The ICANN GNSO "Business Constituency"

Comments on Second Accountability and Transparency Review Team (ATRT 2) Final Report & Recommendations

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC). The BC's comments arise from the perspective of Business users and registrants, as defined in our Charter[1]:

> The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:
> 1. promotes end-user confidence because it is a safe place to conduct business
> 2. is competitive in the supply of registry and registrar and related services
> 3. is technically stable, secure and reliable.

On 31 December 2013, the Second Accountability and Transparency Review Team (ATRT2) submitted its Final Report and Recommendations to the ICANN Board of Directors.   The report is now posted for public comment to inform Board action on the ATRT2's proposed recommendations.

BC General Comment

The BC greatly appreciates the extraordinary efforts of the Affirmation review team over many months as it gathered community input and compiled its findings and recommendations.   The work of this review and the recommendations are the most effective way to keep ICANN's board and management team accountable to the interests of global Internet users.

Moreover, the thorough and professional way this team conducted its review is a superb precedent for future reviews. This assumes that ICANN will continue doing reviews called for in the *Affirmation of Commitments*. We take some reassurance that ICANN intends to continue its *Affirmation* obligations from the CEO's recent statement regarding the present review:

> There won't be a day when we decide: "*OK, we're accountable and transparent now, so we can stop reviewing these things*." Long-term accountability is not a box you check, or a certificate you hang on the wall. It's a continuous, evolving process of careful implementation and review.[2]

The BC encourages ICANN to make permanent the *Affirmation* a permanent obligation to conduct the reviews set forth in the Affirmation, since the present *Affirmation* could be unilaterally canceled by ICANN at any time.

In addition, the BC is extremely concerned that ICANN is tending to use more top-down strategy and policy direction, including advice from 'experts' not part of the ICANN community.   Those actions, coupled with expert advice to move to 'crowdsourcing' of policy decisions, could dramatically re-order the ICANN model by significantly diminishing the role of stakeholder groups and advisory committees (AC/SO) within ICANN.

In the comments below, the BC calls attention to several ATRT2 Recommendations that would strengthen the AC/SO structures and process. The BC does not favor unilateral staff-driven initiatives that are imposed upon the very community that gives ICANN its authority and credibility.

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[1] Business Constituency Charter, at http://www.bizconst.org/charter.htm.

[2] Fadi Chehade, "How ICANN is Accountable to the Global Community", 12-Feb-2014, at
http://blog.icann.org/2014/02/how-icann-is-accountable-to-the-global-community/

A final general comment is to remind ICANN's board of the organization's limited technical mission. We note that the recent top-down strategy panels and crowdsourcing initiatives are likely to tempt ICANN to expand its reach beyond DNS coordination, which would expose the organization to greater criticism and risk of interference from intergovernmental bodies.

One way to limit 'scope-creep' would be for ICANN to develop a specific definition of 'public interest' that is limited to the scope of ICANN's mission. An understanding of the public interest implications and responsibilities for ICANN should be developed through a bottom-up approach that is open to ICANN stakeholders, and includes the unique advisory role for representatives of governments through the GAC. In addition, technical experts have an advisory role that takes into account their technical expertise and can help ensure a stable, secure, and resilient Internet.

BC Comments on specific ATRT2 Recommendations

As the ICANN board considers the ATRT2 proposal, the BC offers these comments to highlight specific recommendations that are particularly important to the business community, along with some specific ideas for implementing those recommendations.

Governmental Advisory Committee (GAC)-related recommendations

In accord with our mission statement, the BC works closely with GAC members who share our interest in having a DNS that is reliable and secure while helping consumers feel safe and confident they are reaching domains they actually intended to reach. To that end, we endorse ATRT recommendations that would improve GAC-Board coordination and bring more governments into the GAC. Namely:

> 6.7. ATRT2 recommends that the Board work jointly with the GAC, through the Board-GAC Recommendation Implementation Working Group (BGRI-WG) to regularize senior officials' meetings by asking the GAC to convene a High Level meeting on a regular basis, preferably at least once every two years. Countries and territories that do not currently have GAC representatives should also be invited and a stock-taking after each High Level meeting should occur.

