

## Stalling on Accountability

### Executive Summary

This White Paper describes ICANN's failure to carry out a key recommendation by the Affirmation of Commitments Accountability and Transparency Review Team ("ATRT"). The ATRT urged the ICANN Board of Directors "to seek input from a committee of independent experts on the restructuring of the three review mechanisms—the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman."<sup>1</sup> That recommendation was given "high priority" by the ATRT and implementation was expected "[a]s soon as possible, but no later than June 2011."<sup>2</sup>

More than a year has passed, and ICANN has so far failed to complete even the first task—identifying experts to conduct the review—laid out in its own *Implementation Plans*.<sup>3</sup> Administrative preliminaries such as approving the recommendation, assigning Board and staff leadership responsibilities for it, and allocating a budget do not qualify as the kind of action that the *Affirmation of Commitments*<sup>4</sup> promised. ICANN promised in the *Affirmation* that "the Board will *take action* within six months of receipt of the recommendations."<sup>5</sup>

ICANN's inaction is inconsistent with its obligations under the *Affirmation of Commitments* and undermines the voluntary self-correction process prescribed by the *Affirmation*. It also inhibits the ICANN community from having an open and fully-informed conversation about what standard of accountability should be adopted by the ICANN Board.

But all is not lost. A few steps would enable ICANN to demonstrate to the United States and its stakeholders that ICANN's commitments to accountability and transparency are genuine. Such steps include:

- ♦ Publicly acknowledge that implementation of ATRT Recommendation 23 has been unduly prolonged.
- ♦ Publicly recommit to carrying out that Recommendation by revising and clarifying the *Implementation Plans* to include hard-and-fast dates for each task listed there.

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<sup>1</sup> Final Recommendations of the Accountability and Transparency Review Team 5 (Dec. 31, 2010), available at <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf> ("Final Recommendations").

<sup>2</sup> *Id.* ("As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms ....") (emphasis added).

<sup>3</sup> See ICANN, *ATRT Recommendations—Proposed Implementation Plans* 57 (Oct. 2011), available at <http://www.icann.org/en/accountability/atrt-recommendations-implementation-plans-2-22oct11-en.pdf> (recommending that ICANN staff "draft RFP for team of independent experts and post according to the ICANN Procurement Guidelines").

<sup>4</sup> *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers* (Sep. 30, 2009), available at [http://www.ntia.doc.gov/files/ntia/publications/affirmation\\_of\\_commitments\\_2009.pdf](http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf) ("Affirmation").

<sup>5</sup> *Id.* at ¶ 9.1(e).

- ♦ Revised deadlines should be designed to produce a preliminary report within 120 days and a final report within 150 days. The ATRT itself was produced in less time.
- ♦ The ICANN Board should agree that within 30 days of receiving the final report it will enter a formal resolution approving or rejecting each recommendation and provide a reasonable explanation of its rationale for each decision. It should further agree that any approved recommendations will be implemented immediately, either through directions to staff, proposing changes to bylaws, or otherwise, unless the nature of the recommendation requires additional time for reasons beyond the Board's control.

Taking these few steps would reassure its global stakeholders that ICANN stands behind its written commitments.

## Introduction

This White Paper describes the response by the Internet Corporation for Assigned Names and Numbers (“ICANN”) to a key recommendation by the Affirmation of Commitments Accountability and Transparency Review Team (“ATRT”). It chronicles ICANN’s failure to act on the ATRT’s recommendation to commission a group of experts to study ICANN’s procedures for reviewing decisions by the ICANN Board of Directors. That failure is inconsistent with its obligations under the *Affirmation of Commitments*<sup>1</sup> and undermines the voluntary self-correction process prescribed by the *Affirmation*. It also inhibits the ICANN community from having an open and fully-informed conversation about what standard of accountability should be adopted by the ICANN Board. Before explaining those implications, it must be understood what the ATRT said and how ICANN has responded.

