

Proposal for a Limited Scope of the ATRT3 Review

The CCWG-Accountability (CCWG) at its face to face meeting at the ICANN 56 in Helsinki considered the implications of the collision of topics, and therefore efforts, between ATRT3 and Work Stream 2 (WS2) (please see Annex 1 for a detailed consideration of this issue).

In its discussion of this issue the CCWG considered the following points:

- Collision of topics between WS2 and ATRT3 - There is potential for significant overlap between WS2 topics and the scope of ATRT3 as 6 of the 9 WS2 topics are accountability and transparency issues ATRT3 could also consider.
- Timing of the two activities - WS2 began in July 2016 with an objective of completing its work by the end of 2017. ATRT3, which is expected to take 12 months to complete, is currently scheduled to begin in January 2017 but could potentially be delayed until February 2018 under the new Bylaws (which require ATRT every 5 years versus the AoC requirement for every 3 years). It would seem inefficient, at best, to have both of these activities working on the same topics independently, while drawing on the same pool of community volunteers. At worst, ATRT3 and WS2 groups could issue recommendations that are conflicting or duplicative.
- Implementation of recommendations – The Bylaws for WS2 give CCWG recommendations greater weight when it comes to board consideration, relative to recommendations from an ATRT organized under the AoC.

While in Helsinki, the CCWG concluded its preferred approach, as communicated in our 8-Aug-2016 [letter](#) to the Board of ICANN:

Convene ATRT3 as soon as possible with the limited scope of assessing implementation of ATRT2 recommendations. Allow WS2 to handle new recommendations for accountability and transparency. The fourth ATRT would convene before 2022 and would assess all accountability and transparency topics and make recommendations

The ICANN Board [replied](#) to the CCWG letter on 24-Oct-2016, saying,

It is not up to the Board to dictate the scope of this important community review. While we share the concerns raised of avoiding duplication of resources, it is essential that the broader ICANN community have a voice in determining how the ATRT3 should be scoped in alignment with the Bylaws. The Board and the ICANN Organization stand ready to support the community's direction.

Accordingly, the CCWG is now proposing to community leadership the following approach:

- Requesting that the SO/AC leadership select (following the new Bylaws) a small group of review team members that have either participated in or closely tracked ATRT2.
- Requesting the ICANN organization to do a "self-assessment" reporting on a) the extent to which each recommendation was followed and/or implemented; b) the effectiveness in addressing the issues identified by ATRT2; and c) the need for additional implementation.

- Specifically request that the Review Team exclude the issues that are already covered by the CCWG-Accountability WS2 (see Annex 1).
- Suggesting that the work be conducted & completed more quickly than normal, such as asking that the Final Report be issued within six months

If the suggested approach above is agreeable to SO/AC community, the next steps would be:

- SO/AC leadership to issue a public statement or a letter to ICANN CEO and Board Chair that explains why limited scope is appropriate and articulates that they have broad support of the ICANN community
- Call for Volunteers to note limited scope & unique expertise sought
- Reach out to previous ATRT Review Team members and encourage them to apply for the narrowly-scoped ATRT3 Review Team
- Propose a Charter for the ATRT3 Review Team to adopt that tracks the limited Scope

Annex 1

For discussion by CCWG-Accountability: Synchronizing Work Stream 2 and next scheduled ATRT

Several of our approved Work Stream 2 (WS2) accountability tasks are within the scope of the next Accountability and Transparency Review Team (ATRT3), which is currently scheduled to begin Jan-2017. The CCWG may wish to consider whether to recommend delaying the start of ATRT3 in order to allow WS2 accountability items to be completed first.

Under ICANN's obligations in the 2009 [Affirmation of Commitments](#) with NTIA (AoC), ICANN's Board made a commitment to begin ATRT3 in January 2017, as documented in the [letter](#) dated 28-Jan-2016 from Fadi Chehade to Larry Strickling:

“The Board also endorsed starting the third Accountability and Transparency Review (ATRT3) with a call for volunteers in July 2017, based on the proposed trigger of three years from the time that the Board took action on the recommendations of the prior Review Team. Given the amount of time that will have passed since the submission of the ATRT2 recommendations, we believe that the call for volunteers should take place in January 2017. In the interim, ICANN staff will publish a thorough report on implementation of the ATRT2 recommendations by the third quarter of 2016.”

