



International Chamber of Commerce

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Policy and Business Practices

ACCOUNTABILITY AND TRANSPARENCY
REVIEW TEAM
PROPOSED RECOMMENDATIONS
REQUEST FOR PUBLIC COMMENT

**ICC's task force on Internet and Telecoms
Infrastructure and Services (ITIS) comments on
the ATRT's proposed recommendations**

Introduction

The International Chamber of Commerce (ICC) and its members from across sectors and geographies, applaud the substantive efforts of the AoC Accountability and Transparency Review Team (ATRT). The ATRT's proposed recommendations document reflects a thorough analysis and assessment of the issues, community concerns and inputs and thoughtful consideration. In addition, the ATRT review process and report establishes a model for how future reviews should be conducted. We welcome the opportunity to provide feedback for further discussion at the next ICANN meeting in Cartagena, Columbia and as the ATRT finalizes its report by the end of this year. Overall, ICC supports the recommendations put forward, and has suggestions for clarifying some of them which have been inserted into the executive summary below.

ICC encourages careful consideration of the recommendations by the Board and ICANN leadership and urges prompt movement towards implementation. We take this opportunity to state this view clearly because to date it has not been clear how the ATRT recommendations, and those of other review teams, will be taken up by ICANN and within what timeframe.

Executive Summary

In keeping with the Affirmation of Commitments (AoC), the Accountability and Transparency Review Team (ATRT) provides the following report to the ICANN community for input and

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comment. The ATRT specifically seeks comment on the draft proposed recommendations included below so as to produce Final Recommendations to the ICANN Board of Directors no later than December 31, 2010. The report also contains information on the background, structure and methodology of the review as well as the reports of the four working groups created by the ATRT to progress its work. Comments on the draft proposed recommendations are due 30 days after publication of this report.

Request for Public Comment - Draft Proposed Recommendations

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

Recommendations

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

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

- a. Benchmarking Board skill-sets against similar corporate and other governance structures;
- b. Tailoring the required skills to suit ICANN's unique structure and mission, through an open consultation process, including direct consultation with the leadership of the SOs and ACs;
- c. Reviewing these requirements annually, delivering a formalised starting point for the NomCom each year; and

- d. Publishing the outcomes and requirements as part of the Nominating Committee's call-for-nominations.
2. Recognising the work of the Board Governance Committee on Board training and skills building, the Board should reinforce and review on a regular basis, (but no less than every INSERT NUMBER OF YEARS) the training and skills building programmes.
3. Subject to the caveat that all deliberations and decisions about candidates must remain confidential, (as soon as possible but no later than the 2012 selection process,) increase the transparency of the Nominating Committee's deliberations and decision-making process by doing such things as clearly articulating the timeline and skill-set criteria at the earliest stage possible before the process starts and, once the process is complete, explain the choices made.

ICC supports the recommendations for formalizing the requirements for Board qualifications and benchmarking against similar organizations. We also agree that the NomCom has an important responsibility and its deliberations and decisions about candidates should remain confidential. The goal should be to provide them with useful input on the 'gaps' or balancing factors that the Board at any given time believes would help them to be more effective; we also believe it is important to preserve the NomCom's independence and not have the criteria provided to them or Board input to them create inflexibility or influence by the Board. The NomCom should be free to get information from the community as well on the balance and composition of the Board.

4. Building on the work already done, continue to expedite reforms to Board meetings and work practices.
5. Follow the recommendations of the Boston Consulting Group and expeditiously implement the compensation scheme for Board Directors.
6. Clarify, (as soon as possible but no later than INSERT DATE,) which issues are considered at Board level in order to improve visibility among stakeholders of the work the Board undertakes in steering ICANN's activities.
7. Develop complementary mechanisms for consultation with SOs and ACs on policy issues that will be addressed at Board level.

ICC supports the objective of ensuring productive consultation opportunities for the Board with SOs and ACs on policy issues they will address. It would be useful to take stock of the existing opportunities such as the Board GNSO meeting, Board GAC meeting and other Board interactions to understand what kind of new mechanisms would be most helpful to build on the existing ways of interacting. The Board should also encourage more discussions between SOs and ACs, specifically when for example two of those organizations have different views. It is not helpful if the Board is the only space where divergent views are resolved (which also puts the onus on the staff to draw conclusions, file papers, and then open comments on a webpage – a mechanism that does not work optimally). The

community should be encouraged to build consensus views on policy issues, not just express one view on behalf of a given AC or SO.

8. Promptly publish all appropriate materials related to decision-making processes – including preliminary announcements, briefing provided by staff and detailed Minutes, and Directors’ statements relating to significant decisions or votes. The redaction of materials should be kept to a minimum, limited to matters clearly associated with litigation and staff issues such as appointments and remuneration.

ICC strongly supports the recommendations to improve transparency, but cautions that requiring full disclosure of Directors’ statements may constrain the Board. It is important for the Directors to be able to engage in frank and sometimes difficult discussions in closed session and use work material that is not made public. Thus, there needs to be a balance struck to ensure they can engage in such discussions without having to make public statements. Mindful of this balance, this recommendation should be incorporated into ICANN’s Bylaws.

9. Produce and publish a document, (as soon as possible but no later than INSERT DATE,) that clearly defines the limited set of circumstances where materials may be redacted and that articulates the risks (if any) associated with publication of materials. These rules should be referred to by the Board, General Counsel and staff when assessing whether material should be redacted and cited when such a decision is taken.

10. Publish a detailed explanation at the conclusion of each decision-making process, including:

- why the matter was considered by the Board;
- what consultation occurred;
- what input was received from the ICANN community; and
- how this input was considered and how and why it was adopted or discarded.