### 1. What the ATRT Said

More than a year ago the ATRT published its *Final Recommendations*.<sup>2</sup> Under the rubric of “Review Mechanisms for Board Decisions,” its Recommendation 23 urged that “the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms—the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman.”<sup>3</sup> The ATRT explained that it intended for this expert consultation to be “a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms and of their inter-relation, if any ... determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability.”<sup>4</sup> Included within the scope of this review were proposed mechanisms for compelling the Board to reconsider a decision and to remove the entire Board.<sup>5</sup>

Prompt follow-through was an integral part of this Recommendation. The ATRT said that the core—“to seek input from a committee of independent experts”<sup>6</sup>—was to be

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<sup>1</sup> *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers* (Sep. 30, 2009), available at [http://www.ntia.doc.gov/files/ntia/publications/affirmation\\_of\\_commitments\\_2009.pdf](http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf) (“Affirmation”).

<sup>2</sup> *Final Recommendations of the Accountability and Transparency Review Team* (Dec. 31, 2010), available at <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf> (“*Final Recommendations*”).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.*

<sup>5</sup> *See id.* (“The committee of independent experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the Draft Implementation Plan.”); ICANN, *Draft Implementation Plan for Improving Institutional Confidence* 7 (Feb. 26, 2009), available at <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf> (“*Draft Implementation Plan*”) (“Recommendation 2.8: Establish an additional mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees.”); *id.* (“Recommendation 2.9: Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.”).

<sup>6</sup> *Final Recommendations* at 5.

implemented “[a]s soon as possible, but no later than June 2011.”<sup>7</sup> To remove any doubt that it intended for Recommendation 23 to be acted on promptly, the ATRT assigned it a specific deadline and included it among eight recommendations having a “high priority.”<sup>8</sup>

Recommending an expert review was a compromise. Not everyone on the ATRT agreed that adequate review mechanisms needed to be “both binding and independent.”<sup>9</sup> Widespread concern was expressed “over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority.”<sup>10</sup> Yet the full ATRT “did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability.”<sup>11</sup> On this one issue alone—whether ICANN’s accountability should consist of binding authority over the Board of Directors—did the ATRT confess itself unable to come to agreement.

This impasse was all the more remarkable because it enabled the ATRT to avoid a direct conflict with ICANN. Working Group 4 (“WG4”), tasked with studying ICANN’s Board review mechanisms, found them all inadequate.<sup>12</sup> Neither the Ombudsman nor the Request for Reconsideration was thought to be sufficiently independent of the Board, and their decisions did not bind it.<sup>13</sup> WG4 rejected a proposed community re-vote as likely requiring too high a level of consensus among the Supporting Organizations and Advisory Committees.<sup>14</sup> Only the Independent Review Panel (“IRP”) was considered independent and its suitability too was questioned because “its decisions and recommendations are not binding on the ICANN Board.”<sup>15</sup> Having exhausted every other avenue, WG4 asked ICANN how California law might affect its consideration of alternative review mechanisms. ICANN’s legal department responded with a one-page statement that under California law “the board cannot empower any entity to overturn decisions or actions of the board.”<sup>16</sup> Resolving the conflict between WG4’s mandate and ICANN’s legal position was regarded by

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<sup>7</sup> *Id.* (“As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms ....”) (emphasis added).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Final Recommendations* at 53.

<sup>11</sup> *Id.*

<sup>12</sup> The full ATRT agreed that existing Board review mechanisms are inadequate. Over 2000 complaints have been submitted with the Office of Ombudsman, a “vast majority” of which “were rejected on jurisdiction.” *Final Recommendations* at 46. Since 1999, 44 requests for Reconsideration have been submitted, of which 9 (20.4%) were approved and adopted by the Board of Directors. *Id.* at 47. The only IRP case, invoked by ICM Registry to challenge the denial of its application for .xxx, resulted in a decision by the Panel that its decisions were “advisory, and not binding on the ICANN Board.” *Id.*

<sup>13</sup> AoC/ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)* 1, available at <https://community.icann.org/display/atrt/Findings+and+Recommendations> (n.d.) (“Draft Findings”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Internet Corp. for Assigned Names and Numbers, *Limitations on Third Party Review of Corporate Board Actions under California Law* (Aug. 31, 2010), available at <http://www.icann.org/en/reviews/affirmation/third-party-review-of-board-actions-31aug10-en.pdf> (emphasis added) (“*Limitations*”).

members of WG4 as “*critical* to establishing an appeals mechanism that is both binding and independent, and *essential* to the viability of the ICANN model itself.”<sup>17</sup> Urgent concerns like these led WG4 to decide tentatively that it would confront ICANN head-on. “[P]ending further research,” it said, the ATRT should “[c]hallenge ICANN’s interpretation of California corporate governance law as it applies to ICANN policy development.”<sup>18</sup> Direct conflict with ICANN was avoided only because the full ATRT could not agree to endorse WG4’s recommendation and pursue it.

