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COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE ATRT3 DRAFT REPORT

31 January 2020

The GNSO Intellectual Property Constituency (IPC) appreciates the opportunity to provide comments on the Draft Report of the Third Accountability and Transparency Review (ATRT3) https://www.icann.org/en/system/files/files/draft-report-atrt3-16dec19-en.pdf. ATRT3 is mandated under section 4.6 ICANN Bylaws to review "*ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community*".

The IPC represents the views of the intellectual property community within ICANN, and is focused on trademark, copyright, and related intellectual property rights and their effect and interaction with the DNS. The IPC's consensus views on the following aspects of the ATRT3 Draft Report are set out below.

The IPC thanks the volunteer members of the ATRT3 Review Team for their work to date on this important accountability effort. In compiling our comments, the IPC has been conscious that this is a lengthy Draft Report, that a comment on every single recommendation/suggestion would result in a similarly lengthy comment, and that the review team has a fixed time to complete its work. We have therefore sought to focus on the issues of particular concern rather than addressing the minutiae. Inevitably, this means prioritizing the issues where the IPC has concerns with the review team's conclusions.

Prioritization

The IPC agrees that a number of the proposed listed requirements for a prioritization process seem sensible and should help the community to prioritize its workload and the implementation of the many recommendations of past reviews, in addition to likely future recommendations. In particular, the IPC supports:

- The use of the Operating Standards for Specific Reviews as a base;
- Work to be conducted in an open and transparent fashion, with each decision being justified and documented; and
- That where there are multi-year implementations these should be reviewed annually to ensure that they still meet their implementation objectives and the needs of the community.

The IPC also largely supports the following requirements, with the noted comments and additions:

- The identified elements to be considered when conducting the prioritization exercise. To these we would add the following additional elements to be taken into consideration:

- o Whether the recommendation is indeed implementable. Since the Operating Standards for Specific Reviews now expect that recommendations will be SMART (specific, measurable, achievable, realistic, and time-bound) it is to be hoped that over time the incidence of unimplementable recommendations, or of ICANN Board inaction on recommendations, will decline; and
  - o That where a recommendation would require the development of new policy or a change to existing policy, consideration should be given to whether a new policy development process is appropriate at this time, or at all, bearing in mind previous work in this area.
- That the prioritization exercise should not be required to generate additional information in order to evaluate recommendations for prioritization. Whilst we generally support what we presume to be the intent behind this requirement, i.e., that significant further research and data gathering should not be necessary in order to prioritize, nevertheless it will clearly be necessary for the prioritization process to take into account additional information relating to the identified "elements to be considered", such as budget, cost, complexity, dependencies, and so on.

The IPC strongly objects to the proposal that a new entity/standing group be put in place to conduct the so-called annual prioritization process. An "annual prioritization process" which "should be given a fixed one-year term to complete its task" means that as soon as the task is concluded for one year, it will start up again. This would therefore appear to envisage the creation of an effectively permanent small group of "ICANN insiders", who will then operate in a top-down manner. This is not a true "community-led process". Further, while coordination across the community is important, prioritization efforts at the individual SO/AC level (such as those of the GNSO Council's Strategic Planning Session held in January) and within GNSO SG/Cs should be encouraged and supported, rather than simply absorbed or superseded by community-wide efforts. These SO/AC/SG/C-level initiatives should be undertaken with the ICANN Org Strategic Plan and budget in mind, but they should not be otherwise intruded upon or discouraged by broader community initiatives.

Organizational and Specific Reviews

In section 10.5, when considering recommendations to address concerns with the current review structure, the Draft Report specifically refers to the suggestions made by the SSAC in *SSAC2018-19 SSAC comments on Long-Term Options to Adjust the Timeline of Reviews*. These suggestions appear to the IPC to offer sensible and proportionate changes that would maintain these important accountability checks while addressing concerns about workload and prioritization. These suggestions include:
- Staggering reviews so that no more than one Specific Review (SR) and two Organizational Reviews (OR) run concurrently;
- Ensuring that the next round of an SR or OR does not commence until prior recommendations have been implemented and operational for 12 months. We would caveat this with some maximum time period limitation to ensure that future reviews are not blocked by a failure to act on a prior review;
- Adding a maximum duration for other SRs, similar to the 12-month time period for the AT Review. In applying such a maximum duration, we would suggest that real consideration be given to building-in a preparatory phase during which the precise terms of reference can be developed and approved, existing data is gathered by staff and any new data gathering can take place before the review team commences its review. This would remove time pressures such as those we have seen in ATRT3, where by the time the review team had finalised its ToRs and conducted its surveys, a significant portion of the

12-month term had already passed, putting pressure on both the review team and members of the community who would wish to comment on an extremely lengthy Draft Report.
- Focusing SRs on topics of highest priority;
- SRs should have a pre-established budget;
- Allowing scheduling flexibility for SRs, with appropriate checks and balances. This would ensure that where some other workstream is underway (for example in response to a legislative change) then a SR on the same subject matter might be postponed if the community agrees that this is appropriate.

