



**ENHANCING LEGITIMACY IN THE
INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS:**

ACCOUNTABLE AND TRANSPARENT GOVERNANCE STRUCTURES

Final Report to the Markle Foundation

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Architecture is politics.

Mitch Kapor

At first glance, most of ICANN's work appears to be nothing more than obscure minutiae that have no effect on Internet users. But scattered through its highly technical work are important issues about Internet governance that affects users worldwide. Although ICANN was created to coordinate technical management, it has broadened its powers to include policy decisions that will dramatically affect what people are allowed to do online.

Bobson Wong, Digital Freedom Network, June 6, 2002

...fundamental decisions — such as the selection of board members and policies — often have been taken in a loose and non-transparent manner that many observers agree deviates wildly from the purported rules.

William J. Drake, University of Maryland

The struggle to keep the Internet open, free, permissive, and uncontrolled is too important to be left to geeks and engineers.

Attributed to John Naughton

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Introduction

ICANN is a unique organization. There is no parallel for this public-private corporation, with its regulatory functions that have material consequences across a broad spectrum of interests. Inter-governmental organizations do not have functions similar to ICANN. Unlike institutions of democratic national governments, ICANN has no legal avenue to provide for checks and balances. Critics have characterized ICANN's actions as "taxation without representation" and as not subject to the rules of law, there being no apparent mechanism, other than recourse to the courts, for limiting the exercise of its powers. In any case, no single mechanism will provide for legitimacy, irrespective of organization. Improvements in legitimacy are possible through adoption of several mechanisms to enhance participation, transparency, and accountability.

The strategy to improve the legitimacy of ICANN should have two thrusts: first, ICANN should make changes immediately in several dimensions; second, "sunset" clauses should be introduced. Current changes should be made with respect to:

Representation: Increasing geographical diversity on the Nominating Committee and the Board by expanding the application of the accepted concept of constituencies;

Participation: Expanding consultation before decisions by publication early in the policy process, and by providing opportunities for feedback by the public on major issues, including regional workshops; and

Accountability: Enhancing the powers and independence of the Ombudsman Office beyond the Burr Charter; and strengthening provisions of the Reconsideration and Arbitration processes to make them binding on the Board in certain circumstances.

The second thrust to improve legitimacy is to embrace incremental change by widespread application of "sunset clauses." As Becky Burr put it, "adoption of the Blueprint, with any amendments, must be perceived as 'next steps,' not as an endorsement of adequacy." Given that reform is an ongoing process, ICANN should mandate future reviews, and the expectation of these future reviews must be promoted. The existing ICANN Bylaws already call for a review every three years of the Bylaw section on the definition of geographic regions. The general procedure for all ICANN constituent entities currently provides for the Board to review their charter, structure, and operation after one year of operation and every two years thereafter. This "sunset clause" approach can be extended to several of the most contentious Blueprint elements.

This report presents options for elements of ICANN's architecture, based upon an examination of best practices in international governance. These elements include the processes for the selection of the Board of Directors, mechanisms for broad consultation, and provisions for increasing transparency and accountability. The objective is to enhance the legitimacy of ICANN. Increased legitimacy will result from increasing the participation of representatives of civil society organizations and of developing countries

in shaping rules to manage the international resource of Internet Protocol numbers and Domain names. At issue is the corporate governance structure and rules of ICANN.

Corporate governance guidelines and codes of best practices began in the early 1990s in the United Kingdom (UK) and the United States (US) in response to problems in the performance of leading companies and the perceived lack of effective board oversight that contributed to those problems. The Cadbury Report of the UK, the General Motors Board of Directors Guidelines in the US, and the Dey Report in Canada proved to be influential sources for guidelines and codes. Over the past decade, various countries and high profile international institutions have issued several guidelines and codes of best practices.

ICANN has been criticized for the fact that, while it actively seeks input from outside sources, it is under no obligation to listen to them. There is no process of appeal — no independent body can review, and if necessary, overturn decisions of ICANN. The recommendations of the ICANN Blueprint for Reform to restructure the Board have been criticized for reducing public participation. Further criticisms are directed to “weak mechanisms” proposed for the non-binding arbitration process, the proposed Ombudsman Office, and the Manager of Public Participation.

This report will neither review competing proposals to the ICANN Blueprint (e.g., NAIS, New.net, Danny Younger, www.byte.org), nor assess the merit of transferring ICANN functions to the International Telecommunications Union (ITU), the United Nations Commission on International Trade Law (UNCITRAL), the World Intellectual Property Organization (WIPO), or the World Trade Organization (WTO). It will not review Frankel’s excellent report to the Markle Foundation on Accountability and Oversight. Instead, the focus of this report is to suggest guidelines, codes, approaches, and practices which may be effective and appropriate for the governance structure of ICANN.

This report identifies features of other organizations, albeit each with distinct missions and contexts, that build capacity to include the public voice, including those of developing countries and of civil society organizations. The organizations described below share the characteristics of a global mandate and a governance structure involving both national governments, and civil society. Their missions involve difficult trade-offs across priorities, with legitimacy dependent on active participation by people from all geographic regions and diverse sectors of society. This is not an exclusive list – the examples, which are diverse in nature, are useful models in that they offer practical governance options in organizations with diversity of membership and the breadth of geographic reach similar to ICANN. One example is not an international organization – the provincial British Columbia Ombudsman is included to demonstrate the benefits of a strong set of investigative powers, contributing to legitimacy. For each topic area (representation, participation, and accountability), ‘best practices’ or ideas will be presented, and recommendations given to inform the debate over the restructuring of ICANN. The report concludes with concrete recommendations.

Part One: Best Practices in Appointing and Structuring a Board of Directors

The issue of legitimacy is confronted directly by the question of representation on a Board of Directors. A board of directors' primary purpose is to assure that the public or private, profit or non-profit institution fulfills its mission and meets its goals. More specifically, a board of directors' purpose is usually to set broad policy, review and approve programs and budgets developed and implemented by an Executive Director, and ensure financial stability and accountability.