The ATRT’s recommendation to commission an expert study of Board review or appeal mechanisms should be understood, then, as a compromise. Referring the issue to an expert committee is a familiar tool of compromise, evidently acceptable both to ATRT members convinced that binding authority over the Board is *essential* to the viability of the ICANN model itself<sup>19</sup> and to those convinced that it is not the correct standard of accountability for ICANN. Like any compromise, this tool could be effective only if used. Unfortunately, ICANN has left it on the shelf.

## 2. How ICANN Has Responded

Since the ATRT delivered its *Final Recommendations* at the end of 2010, the ICANN Board has taken several steps to implement many of them.<sup>20</sup> It has directed ICANN staff to draw up plans for implementing the recommendations;<sup>21</sup> assigned responsibility for each recommendation to a Board committee;<sup>22</sup> acknowledged that “implementing the recommendations of that [ATRT] review will strengthen ICANN’s self-regulating, global, multi-stakeholder model that is transparent, accountable, and operates in the public interest”;<sup>23</sup> accepted all but one of the recommendations in its June 2011 meeting and directed ICANN’s CEO “to proceed with their implementation”;<sup>24</sup> and approved a \$2.6 million budget for expenses associated with that implementation.<sup>25</sup>

The one recommendation not accepted by the ICANN Board in June 2011 has already been implemented. The ATRT had recommended that “[t]he Board should expeditiously implement the compensation scheme for voting Directors as recommended by the Boston Consulting Group adjusted as necessary to address international payment

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<sup>17</sup> *Draft Findings* at 1 (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> *Draft Findings* at 1 (emphasis added).

<sup>20</sup> A full summary of the Board’s actions to implement the ATRT’s Final Recommendations is available at <http://www.icann.org/en/accountability/atrt-report-25jun11-en.pdf>.

<sup>21</sup> ICANN, Adopted Board Resolutions, Resolution 2011.03.18.19, available at <http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#4>.

<sup>22</sup> ICANN, Adopted Board Resolutions, Resolution 2011.04.21.14, available at <http://www.icann.org/en/minutes/resolutions-21apr11-en.htm#6>.

<sup>23</sup> ICANN, Adopted Board Resolutions, Resolution 2 (June 24, 2011), available at <http://www.icann.org/en/minutes/resolutions-24jun11-en.htm#2.rationale>.

<sup>24</sup> *Id.* at Resolution 2011.06.24.17.

<sup>25</sup> See *id.* at Resolution 2011.06.24.23 (approving FY 2012 Operating Plan and Budget); ICANN, *FY12 Operating Plan and Budget* 31 (Sep. 9, 2011), available at <http://www.icann.org/en/financials/adopted-opplan-budget-fy12-09sep11-en.pdf> (“FY12 Budget”) (allocating \$2.6 million for the costs of ATRT implementation).

issues, if any.”<sup>26</sup> BCG had earlier recommended “a relatively modest fee schedule that offers some compensation for the time and commitment required but which cannot be viewed as in any way excessive.”<sup>27</sup> Concerned with the potential legal implications for ICANN’s non-profit status, the Board sought guidance in implementing ATRT Recommendation 5 from “a committee of independent, non-directors to review whether Board member compensation is appropriate and, if so, with assistance from independent compensation experts to determine the levels of such compensation.”<sup>28</sup> TowersWatson produced a report concluding that while compensating directors is “not prevalent among nonprofits,” it would be nonetheless “reasonable to introduce director compensation at ICANN” and proposed compensation for Board members besides the Chairman in the range of “\$30,000 to \$45,000 annually.”<sup>29</sup> The Board approved changes to ICANN’s conflict-of-interest policy to allow Board members to vote on whether to adopt the TowersWatson recommendations<sup>30</sup> and approved amendments to ICANN’s bylaws “to allow all voting Board members to receive compensation for services provided.”<sup>31</sup> Based on the report, the Board approved annual compensation of \$35,000 per voting director except for committee chairs who will receive \$40,000.<sup>32</sup> Compensation for directors who elected to accept it became effective the day following the Board resolution, December 9, 2011.<sup>33</sup>

