

Third Accountability and Transparency Review Team (ATRT3)

Report

May 2020

MINORITY STATEMENT of the ISP and Connectivity Providers Constituency, the Intellectual Property Constituency and the Business Constituency

22 May 2020

ABOUT THE CONSTITUENCIES LODGING THIS STATEMENT

This Minority Statement is made by the ISP and Connectivity Providers Constituency, the Intellectual Property Constituency and the Business Constituency. Our constituencies represent diverse interests in the gTLD space:

- ISP and Connectivity Providers Constituency: “The Internet Service Providers and Connectivity Providers (ISPCP) operate Internet backbone networks and/or provide access to Internet and related services to End Users. They are key players of the Internet and have an essential role in its stability and development.” (<https://www.ispcp.info/>)
- Intellectual Property Constituency: “The Intellectual Property Constituency (IPC) represents the views and interests of the intellectual property community worldwide at ICANN, with a particular emphasis on trademark, copyright, and related intellectual property rights and their effect and interaction with Domain Name Systems (DNS).” (<https://www.ipconstituency.org/>)
- Business Constituency: “The Business Constituency (BC) is the voice of commercial Internet users within ICANN...” (<https://www.bizconst.org/>)

Our constituencies are administratively grouped together as the Commercial Stakeholders Group within the GNSO Council structure: <https://gns0.icann.org/en/about/council>.

INTRODUCTION AND BACKGROUND

The ISP and Connectivity Providers Constituency, the Intellectual Property Constituency and the Business Constituency together submit to the ATRT3 this Minority Statement to formally record our shared positions on the methodology and recommendations of the ATRT3 Report. In particular, we lodge this Minority Statement to highlight where our views differ from the conclusions and recommendations made by the ATRT3.

POSITIONS OF THE ISPCP, ISP and BC

Our constituencies wish respectfully to record our **lack of support for and/or disagreement with** the following points relating to or arising from the ATRT3 Final Report of May 2020:

1. Fundamental differences between the Final Report and the Draft Report lack adequate explanation and opportunity for community input.
 - a. **Explanations for fundamental differences between the Final and Draft Reports have only been reluctantly provided.** The Review Team has failed to proactively provide explanations for the significant differences between the Final Report and the Draft Report. On 6 May 2020, our constituencies submitted an urgent request through our ATRT3 representative members seeking explanations for these differences. Prior to that point, the ATRT3 appears not to have seen the value of or need for informing the community of their rationales for these significant differences.
 - b. **The community has not been given an adequate opportunity to reflect and provide input on the explanations provided, nor upon the ATRT3 Final Report and Recommendations.** On 6 May 2020, our constituencies submitted an urgent request through our ATRT3 representative members that the ATRT publish in full and provide time for the community to review the Final Report and the RT's explanations for the significant differences between the Draft and Final Reports. One week (then extended to two weeks) is grossly inadequate, particularly when many in the community are working remotely in the face of COVID-19 restrictions. The community still requires time to reflect upon the appropriateness of requesting an additional public comment period to address these significant differences. We appreciate that concerns of this nature were acknowledged last week by the ATRT3 Board Liaison, León Sánchez.¹
 - c. **The community has not been given an adequate opportunity to draft minority statements.** Again, on 6 May 2020, our constituencies submitted an urgent request through our ATRT3 representative members that the ATRT

¹ 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?previaw=/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.” We note for accuracy and completeness that León Sánchez further explained (at page 61 of the transcript) that his “flagging this issue does not equate to me requesting or pushing for another public comment period, just to be clear.”

provide additional time for minority opinions to be drafted. Again, one week is not adequate to achieve this; the last-moment addition of a further week has been helpful but nevertheless has resulted in a rushed effort on our parts to produce this statement.

2. The ATRT3 Final Report recommendations of Section 8 (Assessment of Periodic (now Specific) and Organizational Reviews) have not been adequately justified. Specific and Organizational Reviews are the only practical accountability mechanisms remaining, and they should not be curtailed. The following are points of particular concern because they undermine the recommendations reached by the ATRT3:
 - a. **The suspension of SSR Reviews because SSR2 has not yet completed its work**. Given that security and stability are key to ICANN's mission, transparency through disclosure of the evidence and analysis that the ATRT3 relied upon to come to this conclusion is called for. Postponing the decision on when and if any future SSR Review might take place until the conclusion of ATRT4 effectively means that decision is pushed off until 2027 at the earliest, unless the Board overrules the ATRT3 recommendation.
 - b. **Removing RDS Reviews**. The Final Report states that the work of the EPDP will clearly impact the need for RDS Reviews. We request that the ATRT3 provide greater clarity by identifying precisely which part of EPDP's work they are referring to. We note that the Phase 2 Draft Report and its Addendum make no reference to RDS Reviews.
 - c. **Lack of community support for the proposed "Holistic Review"**. The proposed "Holistic Review" constitutes one of the most significant changes proposed by the Final Report. This recommendation is made in the face of critical input from public comment submissions opposing the suggestion that Specific and Organizational Reviews should be scaled back.² 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 submissions have been taken into account. This idea appears to have originated with a single public comment submission made in a personal capacity by one of the Co-Chairs of the ATRT3, who "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" (<https://mm.icann.org/pipermail/comments-streamlining-org-reviews-proposal-30apr19/attachments/20190714/70b04b7c/CLOPublicCommentonStreamliningOrganisationalReviews-0001.pdf>). Transparency and accountability require that the

² See, for example, BC public comment submission at <https://mm.icann.org/pipermail/comments-ssr2-rt-draft-report-24jan20/attachments/20200311/4f206e98/BCcommentonSSR2Report-0001.pdf>.

evolution of this idea from a personal public comment submission to the Final Report be explained and documented in the ATRT3 Final Report.