A board of directors must have recruitment procedures that encourage a diverse representation of members in terms of ethnicity, age, profession or background, and communities served. It is best if the board of directors represents the diversity of clients served. To be effective, a board must understand the changing needs of the organization. Every organization grows and changes. Boards need to change. That means that board members should be evaluated at the end of their term. The organization should recruit new board members who represent the growing and changing needs of the organization.

ICANN's Bylaws provide for "broad international representation on the Board." At least one citizen of a country located in each of the geographic regions (Europe; Asia/Australia/Pacific; Latin America/Caribbean Islands; Africa; North America) is to serve as an At-Large Director on the Board. The selection of Directors in each Supporting Organization is to comply with these geographic diversity provisions. The Bylaws envision the desirability of change in light of the evolution of the Internet, explicitly calling for a review at least every three years to determine whether any change is appropriate. The Bylaws also empower the Board to create new constituencies. The "Second Interim Implementation Report" (dated September 2, 2002) recommends that evolution and reform should be an ongoing process in ICANN and that each constituent entity should be subject to some form of independent scrutiny at least every two years.

This section of the report highlights a few "best practice" institutions with respect to choosing a board of directors. There are three basic approaches to board selection common in international institutions: the United Nations one member one vote/equitable geographic distribution system; the Bretton Woods shareholder model; and a third category of institutions with *sui generis* (one of a kind) rules designed to reflect members' interests related to specialized areas of international cooperation. This section describes some models from the third category that may have relevance for ICANN.

A. THE GLOBAL ENVIRONMENT FACILITY (GEF)

The Global Environment Facility was established to forge international cooperation and finance actions to address four critical threats to the global environment: biodiversity loss, climate change, degradation of international waters, and ozone depletion. Launched in 1991 as an experimental facility, the GEF was restructured after the Earth Summit in Rio de Janeiro. The facility that emerged after restructuring was to be more strategic, effective, transparent, and participatory. In 1994, 34 nations pledged \$2 billion in support of the GEF's mission to protect the global environment and promote sustainable development; in 1998, 36 nations pledged another \$2 billion. The GEF brings together 173 member governments, leading development institutions, the scientific community, and a wide spectrum of private sector and non-governmental organizations on behalf of a common global environmental agenda.

A.1 The Governance Structure of the GEF

The GEF is a partnership with appropriate representative mechanisms for operations that include:

- the GEF Assembly;
- the GEF Council;
- the GEF Secretariat; and
- the (three) implementing agencies (United Nations Development Programme, United Nations Environment Program, World Bank).

The GEF Council functions as an independent board of directors, with primary responsibility for developing, adopting, and evaluating the GEF programs. Council members representing 32 constituencies (16 from developing countries, 14 from developed countries, and two from countries with transitional economies) meet twice each year for three days, and also conduct business by mail. The Instrument establishing the GEF provides that "Decisions of Council shall be taken by consensus." If consensus appears unattainable, any member of the Council may require a formal vote. Voting has never taken place. Decisions requiring a formal vote require a double-weighted majority, representing both a 60% majority of the total number of participant countries (which favors recipients) and a 60% majority of total cumulative contributions, including Replenishments, made to the GEF Trust Fund (which favors donors). This balances the donors' rights to protect their financial investment against the recipients' rights to influence funding policies on projects taking place in their country.

A.2 Relevance for the ICANN Blueprint

A criticism of ICANN that will gain significance in the future is that its simplistic scheme for geographic representation does not serve developing countries. Japan cannot speak for Asia, South Africa does not speak for Africa, and Brazil does not speak for Latin America. The key element of the GEF structure is the weighting of the Board in favor of developing countries. The ICANN Blueprint provides for eight directors to be selected by the Nominating Committee (NomCOM) and two directors by each of three supporting

organizations. “Global geographic and cultural diversity” is one of four criteria, aside from personal characteristics, listed as qualifications for directors. There are no weights applied to the various criteria and desired personal characteristics, and hence no guarantees of developing country representation in the outcome.

To improve legitimacy it would be simple to add an explicit criterion that three or four of the Nominating Committee’s selections should be from developing countries or economies in transition. A specific reference to a particular number of developing country directors would be consistent with international practice, and certainly not compromise the need for functional diversity, or the capacity to understand ICANN. Such a specific reference would contribute to ICANN’s legitimacy. Certainly, there are sufficient candidates from developing countries that possess the desired personal characteristics.

The ICANN Blueprint pronounces, “one of the underlying principles of the NomCOM is that its very functional and geographic diversity would tend toward selection of directors...who are broad in outlook...and not beholden to particular interest.” The 19 member NomCom is proposed to be composed of “delegates (not representatives) appointed by various constituencies.” One presumes that “developing countries” can be considered a constituency no less able than any other constituency to select a delegate “not beholden to particular interest.” Clearly, like the GEF, legitimacy would be increased if the composition of the Nominating Committee provided for delegates from developing country constituencies, and if the Nominating Committee was directed to select, perhaps, four voting Directors from developing countries.

The GEF provides for a double-weighted majority voting system. A simple majority voting system will deliver more “prompt action” and is consistent with the desire for ICANN to be “unburdened by time-consuming procedures that impede effectiveness” and “able to act appropriately even when widespread consensus is not forthcoming.” In fact for many years, no votes were taken. If significant emphasis is to be placed on the Nominating Committee, one could envisage the requirement for a double majority, where the 19 members would be divided into 2 groups (perhaps one composed of registries, ISP and perhaps large business users, and one group composed of the various categories of other users) with the requirement that a majority of each group is required for nomination. Another approach regarding the Nominating Committee is to require a 2/3 majority for its selections (the Blueprint suggests the current requirement of a 2/3 majority should continue with respect to Board of Director voting on amendments to ICANN Bylaws).