Compared to such swift and smooth progress, the ATRT’s recommendation on Board review mechanisms has not left the starting line. ICANN staff has drawn up a detailed implementation plan consisting of several tasks. The first was for “[s]taff to draft [an] RFP [Request for Proposal] for [a] team of independent experts and post [it] according to the ICANN Procurement Guidelines.”<sup>34</sup> ICANN’s Board and its Board Governance Committee were assigned responsibility for carrying out the recommendation, and ICANN’s legal team was assigned as the lead department.<sup>35</sup> Costs for hiring the experts called for by the ATRT were estimated at \$200,000-\$500,000.<sup>36</sup>

ICANN staff recommended that the experts be identified by June 2011 because they found it “unclear whether the ATRT is calling for the completion of the work of independent

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<sup>26</sup> *Final Recommendations* at 2.

<sup>27</sup> Boston Consulting Group and Colin Carter & Associates, *Independent Review of the Board of ICANN—Main Report* 52 (Nov. 2008), available at <http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>.

<sup>28</sup> ICANN, Adopted Board Resolutions, Resolution 2 (June 24, 2011).

<sup>29</sup> TowersWatson, *Internet Corporation for Assigned Names and Numbers (ICANN)—Board of Directors Compensation Considerations* 13 (Oct. 13, 2011), available at <http://www.icann.org/en/general/report-board-directors-compensation-considerations-13oct11-en.pdf>.

<sup>30</sup> ICANN, Adopted Board Resolutions, Resolution 2011.12.08.14, available at <http://www.icann.org/en/minutes/resolutions-08dec11-en.htm>.

<sup>31</sup> *Id.* at Resolution 2011.12.08.15.

<sup>32</sup> *Id.* at Resolution 2011.12.08.16.

<sup>33</sup> *Id.* at Resolution 2011.12.08.18.

<sup>34</sup> ICANN, *ATRT Recommendations—Proposed Implementation Plans* 57 (Oct. 2011), available at <http://www.icann.org/en/accountability/atrt-recommendations-implementation-plans-2-22oct11-en.pdf> (“Implementation Plans”).

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 58.

experts”<sup>37</sup> by that date. The staff also recommended that the RFP should be posted “[w]ithin three months of approval of budget ... to commence the vendor selection process.”<sup>38</sup> These contradictory recommendations—one would have the experts identified by June 2011 and the other would not begin the process of identifying them until as much as three months later—are simply left unresolved. Staff anticipated that the expert review “could be complete and a final report provided within six months of the initiation of the work,” while noting that this liberal estimate “may require modification.”<sup>39</sup> A deadline for full implementation of the expert recommendations “cannot be estimated,” the staff concluded, “without identification of what those recommendations entail.”<sup>40</sup>

Even these generous timelines have been missed. Because there had been no public record since June 2011 that the ATRT’s recommendation to commission an expert assessment of Board review mechanisms was being acted on, I requested a status update during the public forum session of ICANN 42 in Dakar:

Filiz Yilmaz: On behalf of Shawn Gunnarson, Kirton and McConkie:

[The ATRT] recommended that ICANN convene a group of independent experts to study the problem of board review recommendations<sup>41</sup> and to make recommendations. Has such a group been convened, and if so, then will the recommendations be available for public comment? Thank you.

Steve Crocker: Bill Graham, you want to take this on? Or more briefly, Bruce, do you want to just cover what the current situation?

Bill Graham: I don’t think there’s a great deal to report at this point. I mean, *the group of internal experts is—is now convened and we’re more or less waiting for a response.*

Beyond that, Bruce, do you have anything to add?

