



Comment of the Intellectual Property Constituency

on the

Third Accountability and Transparency Review Team (ATRRT3) Final Report

31 July 2020

The Intellectual Property Constituency (IPC) very much appreciates this opportunity to comment upon the Third Accountability and Transparency Review Team (ATRRT3) Final Report.

While we appreciate the efforts of the members of the ATRRT3 Review Team, we have grave concerns about both the process and substance of the recommendations of the Final Report. In terms of concerns with the substance of the recommendations, these relate in particular to the recommendations on Reviews, both Specific and Organizational.

Some of these concerns were communicated, albeit unsuccessfully, through our colleagues representing the Business Constituency (BC) and Internet Service Providers and Connectivity Providers Constituency (ISPCP) on the ATRRT3 Review Team. We see this Public Comment Submission as an opportunity to emphasise for the Board's consideration particular points which we believe put ICANN at a considerable disadvantage in delivering upon its mission going forward. **In particular, we start from the perspective that Specific Reviews must embody and model the transparency (Article 3) and accountability (Article 4) the ICANN Bylaws require of ICANN. How are we to expect ICANN to uphold these fundamental values when the Review Team charged with evaluating these has not acted accordingly?**

- 1.1. The pathway from [Draft Report](#) to [Final Report](#) is opaque, and the Review Team's answers to this concern are rushed, ex-post, and inadequate.
- 1.2. The Review Team has failed to act in accordance with one of its own Bylaws mandates, which is "assessing and improving the processes by which ICANN receives public input (*including adequate explanation of decisions taken and the rationale thereof*)" [ICANN Bylaws Article 4, Section 4.6(b)(ii)(C), emphasis added]. Public Comment is a cornerstone of the multi-stakeholder model. As the ICANN website itself states: "Public Comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback. Public Comment is a key part of the policy development process

(PDP), allowing for refinement of recommendations before further consideration and potential adoption. Public Comment is also used to guide implementation work, reviews, and operational activities of the ICANN organization.”¹

- 1.3. The Review Team has failed to proactively provide or document explanations for the significant differences between the Final Report and the Draft Report. When ATRT3 members were asked in early May 2020 to consult with their communities to seek support for the then-Final Report, no explanation was available as to the inconsistencies between the Public Comments (see [Staff Report of Public Comment Proceeding](#)) and the recommendations of the Final Report. The ATRT3 Review Team appears not to have seen the value of or need for informing the community of their rationales for these differences until stakeholders’ concerns were acknowledged by the Board liaison to the ATRT3.² A subsequently prepared Annex D, titled “Comparing ATRT3’s Proposal on Organizational Reviews to the Bylaws and the ICANN Board’s Public Comment Submission (31 January 2020) on the Third Accountability and Transparency Review Team (ATRT3) Draft Report”, was hastily inserted into the Final Report prior to its submission to the ICANN Board, or at least was not available to the ATRT3 members themselves or to the community when ATRT3 members were instructed to consult.
- 1.4. Whilst Annex D appears to take account of the ICANN Board’s Public Comment Submission point-by-point in a table encapsulated in the Final Report, community Public Comment Submissions are not treated with equal weight. Annex E, titled “Public Comment Analysis”, simply links to a large Excel spreadsheet. Numerous Public Comments are noted in the spreadsheet as having led to no change. Responses or explanations are high-level, one sentence statements that do not evidence critical reflection on the part of the Review Team members. This treatment of Public Comment Submissions discourages engagement in the Public Comment process and with the Final Report.
- 1.5. As noted in footnote 2 below, stakeholders’ concerns were acknowledged by the Board liaison to the ATRT3 on 6 May 2020. Two days later, a new document titled “Explaining Difficult Issues” was shared by the ATRT3 leadership with

¹ <https://www.icann.org/public-comments>

² See comments of Board Liaison to ATRT3, León Sánchez, on 6 May 2020 call https://community.icann.org/display/atrt/Meeting+%2363+%7C+6+May+2020+@+11%3A00+UTC?preview=/126432220/134513799/Transcript_ATRT3%20Plenary63_06May2020.pdf (at page 58), noting “that there are significant differences between the recommendations that we are including in the final report and what was commented by the community. So this might be an issue at the time the board considers the report, and what I’m hearing is that there is some desire to further engage with the community so that they are able to comment on these recommendations since, again, they seem to be significantly different from those in which they were able to comment during the public comment period. So I just want to flag this because it might be an issue when time comes for the board to consider these recommendation. And I don’t know if this calls for any public comment as Daniel is signaling, but certainly, there needs to be some sort of engagement with the community so that they are updated on these changes and they are able maybe to comment on this, or at least be aware of these differences, and then the board is able to consider rightfully these recommendations.”

