

Tough Questions for ATRT

Public comments on the Proposed Recommendations published by the Accountability and Transparency Review Team (“ATRT”) have now been submitted, and it is worth stepping back to evaluate ATRT’s work in the context of ICANN’s larger challenges.

ATRT was constituted to carry out ICANN’s commitments under the AoC. Yet at times ICANN acted as if ATRT were an adversary rather than a partner:

- ♦ ICANN inaugurated the review process at the end of last year by publishing a document prescribing the methodology of review teams like ATRT, when the only authority it has with respect to review teams is to “organize” them.
- ♦ ICANN’s president publicly disparaged ATRT’s objectivity and suggested that ICANN’s board would be free to disregard its recommendations—months before those recommendations were formulated, much less published.
- ♦ ICANN did not approve the contract with Harvard’s Berkman Center as ATRT’s “Independent Expert” until August 5, 2010. As a result, Berkman’s work period was compressed into two months, a delay that directly shaped its conceptual framework and final recommendations.
- ♦ ICANN’s general counsel insisted on participating in all telephone interviews conducted with ICANN staff by the Berkman Center. His participation almost certainly discouraged staff members from speaking as candidly as they would have done otherwise.
- ♦ ICANN directly challenged a central premise of ATRT’s Working Group 4 (“WG4”) by declaring that California law prohibits ICANN’s board of directors from being subject to a binding review of its actions.

Despite such resistance, ATRT has offered some recommendations worth trying. Confidence in ICANN’s policy-making would increase if it would “[c]larify ... which issues are considered at Board level” Likewise, the board’s relationship with GAC would improve by “engag[ing] the GAC earlier in the policy development process” and “ensur[ing] that the GAC is fully informed as to the policy agenda at ICANN”

Unfortunately, some of ATRT’s recommendations merely repackage existing AoC commitments as fresh ideas. For example, ATRT’s “overarching recommendation” that ICANN establish a “regular schedule of internal review ... to ensure that transparency and accountability performance is maintained” is indistinguishable from ICANN’s AoC commitment “to maintain and improve robust mechanisms for public input, accountability, and transparency”

But it is ATRT’s analysis of ICANN’s accountability that most cries out for refinement. The AoC vested ATRT with a broad mandate to “consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.” Ironically, its review of ICANN’s accountability has deepened the conflict over what that accountability ought to mean.

Conflict centers on the necessity, desirability, and validity of an appeal mechanism with the power to reverse decisions of the ICANN board. On this point ATRT diverged from WG4, the only instance when ATRT as a whole evidently departed from its working groups' recommendations. ICANN opposed WG4's efforts to identify an appeal mechanism that qualified as independent and binding. ICANN insisted in a one-page statement that under California law "the board *cannot* empower any entity to overturn decisions or actions of the board."

WG4 tentatively recommended that "pending further research" it would "[c]hallenge ICANN's interpretation of California corporate governance law as it applies to ICANN policy development." But ATRT turned about-face, conceding that it "did not reach consensus on whether binding authority was the standard upon which to judge ICANN's accountability."

California law was apparently the rock on which ATRT's analysis foundered. Influenced by ICANN's legal position, ATRT acknowledged that ICANN may agree to binding arbitration in its commercial agreements "without running afoul of California law" but reasoned that "it is less clear and deserves further legal analysis as to what extent and through what mechanisms ICANN could agree to enter into binding arbitration more generally."

In an effort to resolve those doubts, I prepared a memorandum analyzing ICANN's legal position in light of California law. It demonstrates that California law does not prevent ICANN's board of directors from adopting a binding form of review. ATRT's recommendations should be reconsidered in light of this analysis.

ATRT's experience raises some tough questions:

- ◆ Can ATRT's recommendations be refined in time to avoid merely repeating ICANN's existing commitments under the AoC?
- ◆ Can ATRT reconsider its recommendations concerning the necessity and validity of subjecting ICANN's board to binding review, whether through an enhancement of IRP or another appeal mechanism?
- ◆ Can future Affirmation review teams better preserve their autonomy from ICANN?
- ◆ If future Affirmation reviews cannot produce an objective review of ICANN's performance as measured against the commitments prescribed by the AoC, what purpose do they serve?