**ATRT2 Recommendations**

Analysis of Accountability and Transparency in

Policy Development and Implementation Processes

**Findings of ATRT1**:

ATRT1 reviewed ICANN’s policy development and implementation processes, and made many recommendations about the inputs and standards used for making decisions and to appeal decisions.[[1]](#footnote-2) Both to ease assessment of implementation and to shed light on the interrelationships between ATRT2’s mandate[[2]](#footnote-3) and the ICANN Board’s decisions on policy and its implementation, a number of these issues have been grouped in this analysis. Importantly, the assessments and recommendations made in this document presume the default condition of transparency as a basis for all ICANN activities. In those instances where the Chatham House Rule[[3]](#footnote-4) is invoked, discussions are closed and/or reports get redacted, the decision to overrule the transparency imperative still should be publicly documented.

**Recommendations**:

*Recommendation 20*: The Board should ensure that all necessary inputs that have been received in policy-making processes are accounted for and included for consideration by the Board. To assist in this, the Board should as soon as possible adopt and make available to the community a mechanism such as a checklist or template to accompany documentation for Board decisions that certifies what inputs have been received and are included for consideration by the Board.

*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 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 25*: As soon as possible, but no later than October 2011, 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.

*Recommendation 26*: As soon as possible, but no later than October 2011 the ICANN Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

ATRT2, under the terms of its mandate, also determined that the following issues[[4]](#footnote-5) should be addressed in this analysis of accountability and transparency in policy development and implementation processes:

* Publication of yearly statistical reports on transparency
* Enhancement of the employee Hotline that allow relevant information to become transparent (Whistleblower Policy).

**Summary of ICANN’s assessment of implementation:**

### With regard to Board consideration of inputs in policy decision making, Staff undertook an analysis[[5]](#footnote-6) to determine what can be learned based upon actual community usage and participation patterns. The study period was from 1 January 2010 through 31 December 2012, and involved harvesting information from each of 212 archived Public Comments Forums. Ultimately, a checklist was created that is now used with GNSO PDP recommendations to ascertain that all inputs were received. This checklist, now embedded in Standard Operating Procedure, only has been used once to date.

With regard to restructuring review mechanisms, an Accountability Structures Expert Panel (ASEP) was commissioned in September 2012. It included three international experts on issues of corporate governance, accountability and international dispute resolution. The ASEP reported on October 2012 and the Board acted upon its recommendations on 20 December 2012, approving amendments to By-laws Article IV, Section 2 ([Reconsideration](http://www.icann.org/en/about/governance/bylaws/proposed-bylaw-revision-reconsideration-26oct12-en.pdf)), Section 3 ([Independent Review](http://www.icann.org/en/about/governance/bylaws/proposed-bylaw-revision-irp-26oct12-en.pdf)), and the corresponding [Cooperative Engagement Process for Independent Review](http://www.icann.org/en/news/irp/proposed-cep-26oct12-en.pdf).

With regard to the Ombudsman, the Ombudsman undertook a review of his office and function in accordance with ATRT1 Recommendation #23. The Ombudsman recommended to the Board Governance Committee (BGC) that a regular meeting schedule be established, possibly through a committee of the ICANN Board. In turn, the ICANN Board decided (1) that regular meetings would be held by the Executive Committee, and (2) Ombudsman reports that require the full ICANN Board's attention shall be provided to the ICANN Board as a whole, as needed and determined in consultation with the Executive Committee and the Ombudsman.

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~~The adequate implementation of this recommendation can obviously have positive effects on 9.1,~~ *~~c) continually assessing and improving the processes by which ICANN receives public input (including~~*

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## Summary of community input on implementation, including effectiveness

ATRT2 conducted face-to-face sessions with stakeholders in Beijing and Durban as well as a community-wide survey to gather their views on ICANN’s progress towards institutionalizing more accountable and transparent policy development and implementation processes. Those relatively few responses to the survey were generally negative (see all of them in the ATRT2 archive at [https://community.icann.org/display/ATRT2/Questions+to+the+Community](https://community.icann.org/display/ATRT2/Questions%2Bto%2Bthe%2BCommunity)). For example, this graphic summarizes some of the survey responses:

Specific ratings (1-10) to the questions 1-3 on the implementation of ATRT1



Explicit Reconsideration process concerns were raised by some members of the ICANN community. The Registries Stakeholder Group (RySG) challenged Staff’s implementation of ATRT1 recommendations #23 and #25, claiming that they were fundamentally flawed and in fact ran counter to the concept of accountability. The RySG went on to assert that the Board ignored the public comments. Likewise, the Non-Commercial Stakeholders Group (NCSG), responding to ICANN’s rejection of its Reconsideration #13-3 (regarding the TMCH+50 case), publicly stated its “belief that the Board’s response, or rather, the manner in which it was couched and the rationale which the Board (through its representative sub-committee on the matter) chose to employ, was such as to land yet another blow to the vaunted [Multi-Stakeholder Model].” Perhaps all of the expressed frustration can be summed up by one individual’s challenge that “the ATRT2 should address the questions left unresolved by ATRT1: should ICANN provide an independent and binding appeal from Board decisions? What body should have that authority?”

There was limited input on the Ombudsman in the open comments or in the face-to-face discussions with the ICANN community. One report did question the independence of the Ombudsman, noting that the office “appears so restrained and contained.”

## Summary of other relevant information

With regard to Board reconsideration, since December 2010 eight new Reconsideration Request processes were initiated and six of those “resolved.” In the course of its work, ATRT2 found that the general perception throughout the ICANN community is that Reconsideration Requests “all end up in a negative decision.” An analysis of the results bears this out:

* Request 13-5: Booking.com B.V. (Staff action/inaction on non-exact match “hoteis”)

BCG recommendation pending.

* Request 13-4: DotConnectAfrica Trust (Board action/inaction on the GACs Beijing communique impact on dotafrica application)

**Denied** as per BCG recommendation, Board resolution not finalized

* Request 13-3: Non-Commercial Stakeholders Group (against staff action on TMCH+50)

Initially **Denied** by BCG**,** but eventually recommends to adopt **“revised”** recommendation to be brought to the ongoing community discussion on policy versus implementation within ICANN.[[6]](#footnote-7)

* Request 13-2: Nameshop (Board/ Staff inaction *on Applicants Support*)

**Denied**.[[7]](#footnote-8)

* Request 13-1: Ummah Digital, Ltd. (against staff action *on Applicants Support*)

**Denied**.

* Request 12-2: GNSO Intellectual Property Constituency (against Board decision on .cat)

**Denied.**

* Request 12-1: International Olympic Committee (board decision)

**Denied** (“*at this time*”)[[8]](#footnote-9)

* Request 11-1: Michael Gende (staff inaction)

**Denied**.

With Regard to the Ombudsman, under the ICANN bylaws[[9]](#footnote-10):

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

### The Ombudsman maintains its own a set page on the icann.org [website](http://www.icann.org/en/help/ombudsman).[[10]](#footnote-11) Annual reports have been included under this page from 2005 – 2010.[[11]](#footnote-12)

The Ombudsman now reports to the Board on a quarterly basis in addition to publishing an annual report. Furthermore, the Ombudsman has a Facebook page and writes a regular [blog](http://omblog.icann.org) on various topics.

In discussions with the ATRT2[[12]](#footnote-13), the Ombudsman mentioned additional functions that were not include in the explicit Bylaws charter, including:

* “To ensure that there is transparency of the flow of information.”
* “A mandate to assist with keeping peace and harmony within the ICANN community. “
* Involvement in some issue with new gTLD program and Dispute Resolution providers that may have not been anticipated as part of the Ombudsman function by program implementers.

On questions of whether the Ombudsman should have a role in Whistleblower process at ICANN, the current Ombudsman mentioned to the ATRT2 that he, as well as his predecessor, had spoken to ICANN legal staff about this issue, and that he was basically told “no.”[[13]](#footnote-14) He also mentioned that the role had been defined 10 years ago and perhaps that was in issue to be explored.[[14]](#footnote-15)

## ATRT2 analysis of recommendation implementation

### With regard to Board consideration of input in policy decision making (ATRT1 Recommendation #20), ATRT2 found this implementation to be incomplete. Although the ICANN Board and the GAC have developed a modality that allows the latter’s advice to be received, reviewed, considered, and discussed with decisions explained, and the Supporting Organizations have rich Bylaws text defining processes for consideration of policy advice, the remaining Advisory Committees may offer advice but there is no defined response mechanism. In fact, there isn't even Bylaws obligation on the ICANN Board to respond.