ATRT. Review Team members were given one week to consult with their constituencies about this document. This document is not included in the ATRT3's Final Report; its ultimate purpose remains unclear, and the community's time in reviewing this document in such an unnecessarily hasty manner has not been justified. Worse, even a cursory review of the Explaining Difficult Issues document revealed that it mischaracterized public input as it relates to Organizational Reviews. For completeness of the public record on this Review Team's work, we again note specifically here the following³:

- 1.5.1. The positions of the NCSG appear to have been overlooked. They are captured here in this spreadsheet (https://docs.google.com/spreadsheets/d/1DEzRYW5DqQKI1HW93INDb_ILERDOOvc2Qy1fhfZAG-c/edit#gid=1969175471). The NCSG supports Option 1, and very clearly opposes Option 2.
- 1.5.2. Comments of Heather Flanagan are also overlooked but clearly relate, in part, to Option 2.
- 1.5.3. The RySG position on Option 2 is mischaracterized as "Does not support because it is not different enough". By contrast, the RySG opposed Option 1 as not representing a sufficiently significant departure from the status quo. On reading the rest of the comment, it is clear that RySG does not support Option 2, not because it does not go far enough but because it goes too far, i.e., Options 1 and 2 appear to be "somewhat extreme alternatives", with the RySG favouring a "middle path, where the system of Organizational and Specific Reviews could be improved without a drastic overhaul." They also refer to and support SSAC comments quoted in the initial report which proposed a series of potential improvements seemingly discounted/rejected by the RT.
- 1.5.4. The SSAC position on Option 2 is also somewhat mischaracterized – the SSAC does indeed oppose Option 2, but it is not strictly accurate to refer to their position as preferring the status quo.
- 1.5.5. Some groups, such as the Board and the BC, have positions that are more nuanced than a simplistic support/does not support standard allows, even with the inclusion of wording like "wants more details". The Board, for example, supports "the direction of Option 2" but has expressed the more nuanced position that its members feel that there is much more work to be done.
- 1.6. Few substantive decisions of the ATRT3 are recorded in the [Decisions Reached](#) log since the [Staff Report of Public Comment Proceeding](#) was published on 14 February 2020; of the mere six "decisions reached" since 16 March 2020, only one appears to document a substantive decision, ie, "to include text in recommendation to suggest the Board implement a moratorium on launching any

³ In this context Option 1 suggests the introduction of a new Independent Accountability Office and Option 2 to conducting Organizational Reviews as 3-5 day workshops coupled with an "holistic review"

new Organizational and Specific Reviews until it has made a decision on this recommendation, as noted in the transmittal letter.” The wiki is the primary means of transparency of a Review Team; it is the community’s only, best and quickest way of keeping track of the progress - both procedural and substantive - of a Review Team’s work.

