



**Pilot Holistic Review Draft Terms of Reference
Response to ICANN Call for Comments
November 10, 2022**

The Intellectual Property Constituency (IPC) appreciates the opportunity to provide comments on the Pilot Holistic Review Draft Terms of Reference. The IPC represents the views of the intellectual property community within ICANN, and is focused on trademark, copyright, and related intellectual property rights and their effect and interaction with the domain name system (DNS). The IPC's consensus views on the Pilot Holistic Review Draft Terms of Reference ("Draft Terms") is set forth below.

As an initial matter, the IPC takes the viewpoint that in general, a holistic review such as the one ICANN is embarking on, should be an opportunity for ICANN to showcase to others that it is meeting its internal objectives, or provide a clear and easy path to better understand and meet its objectives. The Draft Terms do not seem to accomplish that objective for the following reasons.

- The Draft Terms are Dense and Inaccessible to Most Readers

Upon initial review of the Draft Terms, the reader is struck by the length and density of the document which is 15 pages long, single-spaced and difficult to follow. They are overly complex and full of ICANN acronyms and "ICANNese," such that only the most dedicated and involved volunteers or participants can understand. Members of our constituency with decades of experience in Internet governance and ICANN-related activities had a tough time interpreting what the Draft Terms actually mean, much less what they are trying to achieve. We recommend that ICANN take a different approach to the Draft Terms. Specifically, that ICANN focus the Draft Terms with one objective, namely, to enable those outside the ICANN ecosystem to be informed of ICANN's successes and learn about what ICANN is doing to improve in areas where there are ongoing challenges. We think these objectives can be met within the holistic review recommended by ATRT3.

- The Draft Terms are Unclear as to the Primary Purpose of the Review

If we understand the Draft Terms correctly, the primary purpose of the Pilot Holistic Review appears to be largely to develop the program, principles and criteria for future (post-Pilot) Holistic Reviews, while at the same time performing a partial review of only limited aspects of what would truly make up a "holistic review." as opposed to serving as a substantive review itself. We can certainly see merit in the development of a standard structure that will be applied to future Holistic Reviews and which is put into place before such a review is initiated, but this is not what the IPC understands as a complete "Pilot". Further, since Holistic Reviews are proposed by ATRT3 to be on an 8-year cycle does this mean that the first truly holistic review substantive Holistic Review would not take place until 2030 or later? Is this actually what is intended by the Draft Terms? If so, what is the justification in placing all other organizational and structural reviews on hold pending a review which is more than eight years away?

- The Propose Holistic Review Should Use the 2002 Holistic Review as a Benchmark

ATRT3 explained that the last complete holistic review took place in 2002, when the ICANN CEO published an initial paper setting forth what he saw at the time were the most pressing issues ICANN faced at that time. In that same year, ICANN published its blueprint for reform what it then saw as

weaknesses within the ICANN structure - namely (1) too little participation by critical entities; (2) too much process; and (3) too little funding. Although we believe the third issue for the most part has been addressed, the first two are very much still issues.

The 2002 Review resulted in significant changes to the ICANN mission, the composition of the ICANN Board of Directors, a new supporting organization for the ccTLDs, a restructuring of the Generic Names Supporting Organization, and the creation of the At-Large Advisory Committees. It was only because the review examined all of the issues at that time that the community was able to set ICANN on a path to better fulfill its mission for the next two decades. A partial review examining just the few types of issues as contained in these Terms of Reference would not achieve the same type of results needed to put ICANN on an effective path for the next twenty years.

If the holistic review is to be set up for success it is essential that its terms of reference are clear, unambiguous and comprehensive. Commencing a holistic review with terms which are open to differing interpretations risks setting review team members against each other from the outset and will lead to inevitable community disappointment when the output does not deliver on their differing expectations.

The IPC supports a holistic review of ICANN, but in order to have any meaning, it needs to look at many of the same elements that were examined in 2002; namely, the ICANN structures to see if they are all fit for purpose. And even if the structures are still the right ones, what improvements can be made. Indeed, this does require us need to look at the ICANN structures. This was clearly identified in the ATRT3 recommendations: "Review SO/AC/NC as a whole to determine if they continue to have a purpose in the ICANN structure as they are currently constituted or if any changes in structures and operations are desirable to improve the overall effectiveness of ICANN as well as ensure optimal representation of community views (but taking into consideration any impacts on the Board or the Empowered Community)."