### With Regard to restructuring review mechanisms (ATRT1 Recommendation #23), ATR2 also found this to be incomplete. Review mechanism is only the last stage of the PDP process, but one where the objectives of AOC 9.1(d) are at risk. Review mechanism should be a “final” guarantee that there is wide support for the decisions. It should not be seen as a way to solve process logjams at this stage alone.

With regard to Board Reconsideration issues, ATRT2 found that Recommendations #25 remains **incomplete**. While steps were taken to clarify the process, the issues described above indicate that it still requires clarification. Regarding Recommendation #26, though, this item is **complete**. A time line and suggested format for generating a Reconsideration Request can be found at <http://www.icann.org/en/groups/board/governance/reconsideration>.

With Regard to the Ombudsman (ATRT1 Recommendation #24), this item also is **complete**.ATRT2 believes, however, that ICANN needs to reconsider the Ombudsman’s charter and the Office’s role as a symbol of good governance to be further incorporated in transparency processes.

# **Proposed New Recommendations by ATRT2**

## Hypothesis of problem

Full transparency requires an ability for employees to report irregularities in a safe and reliable manner. While ICANN has a hotline that is meant to serve the whistleblowing activities, evidence does not indicate that this program has been used effectively.

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## Background research undertaken

While ATRT1 did not make any specific recommendations on a manner in which continual assessment could be done, previous ICANN-contracted reports did include relevant suggestions:

In 2007, **One World Trust** concluded[[15]](#footnote-16) that

*ICANN should consider implementing processes that act as deterrents to abuses of power and misconduct which would protect staff who might want to raise such instances. Specifically, ICANN should consider developing a whistleblower policy that enables staff to raise concerns in a confidential manner and without fear of retaliation; and developing appropriate systems to foster compliance.[[16]](#footnote-17)*

In 2010, the **Berkman Center for Internet & Society** reiterated[[17]](#footnote-18) One World Trust’s recommendation that ICANN carry out a yearly transparency audit that would be published as part of an annual Transparency Audit.[[18]](#footnote-19)

## Relevant ICANN bylaws/published policies/published procedures

## ATRT2 analysis & rationale

ICANN already issues an annual report on implementation and progress on ATRT1 recommendations. Additionally, while staff does not anticipate any issues with being able to report how the Anonymous Hotline is being used, ICANN’s ability to report publicly on results from Anonymous Hotline may be limited in certain cases due to legal implications. ICANN may be limited to providing a generic disposition due to such legal limitations.

## Draft recommendations

[ATRT2 wiki Rec 12]

That Bylaws Article XI be amended to include:

*The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees explaining what action it took and the rationale for doing so.*

[ATRT2 wiki Rec 13]

The ICANN Board should convene a Special Community Committee to discuss options for improving Board accountability with regard to restructuring of the Independent Review Panel (IRP), the Reconsideration Process. The group will use the report of the Experts Group Report (ESEP) on Restructuring as one basis for its discussions.

[No further recommendation(s) regarding ATRT2 wiki Rec 14]

[ATRT2 wiki Rec 15]

The Ombudsman role as defined in the Bylaws shall be reviewed to determine whether it is still appropriate as defined, or whether it needs to be expanded or otherwise revised to help deal with the issues such as:

* A role in the continued process review and reporting on Board and Staff transparency.
* A role in helping employees deal with issues related to the public policy functions of ICANN
* A role in proper treatment of whistleblowers and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment.