- 1.7. Documented concerns about the Review Team’s use of Skype channels have still not been addressed. We note that the IPC flagged in its [Public Comment Submission of 16 December 2019](#) concerns about the use of Skype channels by the ATRT. This, in conjunction with the sparsity of publicly accessible documentation of the Review Team’s [Decisions Reached](#) and consideration of community feedback (see apparently incomplete or abandoned document at https://docs.google.com/spreadsheets/d/1DEzRYW5DqQK11HW93INdb_ILERD_OOvc2Qy1fhfZAG-c/edit#gid=1969175471) have significantly impeded community input into the Final Report prior to its submission to the ICANN Board. Had the Review Team fully utilised public mailing lists, like all other review teams, we would have had an opportunity to properly track ATRT3’s work and provide feedback and input in a more timely manner than by now submitting such a detailed and critical Public Comment submission.
- 1.8. The ATRT3 Final Report does not provide the definition or methodology utilised to reach “consensus” designations. The Review Team’s sparsely populated [Decisions Reached](#) record and consideration of community feedback (see apparently incomplete or abandoned document at https://docs.google.com/spreadsheets/d/1DEzRYW5DqQK11HW93INdb_ILERD_OOvc2Qy1fhfZAG-c/edit#gid=1969175471) inappropriately imply to those outside of the Review Team that a formal methodology has not been used. Indeed, the Chairs’ covering letter to the Board states that the designation of consensus was based on a single call on 6 May 2020 “where 12 of the 15 active members participated”. The meeting summary for that call, however, records no decisions as having been made (<https://community.icann.org/display/atrt/Meeting+%2363+%7C+6+May+2020+@+11%3A00+UTC>), and it is clear from the mailing list activity on 6 May and subsequently that some Review Team members had significant concerns and viewed the Review Team’s work as not yet complete, such that assessing consensus based on the 6 May call would seem premature. We also question a designation of “consensus” as it relates to the recommendations on Reviews, where 4 of the 15 RT members, from different parts of the community, disagree with the outcome.
- 1.9. Recommendations pertaining to Section 8 - Assessment of Periodic (now Specific) and Organizational Reviews have not been justified by documented evidence and analysis. It is not clear what the Review Team has relied upon to reach the following recommendations in particular.
 - 1.9.1. Suspension of SSR2: On what basis is this recommended, given that the Review Team has not yet completed its work?

- 1.9.2. Only one further CCT Review: The IPC fully supports future CCT Reviews being “clearly scoped”, time limited, and based on a framework of data, but struggles to understand from the ATRT3 Final Report how the elimination of future CCT Reviews solves the problems identified.
- 1.9.3. Eliminating RDS Reviews: ATRT3 states that the work of the EPDP will clearly impact the need for RDS Reviews. How, specifically, has the Review Team taken account of the EPDP Phase 1 Recommendations, or indeed Phase 2 draft recommendations? Again, how does eliminating RDS Reviews solve the *specific problems identified*?
- 1.9.4. Organizational Reviews: These are recommended to be replaced by a continuous improvement program, the assessment of which could be conducted by independent contractors if “the SO/AC/NC desires and the budget permits”. How has the overwhelming feedback from the Review Team’s surveys of both individuals and structures in favour of Organizational Reviews continuing to be conducted by external consultants (Final report p 206) been taken into consideration when recommending to make this optional and subject to budget? How is this budget to be safeguarded for something expressed as optional, but which the community so clearly desires?
- 1.10. Lack of community support for the proposed Holistic Review is not accurately captured in the ATRT3 Final Report. The proposed Holistic Review constitutes one of the most significant changes proposed by the Final Report, in the face of critical input from Public Comment submissions. A change of this magnitude cannot simply be put to the ICANN Board without fulsome explanation and opportunity for the community to better understand how their questions and concerns raised in Public Comment have been taken into account. This idea appears to have originated with one Public Comment submission made in a personal capacity by one of the Co-Chairs of the ATRT3, which “propose[d] consideration of a full redesign of the nature of the Reviews Program to permit a continuous improvement plan inclusive of a pattern of more regular, shorter, smaller highly focussed internal reviews/audits/ examinations; less frequent wider ranging or ICANN Holistic Review and occasional External or Independent Examination/audit/review methodologies being deployed”.⁴ It is not clear how this personal submission has come to be adopted by the Review Team.
- 1.11. The community was initially given one week to review the so-called “Final Report” (minus its annexes, and in addition to the as yet unexplained “Explaining Difficult Issues” document) and provide input through ATRT3 representatives. The IPC was informed that the Review Team would not accept any input directly from stakeholder groups or constituencies; this could only be channelled through a

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<https://mm.icann.org/pipermail/comments-streamlining-org-reviews-proposal-30apr19/attachments/20190714/70b04b7c/CLOPublicCommentonStreamliningOrganisationalReviews-0001.pdf>