The decision to start ATRT3 in Jan 2017 rather than July 2017 stemmed from community's concern about too much time passing since ATRT2 recommendations were issued. Community members strongly endorse the idea that subsequent Review Teams check on implementation of previous ATRT recommendations. Deferring this assessment for an additional year may be a concern to those stakeholders who advocated the Jan-2017 start date.

Regarding timing of ATRT3, note that the draft new bylaws require this review “be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.” Since the last ATRT was convened in Feb-2013, ATRT3 could begin as late as Feb-2018.

Below is a summary of WS2 items, CCWG discussions of WS2, and comparison of proposed bylaws for WS2 and ATRT recommendations. This document is intended to help CCWG determine whether and how to integrate and/or sequence WS2 activities with the third Accountability and Transparency Review.

This Annex provides necessary background to address three questions:

How does the scope of ATRT compare with WS2 accountability items?

What do the proposed bylaws require for implementation of WS2?

What do draft new bylaws require for the AoC review of Accountability and Transparency (ATRT)?

How does the scope of ATRT compare with WS2 accountability items?

WS2 items were described in our CCWG Supplemental Final Proposal on pages 47-48:

CCWG-Accountability Recommendations

The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
 - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
 - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
 - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
 - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
 - Enhancements to ICANN's existing DIDP
 - Transparency of ICANN's interactions with governments.
 - Improvements to the existing whistleblower policy.
 - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

The CCWG-Accountability notes that further enhancements to ICANN accountability can be accommodated through the accountability review process (see Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees) or through specific, ad hoc, cross community working group initiatives.

The scope of ATRT, as described in proposed bylaws

(<https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>):

(i) The Board shall cause a periodic review of 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 ("Accountability and Transparency Review").

(ii) The issues that the review team for the Accountability and Transparency Review (the "Accountability and Transparency Review Team") may assess are the following:

(A) assessing and improving Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition's and allocation structure meets ICANN's present and future needs, and the appeal mechanisms for Board decisions contained in these Bylaws;

(B) assessing the role and effectiveness of the GAC's interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;

(C) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);

(D) assessing the extent to which ICANN's decisions are supported and accepted by the Internet community;

(E) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and

(F) assessing and improving the Independent Review Process.

It appears that ATRT scope could include six of the WS2 streams proposed by CCWG, as reflected in draft Bylaws, pages 134-5:

(i) Improvements to ICANN's standards for diversity at all levels;

(ii) ICANN staff accountability;

(iii) Supporting Organization and Advisory Committee accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;

(iv) Improvements to ICANN's transparency, focusing on enactments to ICANN's existing DIDP, transparency of ICANN's interactions with governments, improvements to ICANN's whistleblower policy and transparency of Board deliberations;

(v) Developing and clarifying the FOI-Human Rights (as defined in Section 27.3);

(vi) Addressing jurisdiction-related questions;

(vii) Considering enhancements to the Ombudsman's role and function;

(viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual ICANN Board Directors; and

(ix) Reviewing the CEP (Constructive Engagement Process to precede IRP) as set forth in Section 4.3.

Modifying the ATRT3 Start Date

To modify the ATRT3 start date (January 2017) to allow the CCWG to complete its work on WS2 would require the Community (CCWG and or the SO/ACs Leadership) to request that ICANN defer the start date for ATRT3. The Board could then adopt a resolution to modify the schedule adopted in its July 2015 resolution.

At the CCWG face to face meeting in Marrakech on 8-Mar-2016, we made these observations about WS2 and ATRT3 (<https://community.icann.org/pages/viewpage.action?pageId=58725713>)

ATRT3 is scheduled to kick off in January 2017. Once Board takes action on implementation – one of improvements will be to have continuity: RT members to participate in implementation work with staff and Board.

Do we wait for ATRT to finish? Discuss post ATRT3 – we can give them baseline.

Do we want to feed into ATRT, post ATRT or both?

We should refer to ATRT – not feed into ATRT.