ICC supports this recommendation as a core component of ensuring that ICANN is transparent and accountable, and that the ICANN community has confidence in the decision-making process. As with recommendation 8, this recommendation should be incorporated into ICANN’s Bylaws.

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

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

12. ICANN should, (as soon as possible but no later than INSERT DATE,) establish a more formal, documented process by which it notifies the GAC of matters that affect public policy

concerns to request GAC advice. As a key element of this process, the Board should be proactive in requesting GAC input in writing. At the same time, the GAC should agree that only a “consensus” view of its members constitutes an opinion that triggers the Board’s obligation to follow the advice or work with the GAC to find a mutually acceptable solution. The GAC can continue to provide informal views but these would not trigger any obligation on the Board to follow such input. In establishing a more formal process, ICANN should develop an on-line tool or database in which each request to the GAC and advice received from the GAC is documented along with the Board’s consideration of and response to each advice.

ICC supports recommendations to improve ICANN’s working relationship with the GAC. The GAC should decide on their internal processes and determine when input they file is advice, and when it is input the Board must act on according to this agreement. *Consensus* should not be read narrowly to imply “strict majority when voting”, when in reality among countries it might very well imply “*no objection against*”.

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

ICC agrees that it is important for the Board and the GAC to work together to ensure that GAC advice is delivered in a timely fashion.

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

15. The Board and the GAC should jointly develop and implement actions to ensure that the GAC is fully informed as to the policy agenda at ICANN and that ICANN policy staff is aware of and sensitive to GAC concerns. In doing so, the Board and the GAC may wish to consider creating/revising the role of ICANN staff support to the GAC and whether the Board and the GAC would benefit from more frequent joint meetings.

16. The Board should endeavor to increase the level of support and commitment of governments to the GAC process. First, the Board should encourage member countries and organizations to participate in GAC deliberations on a timely basis and at a sufficiently authoritative level. To the extent member representatives attending GAC meetings are prepared and authorized to speak on behalf of their countries and organizations, the process by which GAC develops and submits consensus opinions to the Board should take less time and should lead to a more authoritative work product. Second, the Board should place a particular focus on engaging nations in the developing world, paying particular attention to the need to

provide multilingual access to ICANN records. Third, the Board, working with the GAC, should consider establishing a process by which ICANN engages senior government officials on public policy issues on a regular and collective basis.

ICC supports these recommendations, and would like to highlight that the effective communications and a good working relationship between the Board and the GAC are essential to the further evolution of ICANN. We reiterate our support for efforts to engage government representatives, particularly from developing countries, in the substantive work of the GAC.

We recognize the value of engaging senior government officials on public policy issues and seek clarification of how this would be done, and encourage discussion about this point in Cartagena.

C. Public input processes and the policy development process

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

ICC supports this recommendation and especially supports the need for prioritization.

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

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

ICC supports recommendations to improve the comment process. In addition to prioritizing proceedings, we note that adequate timeframes for public comments need to consider the volume of parallel issues out for comment, and consider the internal consensus building processes of many in the community.

20. [With recognition of Recommendation WG#1, Area 2, number 5.] The Board should, in publishing decisions, (as soon as possible but no later than INSERT DATE), adopt the practice of articulating the basis for its decision and identify the public comment that was persuasive in reaching its decision. At the same time, the Board should identify the relevant basis and public

comment that was not accepted in making its decision. The Board should articulate the rationale for rejecting relevant public comment in reaching its decision.

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

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

ICC supports this recommendation, but only text in one of the languages (English) should be the binding text, specifically when talking about guidelines, requirements and such. We do not recommend using a system like the one used in the EU.

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

Part of such a checklist should include a point on the range of inputs received from various stakeholders. It also may be advisable to ensure that relevant issues and concerns have been addressed, such as the impact of decisions on security, stability and resiliency of the DNS.

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

D. Appeal mechanism(s) for Board decisions

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

ICC supports this recommendation and also urges that this assessment should investigate the extent to which the IRP may have binding authority to overturn Board decisions in order to help ensure independence. Also, the comprehensive assessment should consider benchmarking against similar corporate and other structures.

26. The operations of the Office of Ombudsman should be assessed and, to the extent they are not, should be brought into compliance with the relevant aspects of internationally recognized standards for an Ombudsman function such as International Ombudsman Association⁸ and its Standards of Practice⁹ (as soon as possible, but no later than - DATE WILL BE INSERTED IN THE ATRT FINAL REPORT).

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

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

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

Overarching Recommendation

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

ICC supports this recommendation, and recommends the inclusion of specific timelines by which these recommendations should be documented in a report and implemented, as we remain concerned that previous efforts to enhance ICANN's accountability have not progressed with sufficient focus or speed.

Contract enforcement is an important accountability issue for business and all stakeholders, as suggested under the 'corporate and legal accountability' definition included in the

Berkman Report. ICC also suggests including a recommendation to assess and provide adequate funding for this issue and other priorities.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

ICC Commission on E-Business, IT and Telecoms (EBITT)

Business leaders and experts drawn from the ICC membership establish the key business positions, policies and practices on e-business, information technologies and telecommunications through the EBITT Commission.

With members who are users and providers of information technology and electronic services from both developed and developing countries, ICC provides the ideal platform to develop global voluntary rules and best practices for these areas. Dedicated to the expansion of cross-border trade, ICC champions liberalization of telecoms and development of infrastructures that support global online trade.

ICC has also led and coordinated the input of business around the world to the World Summit on the Information Society, Geneva 2003, Tunis 2005, and continues this effort in the activities established in the Tunis Agenda through its initiative, Business Action to Support the Information Society (BASIS <http://www.iccwbo.org/basis>).



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