B. THE GLOBAL ALLIANCE FOR VACCINES AND IMMUNIZATION

The Global Alliance for Vaccines and Immunization (GAVI) is a public-private partnership focused on increasing children’s access to vaccines in poor countries. The Alliance is a network of international organizations, developed and developing countries, technical agencies, research and development agencies, industry, foundations, non-governmental organizations, and other entities that have expressed their interests in its mission and objectives by notifying the Executive Secretary. The members of the

Alliance are referred to as “the Partners.” Currently, Partners include national governments, UNICEF, the World Health Organization (WHO), the World Bank, the Bill and Melinda Gates Foundation, the vaccine industry, public health institutions, and non-governmental organizations. The Alliance provides a forum for partners to agree upon mutual goals, share strategies, and coordinate efforts through the “Working Group” and the “Partner’s meeting.” All members of the Alliance are welcome at the Partners meeting.

B.1 The Governance Structure of the GAVI

The mechanisms of the GAVI are:

- the Partner’s meeting;
- the Board of Directors;
- the Working Group; and
- the Secretariat

Composition of the GAVI Board:

The Board is composed of members from amongst the Partners as follows:

- a) One representative of each of the following members:
 - The Bill and Melinda Gates Foundation;
 - UNICEF;
 - The World Bank; and
 - The WHO.

The term of these members is two years renewable.

- b) One representative of each of the following groups of the other partners, namely:
 - Foundations;
 - Industry from the developing countries;
 - Industry from the Organisation for Economic Co-operation and Development (OECD) countries;
 - Research institutions;
 - Technical health institutions; and
 - Non-governmental organizations.
- c) Two representatives from the group of the developing countries.
- d) Three representatives of OECD countries.

The Executive Director of UNICEF, the President of the World Bank, and the Director-General of the WHO are currently considered as members ex officio.

The Board members are empowered to change the composition of the Board without exceeding the limit of fifteen members, including the Chair.

To ensure an equitable rotation amongst the representatives of the members of the Board representing partners other than the Gates Foundation, UNICEF, the WHO, and the World Bank, their terms of office are normally two years, non-renewable. However, to

secure continuity, an extension of one year of the first mandate of half of these members is made to permit a staggering of terms. The non-renewable members hold their seats until their successors are elected.

B.2 Operations of the GAVI Board

The operations of the GAVI Board are for the most part conventional; however, two features stand out as practices that could improve ICANN's operations, specifically:

- Observers may be invited to attend the Board's meeting, or part of it, upon invitation from the Chair. The Observers have the right to participate, without a vote, in the deliberation of the Board.
- The Board normally takes its decisions by consensus. Nevertheless, should a vote be required each member has one vote only, the ex officio members, if present, voting for their respective organizations.

B.3 Relevance for the ICANN Blueprint

The GAVI was chosen both because of its private-public structure and because partnering with NGO's, governments, industry, and institutions in the developing countries is crucial to its functions and legitimacy. There are several features of the GAVI Board that make it a suitable model for ICANN to follow. With respect to its composition, the GAVI model is clearly representative of its membership, with one board position for all partners, including developing country representation. The limited term for board members (two-years, non-renewable) is also preferable to the three-year term, renewable for three successive terms, suggested in the ICANN Blueprint. In ICANN's Blueprint, "staggering" loses its significance if terms are renewable. Shorter terms that are non-renewable allow for changes in direction to be accomplished with relative ease. The Board members are chosen at the Partners meeting, which "normally" takes place every two years, and consists of all members of the GAVI. All proposed candidates are subject to a consultation process, allowing for the various constituents to voice opinions, and requires general agreement by all Partners. Such a process is preferable to the Nominating Committee of ICANN, which is not representative of the public-private-corporate stakeholders of the Internet.

C. WORLD COMMISSION ON DAMS

The World Commission on Dams (WCD), originally conceived to focus on the study of the World Bank's dam-building record, became an independent review with 12 Commissioners, a full time professional Secretariat, a 68 member Advisory Forum, and thousands of contributors. Its goals were to build a comprehensive knowledge base of large dam's effectiveness and to develop criteria and guidelines to advise future decision-making on dams (Dubach et. al, 2001).

C.1 Structuring the Board for the WCD

The World Bank and the World Conservation Union (IUCN) — both perceived as partial conveners — together sponsored a meeting bringing together opponents in the dams debate as well as a broad political middle; these two organizations and a core group of meeting participants oversaw a contentious process in 1997 to select the Commissioners. A small group representing industry, NGO's, and dam affected peoples participated in vetting candidates and drawing up the final slate. "The process of Commissioner selection was so tense that major interest groups involved threatened on many occasions to withdraw and scuttle the effort in a barrage of negative publicity." Although representation was a key selection criterion for Commissioners, they were chosen to serve in their individual capacities rather than as formal representatives of their organizations.

The WCD did produce a consensus report — a tangible demonstration of success, transcending, rather than reproducing fractures among interest groups in the dams debates.

C.2 Relevance for ICANN

The WCD is a best practice in terms of enhancing the legitimacy of a multi-stakeholder process, providing for representation of broad constituencies and skill-based categories, rather than neutrality and eminence alone, to create political space for a large range of stakeholders. The model for provision of directors to represent a developing country constituency, presented in the GEF example above, can be extended to multi-sectoral representation and involvement of civil society organizations and non profit corporations.

Similarly, with respect to the NomCom, ICANN could provide for a minimum number of representatives from developing countries and from civil society organizations and non profit corporations.

A lesson from the WCD experience is that Southern governments may be unwilling to engage with NGOs and social movements. This is a problem ICANN will be able to finesse if developing countries are adequately represented on the Government Advisory Committee. One idea for ICANN might be to structure the Nominating Committee to provide for representation of developing countries and also of organizations with unconventional views (e.g., Babson Wong). Perhaps the proverbial saying about being "preferable to have them inside the tent..." applies.

The conclusion with respect to the WCD experience is “despite the trade-offs involved that make it impossible to satisfy all sides, and despite the challenges of balancing various forms of representation, the potential legitimacy gains make the representative multi-stakeholder model worth emulating” (Dubach et. al, 2001).