Steve Crocker: So while you’re thinking about that, this is one of the 27 ATRT recommendations and it’s part of what’s being tracked and reported on. Thank you.<sup>42</sup>

Based on this exchange, ICANN appeared to have engaged experts without posting an RFP, contrary to the *Implementation Plans*<sup>43</sup> and in violation of ICANN’s *Procurement*

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<sup>37</sup> *Id.* at 57.

<sup>38</sup> *Id.* at 58.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> The question posed via remote participation used the word “mechanisms” rather than “recommendations.” See ICANN42—Public Forum—AOB [Any Other Business], available at <https://icann.wufoo.com/reports/icann42-public-forum-aob/>.

<sup>42</sup> ICANN, Transcript of ICANN Public Forum, ICANN Meeting—Dakar (Oct. 27, 2011), available at <http://dakar42.icann.org/node/27025> (emphasis added) (“*Transcript*”).

<sup>43</sup> *Implementation Plans* at 57 (recommending that ICANN staff “draft RFP [Request for Proposal] for team of independent experts and post according to the ICANN Procurement Guidelines”).

*Guidelines*.<sup>44</sup> Pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"), I requested any documents in ICANN's possession soliciting the recommended expert review, agreements between ICANN and experts concerning such a review, statements of work or other documentary information related to such agreements, and documents stating why ICANN did not post an RFP.<sup>45</sup> ICANN produced no documents, explaining that "the committee of independent experts has not yet been retained."<sup>46</sup> That fact is confirmed by the summary report referred to in ICANN's DIDP Response<sup>47</sup> and by the minutes of the Board Governance Committee's November 30, 2011 meeting.<sup>48</sup>

### 3. Analysis and Implications

ICANN's Board of Directors has let 12 months slip by without implementing the ATRT's recommendation to seek advice from experts concerning Board review mechanisms. In fact, it has failed to complete the very first task—identifying experts to conduct the

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<sup>44</sup> Compare ICANN, *Procurement Guidelines* § 3.1 (requiring "a formal documented RFP process for any purchases which exceed \$150,000"); § 3.2 (requiring a broad solicitation, which includes posting a formal RFP and statement of work on ICANN's website, "whenever the estimated contract exceeds \$250,000) *with Implementation Plans* at 57 (estimating that implementing Recommendation 23 will cost \$200,000-\$500,000).

<sup>45</sup> Here is the DIDP request in full:

I hereby request a copy of **(1)** any Requests for Information (RFI), Requests for Quotation (RFQ), or Requests for Proposal (RFP) that ICANN staff, officers, or directors transmitted in any manner to any third parties soliciting a review of ICANN's three Board of Directors review mechanisms by independent experts, as called for in the *ATRT Recommendations—Proposed Implementation Plans*, in order to implement the Accountability and Transparency Review Team's Recommendation #23; **(2)** any executed agreements or contracts with the party or parties whose response to an RFI, RFQ, or RFP referenced in (1) was accepted by ICANN, along with any attachments, appendices, or amendments to such agreements or contracts; **(3)** any document transmitted by ICANN to any party referenced in (2) identifying the expert or experts and their institutional affiliation(s) responsible for performing the work described in (1) and describing the work mandate, timelines, performance goals and standards, deliverables, project budget, and any other material terms of the agreement between ICANN and the party or parties referenced in (2) that are not already contained in documents requested in (2); and **(4)** any report, memorandum, email, transcript, or other document describing why ICANN did not post on its website an RFP with respect to the solicitation described in (1), when ICANN's *Procurement Guidelines*, <http://www.icann.org/en/financials/procurement-guidelines-21feb10-en.pdf>, "require a formal documented RFP process for any purchases which exceed \$150,000 individually or in the aggregate"; a broad solicitation, including posting on ICANN's website, "is required whenever the estimated contract exceeds \$250,000"; and ICANN's staff has determined that "the cost for retaining experts to perform this work is anticipated to cost anywhere between US\$200,000 - \$500,000." <http://www.icann.org/en/accountability/atrt-recommendations-implementation-plans-2-22oct11-en.pdf>.