Although the Draft Report refers to these SSAC suggestions, it appears not to propose to adopt them, without any explanation as to why these have been rejected, and instead proposes two completely different, and quite extreme, alternatives – neither of which the IPC supports. Our comments on these two alternatives are as follows:

Option 1

The proposal for a newly created Independent Accountability Office would appear to create an unnecessary level of additional bureaucracy. Further, it would appear to pass responsibility for these accountability mechanisms away from the community (and each of the component parts of the community, being the SO/AC/SG/Cs) and to a single person/small team (which could be subject to lobbying or even capture). Such a change is unnecessary given that the structures and processes of the ICANN Board, staff and community are already in place to manage implementation of reviews.

This proposal, as with the prioritization standing panel referred to above, seems to indicate a concerning desire on the part of the review team to move away from bottom-up structures in favour of a top-down approach.

Option 2

Organizational Reviews:

The IPC would favour some streamlining, for example by adopting a maximum duration for such reviews. However, we strongly oppose the proposal that these organizational reviews be conducted as 3-5-day workshops focused on self-inspection:

- Self-inspection would appear highly unlikely to surface real issues on its own without other supporting mechanisms to introduce external perspectives. For example, if a structure were suffering from issues of bullying, exclusion of a particular category of member from decision-making, leadership and representative opportunities, travel funding and so on, then the likelihood is that the disenfranchised members would either not be participating in the workshop at all or that their input would be downgraded.
- Survey responses were almost wholly in favour of ORs continuing to be conducted by external consultants with appropriate expertise.
- Some SO/ACs are more complex than others. For example, the GNSO contains stakeholder groups and constituencies with a wide range of perspectives and interests, which are frequently at odds with each other. A genuine review of the GNSO could not be conducted as a 3-day workshop, but meaningful insight could be gained through such a workshop that could feed into a broader process.
- As the IPC and other members of the Commercial Stakeholder Group (CSG) have expressed on a number of occasions, there was a clear flaw in the last GNSO Review by

excluding from consideration issues of structure. See for example the IPC's comments on the last GNSO Review (https://forum.icann.org/lists/comments-gnso-review-01jun15/msg00011.html). We would expect this issue to be included in the scope of the next GNSO review, due to be conducted shortly. Therefore we strongly oppose a change to the manner in which organizational reviews are launched, scoped or conducted which would remove that opportunity.

Specific Reviews:

The SRs serve specific functions, (should) have specific remits, and likely involve community experts and their educated input. These are among the most important tools for ensuring accountability and transparency across the multistakeholder community, including the Board and Staff. Combining the AT, CCT and RDS reviews (each of which, on its own, can be very deep and intricate) into a single review would create more problems than it solves – the remit of this review would be so expansive as to make it unworkable, exacerbating concerns about workload and the length of time such reviews take. The IPC does not favour the further complication of reviews in this manner. Instead, the SR's should be maintained and improved upon. ICANN Org has repeatedly contended that it has fully implemented all past community review recommendations. We know, however, from recent assessments by the Review Teams of WHOIS/RDS, ATRT3 and SSR2, that prior reviews were not implemented fully.

We would certainly favour clarity of scope and remit at the outset of such individual reviews to ensure that they do not duplicate work already under way or recently completed. Additional efficiencies could be achieved by developing a clear structure and timeline for all such reviews, and a pro-forma template report to be completed.

Overarching Comments

The IPC has the following overarching comments on the Draft Report:

- The use of Skype channels. It would appear that the review team has made use of Skype channels for substantive discussion on the work being conducted, as opposed to limiting such means of communication to purely administrative matters such as the fixing of time for calls. This has made it difficult to track the work of ATRT3, as the mailing list has had limited traffic. This is contrary to the Operating Standards for Specific Reviews and would be a concern for any review – but particularly for a review of accountability and transparency.