D. THE INDIGENOUS PEOPLES FUND

The Indigenous Peoples Fund (IPF) is an international organization created to promote the long-term, sustainable self-development of the native peoples of Latin America and the Caribbean. It is an independent organization funded by the Inter-American Development Bank. The IPF supports the social, cultural, political, and economic development of Amerindian peoples by responding to proposals prepared by the indigenous peoples themselves, increasing the efficiency and transparency of development programs, and promoting investment in projects that will benefit these groups.

D.1 The Governance Structure of the Indigenous Peoples Fund

The mechanisms of the IPF are:

- the General Assembly;
- the Board of Directors; and
- the Technical Secretariat.

The Fund’s governing bodies are the General Assembly and the Board of Directors. The General Assembly is made up of one delegate per non-regional member country and two delegates per regional member country. One delegate represents the member country government, while the other represents the indigenous peoples of that country. The day-to-day management of the Fund is in the hands of a Technical Secretariat with headquarters in La Paz, Bolivia.

The Board of Directors is made up of nine members chosen by the General Assembly from among its members as follows:

- three representatives from regional (host) country governments;
- three representatives from indigenous peoples organizations, and
- three representatives from non-regional (donor) country governments.

Decision-making processes consist of meetings among indigenous organizations, host government representatives, donors, and Indigenous Peoples Fund secretariat members.

D.2 Relevance for the ICANN Blueprint

The Fund is organized as a fully participatory and representative international organization whose directorate and management include representatives of indigenous groups, regional (host) governments, and non-regional (donor) governments. While their constituents are not as diverse or large as the global community of Internet users, they represent an extensive and diverse population.

The Fund provides a facility and specific mechanisms that allow indigenous groups to develop their own initiatives and methods of participation. The Fund engages in a broad process of mobilization of indigenous organizations, national institutions, and international development agencies in order to establish shared objectives and priorities that will permit the collaboration of all these different institutions towards the achievement of a common goal. The objectives of ICANN are not so different: “ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy through private-sector, bottom-up, consensus-based means. ICANN welcomes the participation of any interested Internet user, business, or organization.”

The Indigenous Peoples Fund is distinguished by the direct participation of the beneficiaries in its direction and administration. Like ICANN, developing country and indigenous peoples participation is key to its mission and success, yet here the comparison ends. Within the IPF, participation is exemplified in its tripartite governance and board structure, something that ICANN could easily emulate, if truly committed to their bottom-up approach and willing to broaden control among diverse stakeholders.

E. OTHER EXAMPLES

There are other examples of international bodies besides the IPF where representatives of organizations from the non profit sector and of civil society interest groups sit as equals with representatives from business and government. The Joint UN AIDs Program Coordinating Board, the governing body of UN AIDS, includes representatives of 22 governments, 7 international organizations and 5 non governmental organizations. Two examples in ICANN’s area of operation are the G 8 Digital Opportunities Task Force – the “DOT Force” and UNICT Task Force. In both cases, government officials and private sector representatives are joined as equals by representatives from other sectors. The Popular Coalition to Eradicate Hunger and Poverty, described below, is yet another example.

F. SYNTHESIS OF BEST PRACTICES IN GOVERNANCE STRUCTURES

The best practice examples discussed above provide examples of practices that work to ensure that organizational leadership reflects the composition of its stakeholders. Ideas for ICANN include provision in the NomCom and for representation on the Board of the developing countries and non profits and NGO constituencies. For particularly sensitive issues, double majority voting system could be introduced, perhaps requiring support of both the Board and a majority of the supporting organizations. Terms for Board Members should not be renewable, but could be for three years. Renewable terms vitiate the effect of staggering terms. In time, perhaps the NomCom could be supplanted by an “ICANN General Assembly”.

Part Two: Best Practices for Encouraging Participation

Appropriate representation is a necessary first step towards legitimacy, but it is not sufficient. Legitimacy is based upon a feeling of connection, of responsiveness; it must be based upon the constituents' or members' perception that they are not only listened to, but *heard* by the decision-makers.

Public participation (described as access to information and judicial remedy, as well as participation in decision-making) not only has legal precedent in international accords, but also has been formally incorporated into the procedures of many international organizations. Public participation in ICANN would avoid negative publicity and protracted disputes. Access to information and participation in decision-making is essential to deliver the stated ICANN mission by adhering to its core values (as stated in the "Draft Statement of Mission and Core Values," 2 September 2002).

The ICANN Blueprint provides for the establishment of "a staff position (working title: Manager of Public Participation–MPP) responsible for developing mechanisms to encourage full public participation in ICANN, and to facilitate the receipt and analysis of all public comments received on a given proposed action by the ICANN Board. This position would also be responsible for the design and content of other relevant outreach activities, including the ICANN website, public forums and mailing lists, and other options for public comment and participation." Burr's report suggests the MPP should, in addition to traditional information activities, ensure that information about, and public commentary on, the work of ICANN is presented in a variety of user-friendly, accessible fashions through web pages, public forums, and other mechanisms.

This staff position is a necessary step to meet ICANN's objective to encourage full participation by the community. Several specific mechanisms and commitments can enable the MPP to enhance meaningful public participation in the ICANN process. Perhaps foremost among these is a commitment to accountability to members — without this, ICANN will not be seen as a public-private partnership or achieve the equity that this term implies.

However, member support of enhanced participation is also dependent on perceptions of efficacy — participation without a voice is only observation at best, and at worst becomes a charade designed to make an organization appear accountable and transparent.

The most suitable best practices of participation occur with respect to networks and NGOs organized around a specific cause or mission. While these cannot be compared in structure or "service" to ICANN, they can provide suitable examples of mobilizing diverse partners as both stakeholders and beneficiaries.