ICANN, Response to Documentary Information Disclosure Policy Request No. 20111207, at 1 (Jan. 6, 2012), available at <http://www.icann.org/en/transparency/gunnarson-response-06jan12-en.pdf>.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> See ICANN, *ATRT Report—Implementation Summary* 3 (updated Nov. 19, 2011) ("Implementation Summary") (stating that only Milestone 1—"Detailed implementation plan approved/posted"—has been done and that the "Experts hired and recommendations delivered" Milestone has not).

<sup>48</sup> ICANN, Board Governance Committee (BGC) Meeting Minutes (Nov. 30, 2011), available at <http://www.icann.org/en/minutes/minutes-bgc-30nov11-en.htm> (noting that the Committee "passed a motion authorizing staff to prepare a list of organizations and publications where ICANN should send solicitations for experts to participate in a process to review ICANN's accountability mechanisms").

review—laid out in its own *Implementation Plans*.<sup>49</sup> That inaction is inconsistent with its obligations under the *Affirmation of Commitments*<sup>50</sup> and undermines the voluntary self-correction process prescribed by the *Affirmation*. It also inhibits the ICANN community from having an open and fully-informed conversation about what standard of accountability should be adopted by the ICANN Board. Each of these implications will be briefly explained.

ICANN promised in the *Affirmation* that “the Board will *take action* within six months of receipt of the recommendations.”<sup>51</sup> Administrative preliminaries such as approving the recommendation, assigning Board and staff leadership responsibilities for it, and allocating a budget do not qualify as the kind of action that the *Affirmation* promised. While not a definitive source for interpreting what the *Affirmation*’s signatories had in mind, it is surely instructive that the new IANA agreement proposed by the U.S. Department of Commerce requires action within six months at many points.<sup>52</sup> Whatever leeway the phrase “take action” might be interpreted to include, it cannot reasonably mean that the Board has twice six months and more to complete the first step in carrying out the ATRT’s advice.

Unfortunately, the available evidence makes it difficult to attribute ICANN’s slow response to a simple mistake or oversight. ICANN staff interpreted the ATRT’s recommendation to permit until June 2011 to identify experts to conduct the review, because they found it “unclear whether the ATRT is calling for the completion of the work of independent experts”<sup>53</sup> by that date. The supposed lack of clarity seems to result from a strained reading. The ATRT said that the core of its recommendation—“to seek input from a committee of independent experts”<sup>54</sup>—was to be implemented “[a]s soon as possible, but no later than June 2011.”<sup>55</sup> Just in case the words “as soon as possible” and “no later than” were somehow unclear, the ATRT gave Recommendation 23 “high priority.”<sup>56</sup> The ATRT expressed its urgency unmistakably, and its substantive direction—“to seek input from a

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<sup>49</sup> See *Implementation Plans* at 57 (recommending that ICANN staff “draft RFP for team of independent experts and post according to the ICANN Procurement Guidelines”).

<sup>50</sup> *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers* (Sep. 30, 2009), available at [http://www.ntia.doc.gov/files/ntia/publications/affirmation\\_of\\_commitments\\_2009.pdf](http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf) (“*Affirmation*”).

<sup>51</sup> *Id.* at ¶ 9.1(e).

<sup>52</sup> See U.S. Dep’t of Commerce, Request for Proposal (RFP) SA1301-12-RP-IANA, amend. 1 § C.2.6 (directing the IANA Contractor to “develop user instructions” and post them online within 6 months of being awarded the contract); § C.2.7 (directing the IANA Contractor to develop for each IANA function “a process for documenting the source of the policies and procedures and how will it apply [them]” and post the results online within 6 months of being awarded the contract); § C.2.8 (directing the IANA Contractor to “develop performance standards” for each IANA function and post them online within 6 months of being awarded the contract) (Nov. 17, 2011), available at <https://www.fbo.gov/utills/view?id=e3508a8fd63a4dad3f7d7f6d0b17bdfb>.

<sup>53</sup> *Implementation Plans* at 57.

<sup>54</sup> *Final Recommendations* at 5.

<sup>55</sup> *Id.* (“As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms ....”) (emphasis added).

