

Comments on Final Recommendations of the Accountability and Transparency Review Team

EXECUTIVE SUMMARY

The Accountability and Transparency Review Team (“ATRT”) deserves the community’s thanks. Its Final Recommendations, once implemented, will markedly improve ICANN’s transparency and accountability. Additional measures are needed, however, to strengthen the ICANN Board’s accountability:

- ♦ The Board should approve ATRT’s Recommendation #23 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;
- ♦ That committee should strive to identify a review mechanism that is both independent of the Board and binding on it; and
- ♦ The committee should be directed to determine, with the assistance of legal counsel, whether California law requires the Board to reject any appeals mechanism with the power to reverse its actions.

COMMENTS

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. Some issues remain unresolved, however. Perhaps the most important of these is addressed in Recommendation #23:

[T]he ICANN Board should ... 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 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.¹

This “broad, comprehensive assessment” should reconsider a question that divided ATRT: ***Can the Board be legally subject to an appeal mechanism that is both independent***

¹ Final Recommendations of the Accountability and Transparency Review Team 5 (Dec. 31, 2010) (“*Final Recommendations*”).

and binding? ICANN's position that "the board cannot empower any entity to overturn decisions or actions of the board"² was not challenged by ATRT as a whole, because it "did not reach consensus on whether binding authority was the standard upon which to judge ICANN's accountability."³

Until consensus can be found, the foundation of ICANN's accountability is insecure. "[U]ltimate responsibility for ensuring the highest possible levels of transparency and accountability must necessarily reside with the Board."⁴ Yet the validity of binding authority over the board—however limited—now depends on unresolved questions of policy and California law.⁵

Resolving those questions is fundamental and urgent. The AoC commits ICANN to consider "an appeal mechanism for Board decisions"⁶ to improve Board governance, and ATRT's impasse puts that commitment in serious doubt. ICANN's stakeholders have criticized its accountability generally⁷ and the absence of binding review over Board actions specifically.⁸ And ICANN's opposition to binding review of the Board is eroding international support for the private sector model of DNS management. Denmark, France, and Norway recently called for ICANN to shed its corporate form because its resulting accountability under California law is unduly narrow.⁹

² ICANN, *Limitations on Third Party Review of Corporate Board Actions under California Law*, Aug. 31, 2010.

³ Accountability and Transparency Review Team, *Proposed Recommendations—Request for Public Comment* 46 (Nov. 3, 2010).

⁴ *Final Recommendations* at 27.

⁵ A memo analyzing ICANN's legal position and concluding that it is unsupported by California law was previously submitted to ATRT as an attachment to comments on its Proposed Recommendations. See R. Shawn Gunnarson, *ICANN's Accountability and California Law* (Dec. 3, 2010), available at <http://forum.icann.org/lists/atrt-draft-proposed-recommendations/pdf8w0XxyGkl0.pdf>.

⁶ Affirmation of Commitments by The United States Department Of Commerce and the Internet Corporation for Assigned Names and Numbers ¶ 9.1(a) (Sep. 30, 2009).

⁷ R. Shawn Gunnarson, *A Fresh Start for ICANN*, at 13-16 (June 1, 2010) (collecting statements by governments, registries and registrars, trade associations and businesses criticizing ICANN for its weak accountability), available at http://www.techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf.

⁸ *Final Recommendations* at 53 ("[T]here 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.").

⁹ Danish Comments to the Accountability and Transparency Review Team, Draft Proposed Recommendations, Nov. 23, 2010, at 2 (noting that "ICANN's legal accountability is very narrow as the organization is incorporated under Californian law" and recommending that ICANN "continue to explore the ways in which it can create an international legal entity ... in order to further enhance the organization's accountability to internet users globally"); French Comments to the Draft Proposed Recommendations made by the Accountability and Transparency Review Team (ATRT), Dec. 3, 2010, at 2 (noting that "ICANN is de facto a global institution but is ruled under the laws and regulations of only one legal system (California, US)" and questioning the possibility of "giv[ing] ICANN an internationalized legal status with some privileges and immunities to guarantee its independence and to improve legal certainty of its decisions"); Norwegian Comments to the Draft Proposed Recommendations—The Accountability and Transparency Review Team, Nov. 30, 2010, at 2 (finding that "there is insufficient accountability and perhaps even a shortage of classical democracy within ICANN" and concluding that "we strongly believe that ICANN should continue to explore the ways in which an international legal entity could be established. The incorporation of ICANN under US (Californian) law means that ICANN's legal accountability is very narrow and in our view needs to be further enhanced.").

Working Group 4 correctly found that resolving the validity of binding review over the ICANN Board is “critical to establishing an appeals mechanism that is both binding and independent, and essential to the viability of the ICANN model itself.”¹⁰ ATRT could not establish consensus around this standard, but consensus did not form around opposition to it either. The committee of independent experts called for by Recommendation #23 should be directed to investigate and resolve the validity of independent and binding Board review. As an indispensable part of that investigation, it also should determine, with the assistance of legal counsel, whether California law requires ICANN to reject binding review.

CONCLUSION

The question of binding review over the Board should be revisited by a committee of independent experts as part of a comprehensive study of ICANN’s review mechanisms. To satisfy the concerns of governments and private stakeholders alike, that committee should strive to identify a review mechanism that is both independent of the Board and legally binding on it. And the committee should be given the specific mandate to determine whether California law requires the Board to reject any appeals mechanism with the power to reverse its actions.

¹⁰ AoC / ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)*.