> 6.8. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to work with ICANN's Global Stakeholder Engagement group (GSE) to develop guidelines for engaging governments, both current and non-GAC members, to ensure coordination and synergy of efforts.

> 6.9. The Board should instruct the GSE group to develop, with community input, a baseline and set of measurable goals for stakeholder engagement that addresses the following:

> a. Relationships with GAC and non-GAC member countries, including the development of a database of contact information for relevant government ministers;

> b. Tools to summarize and communicate in a more structured manner government involvement in ICANN, via the GAC, as a way to increase the transparency on how ICANN react

The GAC will undoubtedly need to consider implementation issues surrounding these ATRT2 recommendations, including the need for administrative support and meeting facilities. Moreover, the BC believes it is not appropriate to prohibit the GAC or any other AC/SO from having closed meetings, since there are sometimes legitimate needs for private consultations. That said, the GAC should strive to be as open as possible.

Public Comment Process

The BC endeavors to submit comments on any topic relevant to business interests, and we provided written comments on over 20 topics in 2013[3]. However, BC members find that public comment periods are too short to allow for meaningful consideration of increasingly complex issues. Large and small companies – and especially membership organizations – require more than 21 days to examine an issue, prepare comments, and circulate for approval.

The BC therefore encourages ICANN's board to extend initial comment periods. And when a reply comment is necessary, it should follow a longer initial comment period. These comments are relevant to ATRT2's recommendation 7.1:

> 7.1. The Board should explore mechanisms to improve Public Comment through adjusted time allotments, forward planning regarding the number of consultations given anticipated growth in participation, and new tools that facilitate participation.

The BC continues to be disappointed that a carefully considered and substantiated comment filings are not adequately or accurately reflected in a staff summary of public comments. We understand the importance of staff synthesis and summary to inform management and board decisions, given the quantity of individual comments received. To that end, we endorse ATRT2's recommendation 7.2:

> 7.2. The Board should establish a process under the Public Comment Process where those who commented or replied during the Public Comment and/or Reply Comment period(s) can request changes to the synthesis reports in cases where they believe the staff incorrectly summarized their comment(s).

The BC notes that ATRT recommendations for more open GAC meetings were not also recommended for ICANN board and staff interactions, which are actually more closed than for any of the AC/SOs within ICANN. It is evident that more board and staff work is now being done in closed workshops and retreats, with limited transparency as to deliberations and decisions. Board minutes do not reveal vote counts to indicate whether there was any serious split on actions taken, much less where individual members stood. Instead, we are presented with seemingly unanimous positions..

This past fall, the CEO of ICANN organized a Statement in Montevideo and then flew to Brasilia to request an unprecedented meeting on Internet Governance pursuant to a secret September Board Resolution. This is questionable behavior for an organization committed to transparency, accountability, and acting in the public interest. Many decision-making bodies, from national legislative committees to city councils, publicize their deliberations with audio and video recording.

The current practice of having only pro-forma board interaction after the public forum suggests that community comments heard in the forum are not adequately considered by the board for pending substantive decisions. The BC recommends that ICANN's board hold at least one open meeting with a substantive agenda during each ICANN meeting, where the community could observe deliberations and decisions. Further, ICANN has made binding pledges of accountability and transparency in the *Affirmation of Commitments*, and that should encompass policy actions taken by the Board.

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[3] See Business Constituency website, at http://www.bizconst.org/positions.htm

Consideration of decision-making inputs and appeals processes

The BC fully supports ATRT2's recommendation to institutionalize ICANN's obligation to respond to review team recommendations:

> 9.1 Mandate Board Response to Advisory Committee Formal Advice
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> ICANN Bylaws Article XI should be amended to include:
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> *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.*

Over the past year, the BC has been surprised and disappointed at inconsistent and inadequately justified decisions coming from expert panels handling string confusion objections in the new gTLD process. Moreover, reconsideration requests regarding those decisions have been consistently rejected in a perfunctory manner that fails to consider underlying policies and broader implications. The BC therefore strongly endorses ATRT2's recommendation 9.2:

> 9.2. Explore Options for Restructuring Current Review Mechanisms
>
> 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) and the Reconsideration Process. The group will use the report of the Experts Group Report (ESEP) on Restructuring as one basis for its discussions.

