation that such priority items should have a start or completion date prior to June 2011 is a productive approach. ICC supports the ATRT request that the Board provide a status report on all the recommendations at the March 2011 ICANN meeting in San Francisco.

INTA: appreciates the ATRT efforts to provide a balanced review. INTA agrees with the findings and recommendations. The additions of a few clarification and details (as requested below) will ensure that the report is a useful guide for improving accountability and transparency within ICANN.

SG: Misspelling – Gunnarson not Gunnerson. The ATRT deserves the community's thanks. Once implemented, the recommendations will markedly improve ICANN's transparency and accountability. The ATRT deserves praise for producing effective recommendations despite the difficulties it encountered as the first AoC review team and the impediments created by ICANN's lackluster cooperation.

NET: supports the remarkable work done by the ATRT who labored under time and resource constraints and had to create a new process from scratch. Not only did it produce substantive recommendations, it also showed the way for future Affirmation review teams. However, there is a missing element i.e. a workable definition of what *public interest* is in the context of ICANN – to be undertaken by the next ATRT in 2013. Leaving the term *public interest* undefined leaves the floor open to conflicting and competing interpretations that serve the particular interests of ICANN stakeholders. The cost of failing to define public interest is that ICANN will continue to struggle with

competing visions of that definition in future reviews and policy-making processes. A structured community-wide discussion is the best way to institutionalize key Affirmation imperatives such as *public interest* and *consumer trust*. Institutionalize should not mean *creating a new institution* but rather ensuring that the entire organization is acting in support of its mandate. ICANN's Board saw this coming and adopted a resolution in Cartagena for a community-wide effort to develop definitions and metrics for terms in the Affirmation review of the new gTLD program. This is an essential first step for managing and measuring the success of new gTLDs. The Board now needs to request another community-wide effort to define public interest.

NOM: welcomes the thorough and consensual approach adopted by the ATRT. The report provides a good basis for ICANN moving forward and sets a quality benchmark for future reviews. NOM welcomes and endorses the recommendations and supports the ATRT's priority assessment. It is important that the Board establish an implementation plan as soon as possible and that deadlines prescribed by the report are met. NOM believes that there needs to be clear Board-level responsibility for follow-up and would suggest that the Chair of the Board ex officio should have the role of *responsible owner* for implementation. The reasons for not implementing a recommendation should be made very clear and the responsible owner should identify the measures to take to respond to the concerns behind the recommendation. It is important that sufficient resources are made available to support implementation. The CEO should be accountable to the *responsible owner* for ensuring sufficient resources for the timely implementation of the recommendations. The ATRT identified a concept of how to serve the public interest in the context of accountability – *please refer to appendix A of the [Final Recommendations](#)*. NOM believes this is a useful guideline for the future when read in conjunction with section 4 of the Affirmation of Commitments: <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. These should serve as principles for all Board decisions.

NomCom: welcomes the final ATRT report. While NomCom agrees with much of the report, it is important that key features of NomCom should be maintained, namely: NomCom is an independent committee and its decisions are final. These are essential to its success and care must be taken to ensure that nothing in the implementation of the ATRT's recommendations should undermine these essential aspects.

Recommendation 1: *Recognizing the work of the Board Governance committee on Board training and skills building, pursuant to the advice of both the 2007 Nominating Committee Review and 2008 Board review, the Board should establish (in time to enable the integration of these recommendations into the Nominating Committee process commencing in late 2011) 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. From the Nominating Committee process commencing in late 2011, publishing the outcomes and requirements as part of the Nominating Committee’s call-for-nominations.

Recommendation 2: *The Board should reinforce and review on a*

INTA: add to the skill-set a mention of knowledge in intellectual property and in particular, trademark law.

NomCom: expresses the following concerns: a) how would formal mechanisms for identifying skill-sets be developed; b) how would the skill-sets be taken into account as requirements in candidate recruitment and selection process – NomCom must remain independent and its decisions final; c) selections would be judged against these requirements. The NomCom agrees that better identifying the Board’s activities and challenges would be useful in guiding the NomCom as it seeks candidates and in identifying any gaps in the knowledge and experience including geographic, gender and cultural diversity. However, it cannot guarantee that it will be able to recruit high quality international volunteer candidates with those skills. NomCom is also constrained by diversity requirements (with respect to global interest), term limits and by the fact that positions are unique in the great amount of time they demand of volunteers. The overall composition of the Board would be strengthened and NomCom would face fewer constraints in its processes if the SO/ACs gave more consideration to geographic, gender and cultural diversity when selecting Directors. Many of the ATRT’s recommendations could and should be addressed to the SOs and ALAC. We note At-Large’s work in 2010 to develop a broad set of criteria for candidates for the voting Director position it selected. We suggest that all SOs adopt a similar practice. NomCom cannot provide immediate solutions to gaps in skills and experience, as the process would take 18 months to two years from the AGM. Nominating Committees have long attempted to write a “job description” of the positions – in most cases these descriptions have been developed either directly or with the help of Members of the Board/Council concerned. These descriptions are available in the *Invitation for Statements of Interest* and the *Leadership Positions* document. Both documents have been part of the NomCom Process since 2006. Nomcom is aware that both documents could and should be improved and concedes that it is not as well informed of the Board’s work and working methods as it should be. The 2011 NomCom has discussed this with the Board Chair and Chair of the Board Governance Committee. Such information would help NomCom identify and understand the experience useful in potential candidates. Information of this type could form the basis of the “skill-set” information the ATRT recommends be made available, could be updated as required and would be publicly available. NomCom would also benefit from more information about the work of the Councils and challenges they face.