Review Team member. One week was grossly inadequate to accomplish this important task with such wide-ranging impacts on the future of ICANN. At the end of that one week, one further week was allocated, but by this point, the IPC (and presumably other community groups) had rushed to consult, gather views and document these; the additional week provided at this late stage benefitted only those who had failed to take the initial, unreasonable one week deadline seriously. Firstly the ATRT3 did tremendous discredit to the value of its own work, and the community's input into that work, by initially allocating a single week for review, consultation and input. Then the ATRT3 did further discredit to the input of those community groups who had raced to engage by belatedly allocating an additional week at the last minute. This is neither transparent nor accountable, nor does it accord with one of the key functions of the review itself: "assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof)" [ICANN Bylaws Article 4, Section 4.6(b)(ii)(C).

- 1.12. Community review of the so-called "Final Report" prior to its submission to the ICANN Board was also significantly hindered by various seemingly minor faults and omissions which, in the aggregate, and in combination with the extremely limited time allowed, made it very challenging to prepare a meaningful and fully detailed Minority Statement. Annexes were not made available for review. The lack of pagination and the lack of a Table of Contents or other means of navigating the Final Report as it was presented to the community in May and June made it extremely difficult to comment in a clear and logical way. Formatting issues gave a perception of incomplete or sloppy work. The chart setting out all of the Review Team's recommendations ran off the page; it was unclear if any text there or elsewhere in the document was not visible. It was impossible to have trust in this document as being the final version, particularly when coupled with the drip-feeding of new documents as referred to above, and impossible not to let this mistrust of the form of the document bleed into mistrust of the substance.

In conclusion, the IPC agrees with many of the challenges that the ATRT3 Review Team has identified as facing ICANN's future. As documented in our [Public Comment Submission of 31 January 2020](#), the IPC wholeheartedly agrees that prioritization is sensible and appropriate. We fundamentally supported many of the proposals put forward in the Draft Report. It is not now the case that we as a constituency object to the ATRT3's recommendations simply because these are inconsistent with our own views. Rather, we are deeply concerned by the absence of a publicly available record that demonstrates that our views - drafted with careful and considered analysis within (and despite) some unnecessarily inhospitable timelines - and the views of others in the community, have received an equivalent level of care, consideration and analysis by ATRT3. We agree that change is necessary to make ICANN's operations more sustainable and reflective of current circumstances; we simply struggle to draw the necessary connection between ATRT3's initial proposed solutions, the community's input on these proposed solutions,

and ATRT3's final decisions. We hope that the concerns set out in detail in this Public Comment submission demonstrate that the answer to this issue is not to now reverse-engineer some justification of the current version of the ATRT3 recommendations.

We very much appreciate that ATRT3 members and leadership are volunteers who have generously given their time and energy to this review. We also very much appreciate the added strain that COVID-19 restrictions have placed on all of us, in particular by taking away our ability to progress consensus-building intensively in face-to-face meetings. We are all being challenged to balance punishingly high ICANN workloads with new responsibilities arising from working from home, home schooling and increased economic pressure on the DNS industry and the world at large. We wish therefore to emphasize that our critiques captured in this Public Comment Submission are not intended as personal criticisms of ATRT3 members.

The Accountability and Transparency Review is simply too important to our collective future sustainability and ability to deliver on ICANN's unique mission to dismiss the ATRT3 recommendations as lacking urgency or priority. We believe that ATRT3's working methodology is inconsistent with the ICANN Bylaws and simply cannot serve as a model for ICANN Org's operations or for future Review Teams. The outcomes of such a flawed process cannot reasonably and reliably guide ICANN's evolution into its next phase. Our collective future, reputation and integrity are at stake. **We therefore request that the Board remand the ATRT3 Final Report to the ATRT3 Review Team to reflect upon the Public Comments submitted in this and the previous Public Comment process (Draft Report), re-evaluate its recommendations in light of those submissions, document clearly and precisely decisions reached and the methodology used and analysis undertaken to reach them, and provide to the Board a revised Final Report that clearly demonstrates all of these achievements.**

Respectfully yours,

Heather Forrest, on behalf of the Intellectual Property Constituency