ICANN's Evolution and Reform Committee (ERC) recognizes that "there is currently no obvious organized, globally recognized source" for "unaffiliated public interest persons," and they recommend establishment of an At-Large Advisory Committee (ALAC). The Second Interim Implementation Report (Sept 2, 2002) accepts that "[the] ALAC should be viewed as a critical first step towards structured involvement of the individual user community...towards a formalized role in ICANN's policy development proposal." The ERC report focuses on issues of the structure of the ALAC and does not go beyond its

nominating function in considering its potential role. The ALAC could be endowed with several functions in addition to selecting delegates to the Nominating Committee.

There are several potential functions of the ALAC that could be considered, at an early stage, to underline the future role in contributing to policy development, and in increasing relevance, and hence, legitimacy. There are several conventional strategies for creating inclusive processes — sharing control among all partner organizations with suitable representative bodies; sponsoring advisory forums to provide for structured multi-stakeholder input; promoting public hearings with processes for accepting general submissions from the public; and organizing international networks to disseminate information.

A. UNITED NATIONS ENVIRONMENT PROGRAM (UNEP)

A.1 Participation in UNEP

UNEP has had success with “by-invitation” Regional Workshops. To enhance the involvement of African NGOs, representatives of some 30 NGOs were invited to an African NGOs — UNEP Partnership Workshop. The Workshop focused on current UNEP activities (a paper was prepared for a forthcoming international Conference) and concerns regarding its policy towards NGOs. The workshop included both briefings and interactive sessions. A noteworthy outcome of the workshop was the agreement to establish an information network and an ongoing partnership forum for African NGOs, with UNEP to act as convener and facilitator.

A.2 Relevance for the ICANN Blueprint

The most inexpensive means to strengthen the capacity of widespread civil society and at-large users is the building of networks through “by-invitation workshops.”

The UNEP approach demonstrates the essential ingredients for an affordable approach with practical outcomes, namely: a focused relevant agenda, a reasonable number of participants, and a mix between briefings on prepared papers and opportunity for brainstorming and discussion. The ALAC could sponsor two workshops a year, so that one could be held in each geographic region every two or three years.

B. WORLD TRADE ORGANIZATION (WTO)

The World Trade Organization is unique, not only because it is the only global international organization dealing with the rules of trade between nations, but also because, in effect, all decisions in the WTO are taken by consensus among all member countries and they are ratified by members’ parliaments. The goal of the WTO — to help producers of goods and services, exporters, and importers conduct their business — has similarities to that of the ICANN, or at least the results, as more and more of the world’s business is conducted via the Internet.

B.1 NGO Participation at WTO Ministerial Meetings

The WTO has adopted procedures to enable NGOs to participate at meetings of its Ministerial Conferences. An extra day is added to the Ministerial Conference to provide them an opportunity to interact directly. There is an application procedure for accreditation, an NGO Center (meeting rooms and computers) provided regular and special briefings, and open symposia on issues of interest to NGOs. For the eight months preceding the Qatar 2001 Conference, the WTO arranged special activities to encourage substantive dialogue — briefings, informal lunchtime sessions, and open dialogue meetings.

B.2 Relevance for the ICANN Blueprint

The WTO 1996 founding agreement directs the WTO General Council “to make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related to those of the WTO.” Similarly, ICANN’s Bylaws could mandate the development “of appropriate arrangements for consultation and cooperation with the At-Large Constituency concerned with matters related to those of ICANN.”

The WTO General Council developed guidelines that set out specific mechanisms for increasing the WTO’s level of engagement with NGOs. ICANN’s Board could develop and publish guidelines that set out specific mechanisms for increasing the ICANN’s level of engagement with its At-Large constituency.

C. HOMENET

In 1994, members of various grassroots organizations met to form HomeNet. The primary aims of the network are: to build an international network for home-based workers and their organizations, as well as NGOs, cooperatives, trade unions, researchers, women’s groups and others that fit within the HomeNet organization. Specifically, HomeNet welcomes all those directly or indirectly undertaking work in this field. Its mandate or goal is to coordinate an international campaign for the improvement of home-based workers conditions of work at national, regional, and international levels. The long-term aim of HomeNet is to support the development of organizations at the grassroots level for home-based workers, so that they can work together to improve working and living conditions for home-based workers all over the world.

C.1 Promotion of the Network

In Turkey, there is a new group that gained much momentum from a meeting held in Istanbul last October, which brought together HomeNet, the International Center for Research on Women (ICRW), the United National Development Fund for Women (UNIFEM) and the International Labour Organization (ILO) with home-based workers in Turkey, and with representation from other countries in the region. In Latin America, there is a growing network that gained great visibility at the ILO Seminar on Homework held in Santiago, Chile in May 1999. Three representatives of HomeNet attended this meeting and talked about experiences in organizing in Asia, Africa, and Europe.

Key organizations with which HomeNet has worked over the year include: the United Kingdom Department for International Development (DFID); the UK-based Ethical Trading Initiative; and the Clean Clothes Campaign. Most recently, in May, with the support of DFID, HomeNet organized an international workshop to design a major mapping program to identify and develop organizations of home-based workers at the grassroots.

The network publishes a regular newsletter as part of the process of exchanging and disseminating information on home-based workers and their organizations.

C.2 Relevance for the ICANN Blueprint

Following the example of HomeNet, ICANN can exploit the interest of other international organizations and aid agencies to secure financial and in-kind support for communication activities and sponsorship of workshops.

D. THE POPULAR COALITION TO ERADICATE HUNGER AND POVERTY

The Popular Coalition to Eradicate Hunger and Poverty is a global consortium of civil society, inter-governmental and governmental organizations working to empower the rural poor through improved access to land and other productive resources. The participating organizations are diverse in size, nature, and mandate, but share a common belief that rural people must be empowered to be effective agents of their own development.

D.1 Governance and Participation

The Popular Coalition to Eradicate Hunger and Poverty represents a new way of working together for a common goal and within the framework of a shared program. The frameworks guiding its activities and the structure of its governance are reviewed and evaluated every two years. The Popular Coalition is a polycentric collaborative mechanism with over one hundred partners, all of whom are represented.