ICANN presently lacks accountability and appeals mechanisms that are reflective of obligations under the *Affirmation of Commitments*. The BC is concerned about process and about decisions by independent review panels and for reconsideration requests, well beyond decisions regarding the new gTLD program. Also, a full review and possible reform of the Ombudsman office should be considered alongside other review mechanisms.

Effectiveness of cross-community deliberations

BC members are active in several cross-community working groups, including critical work on definitions and metrics to evaluate the gTLD expansion in an upcoming *Affirmation* review. That experience leads us to specifically endorse ATRT2's recommendation 10.1:

> 10.1.c The Board should work with the GNSO and the wider ICANN community to develop methodologies and tools to allow the GNSO policy development processes to utilize volunteer time more effectively, increasing the ability to attract busy community participants into the process and also resulting in quicker policy development.

As noted above, the BC works closely with the GAC on consumer protection and competition issues that are vital for businesses and our customers. We therefore support ATRT2's recommendation 10.2:

> 10.2. The GAC, in conjunction with the GNSO, must develop methodologies to ensure that GAC and government input is provided to ICANN policy development processes and that the GAC has effective opportunities to provide input and guidance on draft policy development outcomes. Such opportunities could be entirely new mechanisms or utilization of those already used by other stakeholders in the ICANN environment. Such interactions should encourage information exchanges and sharing of ideas/opinions, both in face-to-face meetings and intersessionally, and should institutionalize the cross-community deliberations foreseen by the AoC.

The BC is part of the GNSO, although our members' concerns go beyond gTLD policy, to include secure, stable, predictable, and resilient operation of the Internet's unique identifiers. Our members

participate in many cross-community working groups, and were active in the first ATRT where the Commercial Stakeholders Group was allowed to have a representative. However, the second ATRT allowed only one rep from each house of GNSO, reducing participation from business stakeholders.

The BC supports the model of having an SO in charge of defining policy for generic Top Level Domains, with groups such as our constituency able to actively participate. This work of developing policy, which is then managed by the GNSO Council, is central to ICANN's function as technical coordinator for the Internet's naming and addressing system. The BC therefore supports ATRT2's recommendation 10.4:

> 10.4. To improve the transparency and predictability of the policy development process the Board should clearly state to what degree it believes that it may establish gTLD policy in the event that the GNSO cannot come to closure on a specific issue, in a specified time-frame if applicable, and to the extent that it may do so, the process for establishing such gTLD policies. This statement should also note under what conditions the Board believes it may alter GNSO Policy Recommendations, either before or after formal Board acceptance.

As noted in our general comments above, the BC is concerned about top-down policy making, and we regret that ATRT2 did not address this concern in its recommendations.

An example of how top-down pressure is affecting the legitimacy of the constituencies and stakeholder groups can be seen in the executive appointment of cross community and expert working groups. It is not our point that the executive may not convene such panels to help inform the organization's thinking. Rather, the form, function and output of each expert panel ought to be aligned with the view of the community. Right now, the GNSO and ccNSO Councils are collaborating on just such a set of guidelines for the development of meaningful policy by cross community working groups.

A model that could be pursued would be providing cross-community working groups with the same level of staff resources and funding that is being provided to the recent outside expert groups.

Effectiveness of the Review Process

As noted above with respect to ATRT2 recommendation 9.1, the BC endorses formal commitments by ICANN to address review team recommendations, including an expected time frame for implementation:

> 11.6. Board action on Recommendations
> The Board should address all AoC Review Team recommendations in a clear and unambiguous manner, indicating to what extent they are accepting each recommendation.

> 11.7. Implementation Timeframes
> In responding to Review Team recommendations, the Board should provide an expected time frame for implementation, and if that time frame is different from one given by the Review Team, the rationale should address the difference.

Steve DelBianco and Marilyn Cade led drafting of these comments, with significant help from multiple BC members. These comments were approved in accordance with the BC Charter.