<sup>56</sup> *Id.* at 2.

committee”—is no less clear. Seeking input from experts is impossible before the experts have been identified, and such input does not exist until the experts’ work is done. It follows that the ATRT’s direction to “seek input from a committee” was adequately clear. Even if had been less clear, one would have thought that the ATRT’s repeatedly expressed urgency, coupled with the six-month deadline mandated by the *Affirmation*, would prompt ICANN leadership and staff to err on the side of promptness. Instead, ICANN currently plans to allow the experts six months and more, just to produce their report,<sup>57</sup> and places no timeline at all on implementing the expert recommendations once delivered.<sup>58</sup>

Whatever ambiguity one can read into the ATRT’s recommendation cannot explain why more than a year has passed without carrying out the first step outlined in ICANN’s own *Implementation Plans*. Drafting an RFP and engaging experts does not remotely take that long. Measured by its own plans, ICANN’s progress on ATRT Recommendation 23 has not been slow—it has been nonexistent. Not until November 2011, 11 months after the ATRT delivered its *Final Recommendations*, did the Board Governance Committee, responsible for Recommendation 23, direct staff to draft an RFP.<sup>59</sup> (And that step occurred a month *after* a member of the Board publicly stated that “the group of internal experts is—is now convened and we’re more or less waiting for a response.”)<sup>60</sup> Still another two months have passed and no RFP for the expert committee has been posted.

Nor can ICANN claim that it has done all that could be done in the available time. The whirlwind adoption of Recommendation 5, authorizing compensation for voting directors, demonstrates as much. In several respects, Recommendation 5 structurally resembles Recommendation 23. Both were assigned to the Board Governance Committee and the ICANN legal department. Both required the commissioning of an independent expert report. And both involve (or may involve) amendments to ICANN’s bylaws. If anything, Recommendation 5 was comparatively hobbled for a time by the Board’s reasonable need to confirm through outside experts that compensation was consistent with ICANN’s nonprofit status before proceeding to consider and (ultimately) approve it. It is embarrassing—or at least it should be—that ICANN has managed to fully implement the ATRT’s recommendation on Board compensation, complete with amendments to conflict-of-interest guidelines and bylaws, while leaving a proposal that might detract from its autonomy virtually untouched.

Inaction on the ATRT’s recommendation practically nullifies it. So far, it is as if the ATRT had never suggested an expert review. Not only that, but Recommendation 25 on clarifying the standard for Reconsideration requests cannot proceed until work on Recommendation 23 is completed. Without an expert review, both recommendations—and much of the work accomplished by WG4—is meaningless. Many hours of volunteer time will have been wasted.

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<sup>57</sup> *Implementation Plans* at 58.

<sup>58</sup> *Id.* (“The time to ultimate implementation of the expert recommendations cannot be estimated without identification of what those recommendations entail.”).

<sup>59</sup> See ICANN, *ATRT Report—Implementation Summary* 3 (updated Nov. 19, 2011) (“*Implementation Summary*”) (stating that only Milestone 1—“Detailed implementation plan approved/posted”—has been done and that the “Experts hired and recommendations delivered” Milestone has not).

<sup>60</sup> *Transcript*.

Worse yet, inaction undermines the *Affirmation*'s model of voluntary self-correction. The problem is not that ICANN has totally refused to act on the ATRT's *Final Recommendations*. Outright opposition presumably would have attracted political opposition threatening to ICANN's role as the technical coordinator for the DNS. The problem is that ICANN's Board evidently feels itself free to pick and choose which recommendations it will act on, even after announcing that it approves all of them. Implementation of organizational review recommendations is indispensable to the accountability promised by the *Affirmation*.<sup>61</sup> That agreement relies on ICANN's good faith efforts to put organizational reviews into action. Failing to follow through on a key recommendation of the first review team organized under the *Affirmation* raises the uncomfortable question of whether such reviews can effectively produce needed institutional change. Frankly, ICANN has produced reports aplenty on how it should accomplish accountability and transparency.<sup>62</sup> What it needs now are actual changes that help ICANN reflect in practice the values it professes.