The Popular Coalition is governed by an Assembly of the Members, which meets once every two years; and a Coalition Executive Council that serves as the executive board to support and oversee the operation of the Popular Coalition and its Secretariat. The overall

structure also involves such committees, action groups, and advisory bodies as needed on an ad hoc or semi-permanent basis to ensure the effective achievement of the mission.

There are 8 civil-society organizations plus 5 inter-governmental organizations comprising the 13-member Popular Coalition Executive Committee. The eight civil-society representatives are selected by their regional peers to achieve balance from South and South-East Asia and the Pacific; West and Central Africa; East and Southern Africa; North Africa and the Near East; Central and Latin America; the Caribbean; the OECD and northern partners. The five inter-governmental organizations are IFAD, the Food and Agriculture Organization of the United Nations, the World Food Programme, the World Bank, and the European Commission. While the global focal point is located at IFAD in Rome, the program of work is undertaken by geographical nodes, which provide the decentralized means for participation and grass-roots operations.

D.2 Relevance for the ICANN Blueprint

The Popular Coalition has found a method to enhance legitimacy by structuring the organization as a true collaborative network. The key is their polycentric structure — having more than one center of control and decision-making body allows them to ensure programs are decided upon by members, rather than donor or political priorities. It would be unwieldy and expensive for ICANN to alter its structure to a polycentric decision-making one, but ICANN could easily form a network of *advisory* coalitions with representation by region (as in the Popular Coalition) and/or by sector of Internet user (e.g., corporate, small business, NGOs, small civil society organizations). This need not be a large expense, as meetings could be “electronic” with agendas posted in sufficient advance of Board meetings, and input could be in the form of written recommendations.

E. SYNTHESIS OF BEST PRACTICES TO ENHANCE PARTICIPATION

ICANN’s proposed Manager of Public Participation, if backed by a “Participation Charter,” mandated by the Bylaws, and given the duty of issuing and monitoring strong guidelines, is an excellent first step to increasing public participation in the workings of ICANN.

There are many avenues that may be pursued to better public participation. The experiences and practices in the analysis above suggest an integrated plan to improve public participation. First, as shown by UNEP, sponsoring Regional Workshops will allow marginalized voices to be heard by the Board. The iterative process of Regional Workshops could be bolstered by implementing concrete, permanent mechanisms for At-Large constituency input in the manner of the WTO. Provision could be made to allow an extra day, or session at Board meetings to engage with representatives of NGOs and non profit organizations, with a pre-negotiated agenda which is mutually satisfactory.

The MPP could have the objective of nurturing geographically representative “advisory coalitions.” Finally, in line with the practices of HomeNet, ICANN should partner with organizations that operate in the same arena to reduce overlap and expense. ICANN should, as a priority, seek donor support from the development banks and international development aid agencies to secure the effective participation of representatives of developing countries.

Part Three: Best Practices for Transparency

Neither the ICANN Blueprint nor the Second Interim Implementation Report directly address transparency, preferring to sidestep it by addressing it as a core value without stating how it will be incorporated as such. The former report states: “This section on ‘Accountability’ recommends improvements to current processes to advance ICANN’s core values of openness and transparency.” It also recommends ways to improve ICANN’s structure and appeal processes to ensure fairness while limiting frivolous claims. Transparency is noted as a feature of accountability and never mentioned again in the Blueprint or the Second Interim Implementation Report. Although transparency is integral to accountability, it can be addressed in its own right, and should be considered by ICANN as a separate reform issue, not as an afterthought to accountability.

Simply opening an organization’s processes to greater public participation will increase the legitimacy of an organization. But, public participation that is fogged by lack of understanding and based upon the shifting grounds of discretion and obscured processes, simply creates distrust. Increasing the transparency of an organization will reduce uncertainty while promoting knowledgeable interaction.

Transparency is based on the idea that all processes can, and should, be opened up to public view and understanding. In the realm of public and private enterprise, whether non-profit or for-profit organizations, governments or institutions, transparency means that the structure, mechanisms, decisions, and policies of an organization should allow constituents (members, participants, citizens) to see openly into the activities of the organization, rather than cloaking these processes in secrecy. Transparency is at the heart of accountability — allowing constituents to understand the policy regime and hold boards and officials accountable for their decisions.

Transparency enables public involvement and contributes to legitimacy. Transparency involves information dissemination, consultation, and sometimes, participation of stakeholders. As an organization with an international mandate that makes decisions with socio-economic effects across global borders, ICANN’s legitimacy depends on transparency. Ann Florini of the Brookings Institute, a leading authority on issues of transparency in international and national organizations, argues that the key new approach to legitimacy and better global governance is transparency: requiring decision-makers (governmental and non-governmental alike) to explain their actions and decisions to the affected public, which in turn allows that broader public to influence decisions.

ICANN presently does emulate several of the best practices of several international organizations in the pursuit of transparency, if transparency is defined as access to information. The ICANN web site is state of the art and impressive. For example, ICANN provides translation into six languages of documents and information on the “participation page” of the web site. The ERC process is doing many things right. Any further application of ideas to increase information-related transparency and enable informed participation involves expense — but the pay-off is in increased legitimacy. Probably the simplest initiative is to add a telephone and e-mail directory for the staff and the Board. There are several examples of other organizations that have determined that the benefits in terms of access exceed the nuisance costs of such a directory.

This is not the place to review the court proceedings initiated by Karl Auerbach. With respect to transparency of financial information, there is a lesson to be drawn from the evolution of attitudes towards the transparency of fiscal policy and governments' budgets. A review of the OECD's "Best Practices for Budget Transparency" or the IMF "Code of Good Practices on Fiscal Transparency" reveals an evolution away from secrecy towards openness, access, and inclusion. The province of British Columbia recently passed a Budget Transparency and Accountability Act. Following the OECD and IMF ideas, ICANN could adopt some general rules for public availability of information, (including forecasts), open budget preparation, execution and reporting, and a public accounting of past activity. Enshrining the desired procedures in the Bylaws will increase public confidence and improve accountability.