10 months/22 months is kick-off date from now on to transfer to a group that may not exist for a review. They may or may not have desired focus to work on list. We need to make decision once informed.

Concern about mixing ATRT3 and Work Stream 2. ATRT is evaluation group – changes how accepted/reviewed. It is a different work basket.

Let's not make assumptions about ATRT3 until it has started. As soon as it is up and running, important coordination will be needed to avoid duplication of efforts and optimize resource management, including volunteer time and resources.

CCWG published proposed bylaws on 20-Apr-2016, at

<https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

What do the proposed bylaws require for implementation of WS2? (pp 135-6):

Section 27.2. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN Accountability was established pursuant to a charter dated 3 November 2014 (“CCWG-Accountability”). The charter of the CCWG-Accountability was subsequently adopted by the GNSO, ALAC, ccNSO, GAC, ASO and SSAC (“CCWG Chartering Organizations”). Such Charter of the CCWG-Accountability as in effect on 2 April 2016 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 (“CCWG-Accountability Final Report”) that

the below matters be reviewed and developed following the adoption of the New Bylaws (“Work Stream 2 Matters”), in each case, to the extent set forth in the CCWG-Accountability Final Report:

- (i) Improvements to ICANN’s standards for diversity at all levels;
- (ii) ICANN staff accountability;
- (iii) Supporting Organization and Advisory Committee accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;
- (iv) Improvements to ICANN’s transparency, focusing on enactments to ICANN’s existing DIDP, transparency of ICANN’s interactions with governments, improvements to ICANN’s whistleblower policy and transparency of Board deliberations;
- (v) Developing and clarifying the FOI-HR (as defined in Section 27.3);
- (vi) Addressing jurisdiction-related questions;
- (vii) Considering enhancements to the Ombudsman’s role and function;
- (viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual ICANN Board Directors; and
- (ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the charter of the CCWG-Accountability and the Board’s 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters (“**Work Stream 2 Recommendations**”) with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report (“**Work Stream 1 Recommendations**”). For avoidance of doubt, that process and criteria includes:

- (i) All Work Stream 2 Recommendations must further the following principles:
 - (A) Support and enhance the multistakeholder model;
 - (B) Maintain the security, stability and resiliency of the DNS;
 - (C) Meet the needs and expectations of the global customers and partners of the IANA services;
 - (D) Maintain the openness of the Internet; and
 - (E) Not result in ICANN becoming a government-led or an inter-governmental organization.
- (ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.
- (iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. Discussions shall be held

in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2 Recommendation until such time as CCWG-Accountability and the Board reach agreement.

(d) ICANN shall provide adequate support for work on Work Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in [Section 27.2\(b\)](#) shall be the only matters subject to this [Section 27.2](#) and any other accountability enhancements should be developed through ICANN's other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in [Section 27.2\(b\)](#).

What do proposed bylaws require for the review of Accountability and Transparency (ATRT)?

Independent experts:

Section 4.6 (a) (iv) "Review teams may also solicit and select independent experts to render advice as requested by the review team."

Confidential disclosure to the review team:

Section 4.6 (a) (vi) "To facilitate transparency and openness regarding ICANN's deliberations and operations, the Review Teams, or a subset thereof, shall have access to ICANN internal information and documents pursuant to the Confidential Disclosure Framework set forth in the Operating Standards. "

Public comment on ATRT recommendations:

Section 4.6 (a) (vii) (B) "At least one draft report of the review team shall be posted on the Website for public review and comment. The review team must consider the public comments

received in response to any posted draft report and shall amend the report as the review team deems appropriate and in the public interest before submitting its final report to the Board.

Board implementation of ATRT recommendations:

Section 4.6 (a) (vii) (C) “Each final report of a review team shall be published for public comment in advance of the Board’s consideration. Within six months of receipt of a final report, the Board shall consider such final report and the public comments on the final report, determine whether to approve the recommendations in the final report. If the Board does not approve any or all of the recommendations, the written rationale supporting the Board’s decision shall include an explanation for the decision on each recommendation that was not approved. The Board shall promptly direct implementation of the recommendations that were approved.”