NomCom: suggests that that the NomCom elect should attend the AGM from the start of the week

regular basis, (but no less than every 3 years) the training and skills building programmes established pursuant to Recommendation #1.

Recommendation 3: *The Board and Nominating Committee should, subject to the caveat that all deliberations and decisions about candidates must remain confidential, as soon as possible but no later than the Nominating Committee process commencing in late 2011 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.*

Recommendation 7: *In accordance with the Affirmation of Commitments:*

7.1 Commencing immediately, the Board should promptly publish all appropriate materials related to decision making processes – including preliminary announcements, briefing materials provided by staff and others, detailed Minutes, and where submitted, individual Directors' statements relating to significant decisions. The redaction of materials should be kept to a minimum, limited to discussion of existing or threatened litigation, and staff issues such as appointments.

7.2 Commencing immediately, the Board should publish "a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied." ICANN should also articulate that rationale for accepting or rejecting input received from public comments and the ICANN community, including Supporting Organizations and Advisory Committees.

until the end when its members are formally appointed. The week should be used for discussions with the community about the challenges facing ICANN and the quality that might be desirable in candidates for the coming period. Information collected could be made available for public comment before being adopted by NomCom for its year of office.

NomCom: strongly agrees with the call for greater transparency on its procedures. Internal NomCom deliberations on candidates must remain confidential in order to ensure a robust process that attracts quality candidates. With regard to procedural transparency, the 2011 NomCom is attempting to introduce more opportunity for discussion with the community and hopes that these additional meetings will become part of ICANN's regular meeting schedule. Regarding timeline, the NomCom has published a timeline of its activities since 2006.

ccNSO: high priority.

Recommendation 9: *The Board, acting through the GAC-Board joint working group, should clarify by March 2011 what constitutes GAC public policy “advice” under the Bylaws.*

Recommendation 10: *Having established what constitutes “advice,” the Board, acting through the GAC-Board joint working group, should establish by March 2011 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 advice in writing. In establishing a more formal process, ICANN should develop an on-line tool or data base 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.*

Recommendation 11: *The Board and the GAC should work together to have the GAC advice provided and considered on a more timely basis. The Board, acting through the GAC-Board joint working group, should establish by March 2011 a formal, documented process by which the Board responds to GAC advice. This process should set forth how and when the Board will inform the GAC, on a timely basis, whether it agrees or disagrees with the advice and will specify what details the Board will provide to the GAC in circumstances where it disagrees with the advice. This process should also set forth the procedures by which the GAC and the Board will then “try in good faith and in a timely efficient manner, to find a mutually acceptable solution.” This process*

ccNSO: high priority in light of recent developments and perceived ambiguity regarding GAC and ICANN Board interaction over the new gTLD Applicant Guidebook process.

NOM: high priority. The GAC-Board meeting scheduled for the end of February shows the importance of the recommendations related to the role and effectiveness of the GAC and its interaction with the Board.

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must take into account the fact that the GAC meets face-to-face only three times a year and should consider establishing other mechanisms by which the Board and the GAC can satisfy the Bylaw provisions relating to GAC advice.

Recommendation 12: *The Board, acting through the GAC-Board joint working group, should develop and implement a process to engage the GAC earlier in the policy development process.*

Recommendation 13: *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, including the appropriate skill sets necessary to provide effective communication with and support to the GAC, and whether the Board and the GAC would benefit from more frequent joint meetings.*

Recommendation 14: *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 and 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. Second, the Board, working with the GAC, should establish a process to determine when and how ICANN engages senior government officials on public policy issues on a regular and collective basis to complement the existing GAC process.*

ccNSO: high priority in light of recent developments and perceived ambiguity regarding GAC and ICANN Board interaction over the new gTLD Applicant Guidebook process.

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NOM: high priority. The GAC-Board meeting scheduled for the end of February shows the importance of the recommendations related to the role and effectiveness of the GAC and its interaction with the Board.

Recommendation 15: The Board should, as soon as possible but no later than June 2011, direct the adoption of and specify a timeline for the implementation of public notice and comment processes that are distinct with respect to purpose (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.