Enhancing legitimacy will be achieved with a concerted and sustained effort to promote transparent guidelines for decision-making and policy development processes within ICANN. Ensuring that the governance structure is transparent is a first step. Further reforms should follow, substituting clear rules for discretion when making decisions. Enhancing transparency in this way will also address recent criticism regarding "mission creep" within ICANN and allow the corporation to focus on its stated core mission and objectives.

Part Four: Best Practices in Accountability

The uniqueness of ICANN’s mission and membership means that it must represent the broad “public” of private non-profits, NGOs, and government institutions, as well as the “narrow” or “special” interests of for-profit corporations. Procedures to ensure broad accountability make the public sector relatively slow moving and rigid; in contrast, private organizations, both for-profit and non-profit, can be flexible and efficient because their decision-making processes are not subject to public comment. ICANN fits somewhere in the middle of these two ends of the spectrum. The Blueprint recommendations seem to address accountability in response to relatively narrow niche markets or special interests, rather than to all users of the Internet. ICANN must be accountable in more extensive ways than traditional non-profit organizations, which generally have a relatively narrow constituency. It is thus particularly important for the bylaws, constitution, and standards applied to ICANN to be the most rigorous available in order to withstand detailed scrutiny by all members or partners.

Legitimacy in an organization is enhanced when there are strong provisions for checks and balances, and avenues of recourse. Provisions for evaluation and oversight, and/or mechanisms for appeal are common among international organizations with global mandates. This section reviews accountability best practices related to the Blueprint’s recommended “improvements to current processes to advance ICANN’s core values of openness and transparency” and “to improve ICANN’s structure and appeal processes to ensure fairness while limiting frivolous claims.” The four mechanisms at issue include the Ombudsman, the Manager of Public Participation, the Reconsideration Process, and Arbitration. There are examples of arrangements for distancing the Ombudsperson from the board to increase the independence of the office without compromising its effectiveness. There are many relevant models to emulate for mechanisms to encourage public participation. The issue is whether these mechanisms are “legislated” or are to be matters of policy that is more or less discretionary. The reconsideration policy could be strengthened by adopting elements of appeals systems proven pragmatic in other international organizations.

A. BEST PRACTICES FOR AN OMBUDSMAN OFFICE

The ERC characterizes the role of the Office of the Ombudsman as a “staff position dedicated to ensuring that information about ICANN’s activities and public reaction to those activities is fully adequate and available to the ICANN Board and constituent entities in a timely manner.” The Ombudsman is more generally perceived as an internal mechanism to address complaints that require redress.

B. OFFICE OF THE OMBUDSMAN, PROVINCE OF BRITISH COLUMBIA (BC)

An Ombudsman generally receives inquiries and complaints about the practices and services provided by public bodies. The Ombudsman in BC can investigate to determine if the public body is being fair to the people it serves. The Ombudsman is independent of government, responsible for making sure that administrative practices and services of public bodies are fair, reasonable, appropriate and equitable, able to conduct confidential

investigations that are non-threatening and protect complainants against retribution, and required to file an Annual Report with the Legislative Assembly. The Ombudsman is not an advocate for people, not a defender of the actions of government, not a civil servant, and not an elected politician.

B.1 Structure of the British Columbia Ombudsman Office

The BC Ombudsman is independent of the government, with statutory powers defined in legislation. The Ombudsman is appointed by the legislative branch, and is an officer of the Legislative Assembly, not the Executive Council (Cabinet). This independence is reinforced by the six-year length for term of office, which exceeds the term of the government's mandate.

There are several features of the BC Ombudsman Office that may be considered best practices. These include, especially, those related to extensive powers, such as:

- Power to obtain information:
 - The Ombudsman may receive and obtain information from the persons and in the manner the Ombudsman considers appropriate, and in the Ombudsman's discretion may conduct hearings.

The Ombudsman may do one or more of the following:

- (a) at any reasonable time enter, remain on and inspect all of the premises occupied by an authority, talk in private with any person there and otherwise investigate matters within the Ombudsman's jurisdiction;
- (b) require a person to furnish information or produce, at a time and place the Ombudsman specifies, a document or thing in the person's possession or control that relates to an investigation, whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority;
- (c) make copies of information furnished or a document or thing produced under this section;
- (d) summon before the Ombudsman and examine on oath any person who the Ombudsman believes is able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of an authority, and for that purpose may administer an oath; and
- (e) receive and accept, on oath or otherwise, evidence the Ombudsman considers appropriate, whether or not it would be admissible in a court."

B.2 Relevance for the ICANN Blueprint

Much of the design for the Ombudsman Office in the ICANN Blueprint is appropriate. For example, Becky Burr's report includes a Charter, apparently accepted by the ERC, which specifies well the mission, duties, and responsibilities of the ICANN Staff and Board, and confidentiality. The Blueprint includes appropriate recommendations that the Office should have its own budget directly authorized by the Board and should operate under a charter adopted by the Board after public notice and comment. As the Burr report notes, the Ombudsman Office is designed to serve as a neutral, informal advocate of

fairness within the ICANN process concerning both Board and staff actions. Unfortunately, the Blueprint recommends that the Ombudsman be hired by, and report directly to, the ICANN Board. The desire for fairness, and the appearance of fairness, is less likely if the Ombudsman is hired by, and reports directly to, the Board.

The Office of Ombudsman can contribute to ICANN's legitimacy by securing the reality and the appearance of its independence. The Office can be strengthened beyond the recommendations of the Blueprint and the provisions in Burr's Charter in several complementary ways. Most important are the independence and powers of the Office. An external search committee could select the Ombudsman, instead of the President of ICANN. The best example of securing the independence of the Ombudsman function is the Compliance Advisor Office (CAO) of the International Finance Office (IFC) and Multilateral Investment Guarantee Agency (MIGA) (both organizations are in the World Bank Group). An external search committee composed of business and NGO representatives selected the Compliance Advisor. ICANN could emulate this best practice by using a search committee composed of representatives of its various constituencies.