The IPC provides the following responses to the questions posed in the request for comment.

1. Do you support the Pilot Holistic Review Terms of Reference as drafted?

*No. The Pilot Holistic Review Terms of Reference are difficult to understand, overly complex, and not likely to produce a positive result. Rather than providing for an independent review of the structures themselves, it appears that the Holistic Review focuses on self-assessments by insiders that have little interest in seeing a change to the status quo other than to potentially improve their own positions within the community. Those that perceive themselves to have power will never agree to any position that may potentially weaken their power, and those with little power will have little incentive to agree to even the status quo despite whether that status quo is effective or not. Self-assessments can always be part of a full 360 review, but alone they will not likely yield any reliable actionable results. In addition, by definition, a holistic review needs to be done by persons able to look at the whole of ICANN first from an outside perspective as opposed to reviewing from within. ICANN Bylaws 4.4, which the ATRT3 recommendations are meant to reflect, state that: (a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee (as defined in Section 8.1) **by an entity or entities independent of the organization under review** [emphasis added]. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders." This requirement of independence appears to be entirely missing from the Draft Terms.*

2. Does the Holistic Review Program outlined in Section II of the Draft Terms of Reference provide a clear approach to accomplishing the ATRT3's objectives, as set out in the same section, while addressing the information gaps identified by the ICANN Board set out below?

No. The lack of clarity and unnecessary complexity create barriers to success for the review. In addition, the review as outlined in the Draft Terms will require an inordinate amount of time from community members that are already suffering from severe volunteer fatigue due to the complex work required to manage the substantive issues that we believe should already have had more progress such as DNS Abuse, Access to Domain Name Registration Data, etc. The Draft Terms contain a lot of “make work”, documentation, and again will not lead to actions that can actually improve ICANN’s ability to achieve its mission. Frankly, it just adds more bureaucracy. For example, ATRT3 objective of “Review[ing] SO/AC/NC as a whole to determine if they continue to have a purpose in the ICANN structure...” cannot be accomplished by relying on self-assessments. What SO/AC/NC is actually going to determine that they themselves are not fit for purpose? The only members that would be those seeking to improve their own power within the structure. That is human nature. Hypothetically, if one of these (or even all of these) had to be abolished and replaced with something completely different, that can only be something that is recommended by those outside the system and not from within.

3. Do the steps and the deliverables associated with each ATRT3 recommendation 3.5 objective, as described in Section II of the Terms of Reference, clearly outline the scope of work for the Pilot Holistic Review?

No. See answer to question 2

4. Do the steps and the deliverables associated with each ATRT3 Recommendation 3.5 objective, as described in Section II of the Terms of Reference, explain clearly how Supporting Organizations, Advisory Committees, Nominating Committee, as well as their constituent parts will participate in the process of establishing a Holistic Review Program?

No. See answer to question 2

Concluding Remarks and Recommendations

In light of the above, the IPC offers the following recommendations to the Board and to ICANN Org for revision of the approach to the Holistic Review and the proposed Terms of Reference:

1. ICANN should not delay implementation of recommendations from other reviews and/or other review processes while this Pilot Holistic Review is being undertaken. The reason is that no real holistic review will occur prior to 2030.
2. ICANN should refer back to prior holistic review terms of reference in order to simplify the terminology, acronyms, and goals for this Pilot Holistic Review.
3. The Terms of Reference should recite very specifically which improvements have been made since the 20 year old holistic review and provide a method for measuring whether those improvements have been effective, e.g. via survey.
4. The self-assessment portion of the Terms of Reference should be modified to create concrete measurable components for SOs and ACs. For example, in relation to GNSO entities, the Draft Terms of Reference should refer to requirements for these organizations specified in Chapter 7 of the GNSO Operating Procedures.
5. The Terms of Reference should be modified to provide for INDEPENDENT assessment of the factors listed.
6. Independent Assessment should include assessment of Board interaction with the Community in resolving policy disputes where no Consensus has been achieved via the PDP process.

Thank you for considering the IPC's comments on the Draft Terms. The IPC thanks ICANN for the opportunity to comment on the Draft Terms and the IPC looks forward to further participation in the holistic review.

Submitted on behalf of the IPC,

Lori Schulman
President

[1] <https://archive.icann.org/en/general/lynn-reform-proposal-24feb02.htm#WhytheCurrentCourseWontWork>

[2] <https://archive.icann.org/en/committees/evol-reform/blueprint-20jun02.htm#GNSO>