[No further recommendation(s) regarding ATRT2 wiki Rec 16]

[ATRT2 wiki Rec 35]

As part of its yearly report, ICANN should include

* A large range of Transparency efforts and metrics.
* A discussion of the degree to which ICANN, Staff and Community, are adhering to a standard of default transparency or where decisions to either use Chatham House Rule or redaction is made on a case by case basis and is documented in a transparent manner.
* Statistical reporting on ICANN Board information and report disclosure, to include:
	+ the usage of the Documentary Information disclosure Policy (DIDP)
	+ Percentage of Board Book and other information that is released to the general public
	+ Number and nature of issues that Board determined should be treated at either:
		- Under Chatham House Rule
		- Completely confidential
* A section on employee whistleblowing activity, to include metrics on:
	+ Reports submitted
	+ Reports verified as containing issues requiring action
	+ Reports that resulted in change to ICANN practices
* An analysis of the continued relevance and usefulness of existing metrics, including
	+ considerations on whether activities are being geared toward the metrics (aka, teaching to the test) without contributing toward the goal of genuine transparency
	+ Recommendations for new metrics

[ATRT2 wiki Rec #36]

Adopt the One World Trust and/or Berkman Center recommendations to establish a viable whistleblower program. The processes for ICANN employee transparency and whistleblowing should be made public. ICANN also should arrange for an annual professional audit of its whistleblower policy to insure that the program meets the global best practices.

## Public Comment on Draft Recommendations (to be completed later)

## Final recommendation (to be completed later)

1. See Final Recommendations of the Accountability and Transparency Review Team (31 December 2010) at <http://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf> [↑](#footnote-ref-2)
2. See <https://community.icann.org/display/ATRT2/Mandate>, in particular 9.1 (Ensuring accountability, transparency and the interests of global Internet users) subsections (c), (d) and (e). [↑](#footnote-ref-3)
3. See <http://www.chathamhouse.org/about-us/chathamhouserule> “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” [↑](#footnote-ref-4)
4. It should be noted that while not discussed to an extent in the ATRT1 report, the last two issues were documented in both the [2010 Berkman Center for Internet & Society report](http://www.icann.org/en/about/.../review-berkman-final-report-20oct10-en.pdf_) and the [2007 One Work Trust report](http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf_) on “ICANN Accountability and Transparency – Structures and Practices.” [↑](#footnote-ref-5)
5. See <https://community.icann.org/pages/viewpage.action?pageId=41885192> [↑](#footnote-ref-6)
6. The BCG wrote, “*The Request, however, does demonstrate the import of the ongoing work within the ICANN community regarding issues of policy and implementation, and the need to have clear definitions of processes and terms used when seeking community guidance and input. As such, we believe it is advisable for the Board to pay close attention to the policy/implementation debate, and to make sure that the issues raised within this Request be part of that community work. Further, we believe that it is advisable to ask the community to address the issue of how the Board should consider and respond to advice provided by the Supporting Organizations (outside of the PDP) and what types of consultation mechanisms, if any, are appropriate in the event the Board elects not to follow that advice. As ICANN evolves, this is an important question for consideration in upholding the multistakeholder model.”* [↑](#footnote-ref-7)
7. Some interesting case law interpretations appear in the BCG recommendation: “*Reconsideration is not, and has never been, a tool for requestors to come to the Board to seek the reevaluation of staff decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in fact, in contravention of established processes and policies within ICANN.”* [↑](#footnote-ref-8)
8. This issue still pending on a general policy development process between GAC and GNSO on IGO protection. [↑](#footnote-ref-9)
9. See [http://www.icann.org/en/about/governance/bylaws - V](http://www.icann.org/en/about/governance/bylaws#V) [↑](#footnote-ref-10)
10. See <http://www.icann.org/en/help/ombudsman> [↑](#footnote-ref-11)
11. See <http://www.icann.org/en/help/ombudsman/reports> [↑](#footnote-ref-12)
12. See <http://durban47.icann.org/meetings/durban2013/transcript-atrt2-13jul13-en.pdf> [↑](#footnote-ref-13)
13. The current Ombudsman, Chris LaHatte, noted, “the answer really was, well we have a perfectly good law which deals with that so you don’t need to go there. I can’t comment from a legal perspective on whether that’s a good answer as opposed to the correct answer.” He also indicated that the Ombudsman needs “freedom of information powers, and indeed I have those, because it’s in my Bylaw that if I want to see any documents from within ICANN or in the ICANN community, then they must be provided.” He went on to note, however, “That’s not quite the same of course as whistleblowing, but it is perhaps the first step towards that sort of function. If someone were to come to me and say, ‘I want to make this confidential complaint about something that’s happened.’ And it is effectively a whistleblowing complaint, then I have the ability to investigate.” [↑](#footnote-ref-14)
14. LaHatte noted “And the Bylaw it seems to also be restrictive in its approach in that it says the role is between ICANN staff and the community, but in other areas of the by-law it’s not quite as explicit, and it talks about supporting structures. And it’s perhaps understandable in the context of something which was written in 2003, 2004 when it was a lot smaller, much less complicated, and when the supporting organizations hadn’t reached the degree of sophistication which they have some seven or eight years later.” [↑](#footnote-ref-15)
15. See <http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf> [↑](#footnote-ref-16)
16. In fact, One World Trust made many recommendations, including:

	* To ensure compliance with any organisational policy, it is important that there is high level oversight and leadership. Without this, implementation will only ever be piecemeal. To ensure implementation of the information disclosure within ICANN therefore, responsibility for overseeing the policy should be assigned to a senior manager.
	* Supporting this, a set of indicators should be developed to monitor the implementation of the policy, and an annual review should be undertaken which identifies how ICANN is complying with the policy, where there are problems, and the steps that are to going be taken to address these (see recommendation 5.1 in section 8).
	* While ICANN has three mechanisms for investigating complaints from members of the ICANN community, the organisation does not have a policy or system in place that provides staff with channels through which they can raise complaints in confidentiality and without fear of retaliation. Having such a policy (often referred to as a whistleblower policy) is good practice among global organisations. A whistleblower policy that provides such protections serves as an important means of ensuring accountability to staff as well as preventing fraudulent behaviour, misconduct and corruption within an organisation.
	* While the Ombudsman, Reconsideration Committee and the Independent Review Panel provide complaints based approaches to compliance, to generate greater trust among stakeholder, ICANN needs to take a more proactive approach.
	* To address this issue, ICANN should consider a regular independent audit of their compliance with accountability and transparency commitments. Alternatively, it could develop a permanent compliance function to emphasize prevention by identifying shortcomings as they emerge and before they become systemic problems. In either case, a regular report on compliance should be produced and publicly disseminated. [↑](#footnote-ref-17)
17. See <http://www.icann.org/en/about/aoc-review/atrt/review-berkman-final-report-20oct10-en.pdf> [↑](#footnote-ref-18)
18. Specifically, 2.4 Transparency Audit

(a) Issues

The lack of a comprehensive audit of ICANN’s information activities makes it difficult to assess its practices across active, passive, and participatory transparency.

(b) Observations

The 2007 One World Trust review describes an ICANN initiative “to conduct an annual audit of standards of accountability and transparency, including an audit of the commitments made in these Management Operating Principles . . . by an external party” with the results of the audit “published in the Annual Report.”xxxv The last annual report does not contain such an audit.

(c) Discussion

ICANN currently lacks an up-to-date, publicly available transparency audit. This makes it difficult to make substantive assessments of ICANN’s practices as they relate to active, passive, and participatory transparency. The lack of empirical material (e.g., on the time delays in the publication of documents) currently forces reviewers to look for conceptual, structural, and procedural deficiencies in order to identify if, where, and how there are inconsistencies between guiding policies and practices. A comprehensive audit, in contrast, would allow for periodic, facts-based, internal and external reviewing and benchmarking; ICANN could greatly benefit from this when further improving its information policies.

Such a transparency audit needs to be governed by clear policies and processes, which set forth the categories of information pertinent to such an audit, among other things. Following an earlier recommendation by the One World Trust review, the transparency audit should be published in the Annual Report. In addition, the Berkman team suggests that the underlying data be released as part of the Dashboard/ICANN Performance Metrics.xxxvi Accountability and Transparency at ICANN: An Independent Review {99}

(*d) Recommendation*

*Create and implement policies and processes for conducting and communicating regular transparency audits.*  [↑](#footnote-ref-19)