- Weight placed on survey responses. The ATRT3 acknowledges that the responses to the Survey for Individuals are not statistically significant but still relies heavily on data from this survey. In addition, a number of the questions asked in the surveys were loaded Yes/No opinion questions that do not give rise to a clear actionable outcome. For example, a question about the level of satisfaction with interaction with the Board does not identify for the review team that those who expressed dissatisfaction are actually dissatisfied in the same way, for the same reason. The IPC does believe that there is a place for such attitudinal surveys but if they are to be used then they should be expertly drafted in order to ensure they deliver meaningful results. Whilst there is clearly an up-front cost to this it would be a worthwhile investment since such a survey could then be used at intervals in order to measure changing attitudes (and hopefully the impact of implementation of recommendations). The statistical significance and surety of survey results would be a true community benefit.

- Structure of the Report. The current format is quite difficult to read since it requires constant cross-referencing and does not provide clear context for how the ATRT3 reached their proposed suggestions and recommendations. Whilst we support the use of summaries, we would also suggest that for the final report the review team consider restructuring the report so that the consideration of an issue is then followed immediately by the resulting recommendation. This would also cut-down the length of the report since it would remove duplicative text.

- Recommendations and suggestions. The Operating Procedures for Specific Reviews require that recommendations be SMART and based on fact. They should identify what problem they are fixing, and how. They should be based on relevant data, and to the extent that such data is not already in existence (eg, data assessing the return on investment of Fellowship and NextGen expenditure), ATRT3's need should signal a gap that needs filling. They should also include an assessment of the impact on ICANN and whether there is sufficient community capacity and expertise. It appears that the review team intends to label a number of its proposals as "suggestions" where they do not meet the standards to be a recommendation. The review team also considers that suggestions should carry the same weight as recommendations. This is an attempt to circumvent the requirements for recommendations in the Operating Procedures. Either the review team is able to make a recommendation, or it is not.

- Recommendations or suggestions regarding gTLD PDPs. It is a relief, though not a surprise, that ATRT3 has "deemed it as premature to make any specific recommendations or suggestions regarding gTLD PDPs" in view of the activities occurring within the GNSO such as PDP3.0. It is unclear from the ATRT3 Draft Report, however, how much of the review team's time was needlessly utilized to reach this conclusion. As the IPC has previously commented, we believe that it is irresponsible to devote scarce resources to multiple efforts with overlapping scopes. In this way, the ATRT3 Draft Report unfortunately serves as evidence of many of the problems and dissatisfactions it uncovers.

- Scope. Given that one of the ATRT3 scope items was "Assessing the extent to which ICANN's decisions are supported and accepted by the Internet community", the IPC finds troubling the ATRT3 Draft Report's apparent dismissal of the Business Constituency's response to the survey question: "How satisfied are you with the Nominating Committee's selection of Directors for the ICANN Board?" ATRT3 has apparently interpreted this scope item as assessing ICANN Org's decisions, ignoring the fact that Org and Board decisions are guided by community processes (such as decisions of the GNSO Council or advice from an AC). Structure inherently affects these community-level decisions, which inherently affects what ATRT3 understands as "ICANN's decisions".

- Use of the term "decisional participant". The IPC notes that the ATRT3 Draft Report refers to the involvement of the community or community representatives as a "decisional participant" in prioritization/rationalization efforts, and suggests that the precise term "decisional participant" should not be used unless the intention is to refer to the specific powers of Annex D of the ICANN Bylaws. Further, and to the previous point, to take adequate account of ATRT3's scope item on "Assessing the extent to which ICANN's decisions are supported and accepted by the Internet community", the impact of the ICANN community structure must be evaluated to determine how this can be achieved without further disenfranchisement.

- ATRT3 recommendations and suggestions that ICANN continue to support and enhance the following programs (among others): Fellowship, NextGen, ICANN Academy Leadership

Programs, and the Community Regional Outreach Program (CROP). ICANN should also continue to improve the options for remote participation, including captioning. Further, was the return on investment of each of these programs assessed in reaching this recommendation, and if so, on the basis of what data? Can this data please be made available to the ICANN community for detailed consideration.

- When setting out the final recommendations the IPC would urge that the ATRT3 Report should clearly identify the actual problem, with a problem statement, that the recommendation is intended to address, and how it does so. Currently this is not always the case.

Respectfully Submitted,

Intellectual Property Constituency