- d. **An explanation is required to disclose how ‘consensus’ has been determined on Section 8 recommendations and what evidence and analysis the ATRT3 has relied upon in reaching these recommendations.** The concerns outlined above, coupled with the identified inconsistencies in the Explaining Difficult Issues document (see point 3 below) warrant a detailed explanation by ATRT3 as to how the designation of ‘consensus’ for these recommendations was determined. Without this, transparency and accountability are lacking.
3. The Explaining Difficult Issues document is untimely and undermines community trust and confidence in the ATRT3 Final Report and recommendations.
 - a. **The Explaining Difficult Issues document is a rushed and last-minute attempt to justify the ATRT3’s outcomes.** The CSG is aware that on 8 May 2020 a document entitled “Explaining Difficult Issues” was shared with ATRT3 members. The community has been given only one week to comment on this last-minute publication, the origins of which are unclear.
 - b. **The purpose of the Explaining Difficult Issues document is unclear.** The CSG understands that this document will not form part of ATRT3’s Final Report. What purpose does this document therefore serve?
 - c. **The Explaining Difficult Issues document appears to mischaracterize public input.** While adequate time has not been provided to examine this document in detail, we have identified several mischaracterizations of public input in this document. We believe that transparency and accountability are not served if these are not formally documented:
 - i. 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.
 - ii. Comments of Heather Flanagan are also overlooked but clearly relate, in part, to Option 2.
 - iii. 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 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. Those SSAC suggestions were seemingly

- discounted/rejected by the RT from the outset, since although referred to in the Initial Report no explanation was given as to why the RT proposed two entirely different options.
- iv. 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.
 - v. 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.
4. Concerns about the transparency of the ATRT3’s working methodology have been raised but remain unaddressed - particularly concerning in a review of accountability and transparency.
- a. **Documented concerns about the RT’s use of Skype channels have not been addressed.** The IPC flagged in its public comment submission of 16 December 2019 concerns about the use of Skype channels by the ATRT. This concern has not yet been addressed.³ The CSG suggests that had ATRT3 fully utilised public mailing lists, like all other review teams, our constituencies could have had an opportunity to properly track ATRT3’s work and provide feedback and input in a more timely manner.
 - b. **The RT’s process of considering community feedback is undocumented or incomplete.** ATRT3 appears to have started a detailed approach (https://docs.google.com/spreadsheets/d/1DEzRYW5DqQKI1HW93INDb_ILERD0Ovc2Qy1fhfZAG-c/edit#gid=1969175471) to considering feedback, but that the document remains incomplete. The CSG is unclear on whether this is because another approach was adopted or because the work itself was abandoned.
5. Annex B has not been provided to the community for comment. The Final Report makes 14 references to an Annex B, which has not been provided for the purpose of developing this Minority Statement.

In conclusion, our constituencies respectfully remind the Third Accountability and Transparency Review Team of its responsibilities pursuant to Section 4.6(b) of the ICANN Bylaws to preserve ICANN’s “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”. Based on the discord

³ “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.” <https://mm.icann.org/pipermail/comments-atrt3-draft-report-16dec19/attachments/20200131/93576ea3/IPCATRT3comment20200131-0001.pdf>

recorded in this Minority Statement, we unfortunately question whether the ATRT3 has adequately carried out its responsibility under Section 4.6(b). We sadly do not believe that accountability or transparency are adequately demonstrated by the ATRT3's Final Report and recommendations or certain aspects of the methodology employed to develop these. This has done nothing but confirm our constituencies' collective position that moving towards a greater reliance on self-assessment will be problematic, and is therefore not an optimal solution. The ATRT3 itself has highlighted that contrary views can easily be rejected by 'group think'. This risk would only be exacerbated if there were issues of bullying, exclusion, or lack of representation in a group undertaking self-evaluation.

While we appreciate the opportunity to prepare this Minority Statement, we do not appreciate the severe time constraints in which we have had to do so.

The outcome of the ATRT3's work has an undeniable impact not only on ICANN's current and future accountability and transparency, but also on community trust, support and understanding. The challenges of the present global circumstances due to COVID-19 mean that we are all having to take extra efforts, without the benefit of face-to-face collegial discussions and in spite of the strains of changes to home, work and daily lives, to ensure participation and reach consensus. We reiterate our request that the ATRT3 appreciate the disruption that presenting its Final Report to the Board at this premature point may cause. We reiterate our support for the challenging work of the ATRT, and indeed all ICANN Special and Organizational Review Teams, and commit to continued engagement in these vital efforts.

Respectfully yours,

Heather Forrest, on behalf of the Intellectual Property Constituency

Wolf-Ulrich Knoben, on behalf of the ISP and Connectivity Providers Constituency

Claudia Selli, on behalf of the Business Constituency

together comprising the Commercial Stakeholders Group of the GNSO