Recommendation 16: *Public notice and comment processes should provide for both a distinct “Comment” cycle and a “Reply Comment” cycle that allows community respondents to address and rebut arguments raised in opposing parties’ comments.*

Recommendation 17: *As part of implementing recommendations 15 and 16, timelines for public notice and comment should be reviewed and adjusted to provide adequate opportunity for meaningful and timely comment. Comment and Reply Comment periods should be of a fixed duration.*

Recommendation 23: *As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence 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*

ccNSO: high priority.

ICC: agrees that this should be implemented as soon as possible but no later than June 2011 as this will help increase public confidence in ICANN’s decision-making, help prioritize ICANN’s activities and facilitate business participation.

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ccNSO: high priority.

ICC: agrees that this should be implemented as soon as possible but no later than June 2011 as this will help increase public confidence in ICANN’s decision-making, help prioritize ICANN’s activities and facilitate business participation.

INTA: agrees with the comment and reply comment concept. INTA suggests, however, that the commenting process should end with the reply comment. Permitting further comments after the reply comment is likely to lead to bureaucratic delays.

ccNSO: high priority.

SG: ICANN’s position that *the Board cannot empower any entity to overturn decisions or actions of the Board* was not challenged by the ATRT because *it did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability*. The foundation of ICANN’s accountability is insecure – *ultimate responsibility for ensuring the highest possible levels of transparency and accountability must necessarily reside with the Board*. Yet the validity of binding authority over the Board – however limited – now depends on unresolved questions of policy and

accountability and transparency of the three existing mechanisms and of their inter-relation, if any (i.e., whether 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 committee of independent experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the Draft Implementation Plan. Upon receipt of the final report of the independent experts, the Board should take actions on the recommendations as soon as practicable.

Recommendation 24: *As soon as possible, but no later than the March 2011 ICANN meeting, the operations of the Office of the Ombudsman and the relationship between the Office of the Ombudsman and the Board of Directors should be assessed and, to the extent they are not, should be brought into compliance with the relevant aspects of internationally recognized standards for: a) an Ombudsman function; and b) a Board supporting such a function under the Standards of Practice of the International Ombudsman Association.*

Recommendation 27: *The Board should regularly evaluate progress against these recommendations and the accountability and transparency commitments in the AoC, and in general analyze the accountability and transparency performance of the whole organization so as to once a year report to the community on progress made and to prepare for the next ATRT review. All evaluations should be overseen by the Board.*

California law. Resolving those questions is fundamental and urgent. The AoC commits ICANN to consider *an appeal mechanism for Board decisions* to improve Board governance and ATRT's impasse puts that commitment in serious doubt. ICANN's opposition to binding review of the Board is eroding international support for the private sector model of DNS management. The ICANN Board should approve this recommendation at the ICANN Silicon Valley Meeting and organize a committee of independent experts with authority to conduct a comprehensive study of ICANN's review mechanisms. This committee should strive to identify a review mechanism that is both independent of the Board and binding on it. It should be directed to determine, with the assistance of legal counsel, whether California law requires the Board to reject any appeal mechanism with the power to reverse its actions.

FF: there is a small grammatical error: the sentence begins with a collective (relevant aspects of internationally recognized standards) and ends with a singular (Standards of Practice of the International Ombudsman Association). The singular is redundant, and this part of the sentence referring to the IOA should be deleted.

NOM: NOM believes that this recommendation is appropriate: it will be important for the credibility of the process to have regular comprehensive progress reports at ICANN meetings. The status reports should be given by the *responsible owner*. We believe that there should also be a report back at the third meeting in 2011, bearing in mind that some of the deadlines are in October.

<p><u>Working Group 1</u></p>	<p>INTA: - in paragraph 1 on page 15, quote finding #1 in its entirety so as to increase clarity: <i>the central purpose of the NomCom is to find genuinely independent and unaffiliated Board, Council and ALAC members.</i></p> <p>- reference the findings # 2 and 7 from the October 2008 Reports.</p> <p>- item #4 on page 20: <i>building on the work of the Board Governance Committee, the Board should continue to enhance Board performance and work practices</i> is too vague to be effective; add specific details about how previous work and reforms can be improved and built upon. Explain what “enhancing” Board performance would entail or what would constitute adequate enhancement of performance.</p> <p>NomCom: the ATRT recommendations only address the ICANN Board of Directors – it is important to recognize that NomCom also selects members of the GNSO and ccNSO Councils and members of the ALAC. NomCom’s processes apply to all positions it selects. Moreover, the recommendations only address NomCom appointed members of the ICANN Board of Directors, those appointed to the Board by the Supporting Organizations and ALAC are not mentioned.</p> <p>----</p>
<p><u>Working Group 2</u></p>	<p>INTA: agrees with the recommendations provided in this section.</p> <p>----</p>
<p><u>Working Group 3</u></p>	<p>INTA: supports these clear recommendations.</p> <p>----</p>
<p><u>Working Group 4</u></p>	<p>INTA: agrees with the recommendations. The input of an independent body is critical to ensuring stability and fairness. Binding decisions could constitute a balance in the decision-making process.</p>