Failure to commission an expert review of ICANN's accountability mechanisms holds equally serious consequences for the ICANN community as a whole. If the recommendation was a compromise, as I have described, then ICANN's inaction rejects compromise in favor of control. Without an expert review, the contentious question of whether ICANN Board decisions should be subject to binding review continues to simmer but never comes to a boil. Top-down management is substituted for bottom-up consensus by interposing a management decision in place of the ATRT's recommendations. Inaction likewise frustrates the process by which future bottom-up consensus is formed by preventing, or at least inhibiting, the community from participating in an open and well-informed conversation on the correct standard of accountability for ICANN to adopt. For those stakeholders convinced that accountability consists of ICANN must do and not merely what can be pressured or persuaded to do, inaction on Recommendation 23 is deeply ironic. It raises in sharp relief the very question that Recommendation 23 was intended to explore: What measures are needed to ensure that the ICANN Board is accountable?

Finally, ICANN's failure is a missed opportunity. Acting on Recommendation 23 in a timely manner might have quelled a certain amount of criticism and concern by demonstrating in practice ICANN's commitment to being a responsible steward of the DNS. Following the processes laid out in the *Affirmation* where they lead, rather than seeking to control them when they appear to be heading in an unfavorable direction, would have reassured the many stakeholders who asked the United States to renew the Joint Project Agreement because of their concerns about ICANN's weak accountability.<sup>63</sup> Fidelity to the

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<sup>61</sup> See *Affirmation* ¶ 9.1(e) ("Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.").

<sup>62</sup> See, e.g., One World Trust, *Independent Review of ICANN's Accountability and Transparency – Structures and Practices* 7, 35 (Mar. 2007), available at <http://www.icann.org/en/transparency/owt-report-final-2007.pdf>; ICANN, *Draft Implementation Plan for Improving Institutional Confidence* 3 (Feb. 26, 2009), available at <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>.

<sup>63</sup> See, e.g., NeuStar, *NeuStar Response to NTIA's Notice of Inquiry on ICANN and the Joint Project Agreement* 2 (June 8, 2009), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/042.pdf> ("NeuStar believes that it is in the best interests of the Internet community that the relationship between the Department of Commerce and ICANN should continue to exist until such time that the concerns raised in our response are fully addressed and resolved."); Letter from Alan C. Drewsen, Int'l Trademark Association to Lawrence E. Strickling, NTIA 2 (July 24, 2009), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/097.pdf>.

*Affirmation* would have enhanced stakeholder confidence that ICANN will use the organizational reviews as a tool to reform itself.

## Conclusion

ICANN has unfortunately failed to act on a key recommendation of the ATRT. Commissioning an expert study of Board review mechanisms does not take more than a year, as the swift implementation of the ATRT's recommendation to secure compensation for Board members demonstrates. But all is not lost. A few steps would enable ICANN to demonstrate to the United States and its global stakeholders that ICANN's commitments to accountability and transparency are genuine, as ICANN enters a critical period of its history with the advent of the New gTLD Program. Such steps include:

- ♦ Publicly acknowledge that implementation of ATRT Recommendation 23 has been unduly prolonged.
- ♦ Publicly recommit to carrying out that Recommendation by revising and clarifying the *Implementation Plans* to include hard-and-fast dates for each task listed there.
- ♦ Revised deadlines should be designed to produce a preliminary report within 120 days and a final report within 150 days. The ATRT itself was produced in less time.
- ♦ The ICANN Board should agree that within 30 days of receiving the final report it will enter a formal resolution approving or rejecting each recommendation and provide a reasonable explanation of its rationale for each decision. It should further agree that any approved recommendations will be implemented immediately, either through directions to staff, proposing changes to bylaws, or otherwise, unless the nature of the recommendation requires additional time for reasons beyond the Board's control.

Let's hope that ICANN will make a needed course correction by implementing ATRT Recommendation 23 promptly and completely.

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("INTA believes that the NTIA should take the necessary steps to ensure that the JPA with ICANN is extended beyond the September 30, 2009, expiration date in order to allow ample time for a new accountability mechanism to be explored and implemented and for any increase in new gTLDs to be undertaken in a measured and responsible manner."); Coalition Against Domain Name Abuse, Inc., *Comments on the Termination of the JPA between NTIA and ICANN 2* (n.d.), available at <http://www.ntia.doc.gov/comments/2009/dnstransition/069.pdf> ("CADNA contends that termination of the JPA with NTIA should be delayed until ICANN demonstrates its ability to operate in accordance with these principles [of the *DNS White Paper*].").