Preferred features for the ICANN Ombudsman include the following:

The Ombudsman could be hired with the advice and consent of a nominating committee with the same composition as the Nominating Committee that selects the Board.

1. Real powers of inquiry, modeled on those of the British Columbia example, could be formally adopted in the Charter envisioned in the ICANN Blueprint, and incorporated in ICANN's Bylaws.
2. The term of the Ombudsman could exceed that of the Board members, including ICANN's President, certainly more than two (2) years.
3. ICANN could commit to best practice operational policies exemplified by the BC example, including information on the complaint process, standards for responses, multilingual access, and a complete, inclusive Annual Report by the Ombudsman.

Several operational best practices would strengthen the appearance and reality of fairness and accountability:

1. The complaint procedure should be formally articulated in a manual, which is available for purchase;
2. Complaints submission should be allowed by mail or to the web site;
3. A toll free line and on-line multilingual brochures should be made available to provide information on the complaint process;
4. Replies, by phone, or mail to written complaints should be provided within five (5) working days; and
5. The Annual Report of the Office should include summaries to illustrate the number and variety of examples where the Office has improved fairness and accountability.

C. RECONSIDERATION

Virtually every organization that makes administrative decisions affecting material interests provides for an avenue of appeal to an independent body. Good administrative practice provides for an avenue of appeal to a neutral or impartial body in clearly specified circumstances. The essential element of a process seen to be legitimate is that people other than the original decision-maker dispose of the appeal. ICANN's unique character bedevils the attempt to provide for legitimacy in terms of mechanisms for reconsideration or appeals. In the private sector, the avenue of appeal may be the annual meeting of shareholders, or an oversight body such as the Securities and Exchange Commission. In national governments, administrative bodies' avenue for appeal or reconsideration may be a legislative body, an executive agency from which power was delegated, or the Courts. There is no international organization analogous to ICANN.

The ICANN Blueprint suggests that the existing Reconsideration Process should be amended to apply to (a) actions by staff alleged to contradict established Board policy or to be inconsistent with known facts, or (b) actions by the Board alleged to be based on error or lack of relevant information. The Reconsideration Process should require that the Board consider any reconsideration request no later than the second Board meeting following receipt of the request. Burr's report provides a comprehensive package of elements for an amended Reconsideration Policy. There is room, however, for improvement in three of the provisions she suggests.

First, composition of the "appeal" body — who decides the appeal or request for reconsideration — can contribute to legitimacy. The Blueprint recommendation is "the Board will establish and maintain a Committee of the Board consisting of not less than three directors to review and consider any such requests for reconsideration." This is not helpful if the intent is to enhance both legitimacy and the *appearance* of legitimacy. Both would be improved if the Reconsideration Committee were to be composed of distinguished individuals not serving on the Board. One example might be to appoint former Board members.

Second, the nature of the Reconsideration Committee's recommendations are envisioned as *advisory*, not binding — "the Board will not be bound to follow the recommendations of the Reconsideration Committee." This seems to be gratuitously self injurious, especially if the material effect of a recommendation of the Reconsideration Committee is that the Board must deliberate on the issue from a fresh start.

Third, the ERC September 2nd report, states: "... [ICANN's] intention would be to follow these (Burr's) recommendations almost totally. The one exception might be the notion that the Reconsideration Committee should report to the Board on a quarterly basis; we agree that a periodic report of the kind suggested would be useful, but our current view is that an annual report would be sufficient." Limiting the appeal body to reporting on an annual basis sends the wrong signal in terms of transparency. It would be costless to grant the Reconsideration Committee the power to report as, and when, the Committee deems appropriate.

The example below is not intended to commend TRUSTe as a best practice organization. It is presented to provide an example of an Appeal Board with an appointment process that provides comfort as to the independence of its members, without compromising professional expertise.

D. TRUSTe

TRUSTe is an independent, non-profit privacy initiative dedicated to building users' trust and confidence on the Internet, and accelerating growth of the Internet industry. They have a multi-faceted assurance process that attempts to establish web site credibility, thereby making users more comfortable when making online purchases or providing personal information. They have developed a third-party oversight "Seal" program that guarantees users' online privacy, while meeting the specific business needs of each of their licensed web sites.

D.1 TRUSTe Arbitration Process

As part of the TRUSTe Privacy Seal Program, consumers are offered the TRUSTe Watchdog, a dispute resolution mechanism that allows web users to appeal if they believe their privacy has been violated on a TRUSTe-approved web site. The TRUSTe Appeal Board is composed of (1) a representative from TRUSTe's Board of Directors designated by its Chairman; (2) a privacy expert from the academic community; (3) a representative chosen by a consumer/privacy advocacy group designated by TRUSTe's President. As a further measure of accountability, the appellant and appellee may object, for cause, to the inclusion of individual Appeal Board members, and request that replacement members be appointed. Such requests will be subject to approval by the TRUSTe Appeal Board Chair.

D.2 Relevance for the ICANN Blueprint

The "appeal" body for TRUSTe brings in experts from outside rather than using members of their own Board, and their final decision is binding. ICANN, if it were to follow this example, could appoint to the Reconsideration Committee a respected academic and a representative selected by a consumer advocacy group, which in turn had been selected by the Board. Accepting the decision as binding would significantly enhance the legitimacy, as well as the appearance of legitimacy, of the reconsideration process.

E. BYLAW AMENDMENTS AND ALLEGED INFRINGEMENTS

The ERC recommends that “the Board should create a process to require non binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws.” The non binding nature of the proposed arbitration process detracts from the legitimacy of ICANN. The examples below are not intended to commend ITU and WIPO as best practice organizations. They are presented to point to the practicality of desirable features of an arbitration process, models where the parties have a role in the selection of the arbitrators, and where the arbitration decision is binding.

F. THE INTERNATIONAL TELECOMMUNICATIONS UNION (ITU)

The ITU is the international organization where governments and the private sector coordinate global telecom networks and services. Its membership consists of all countries and 658 private sector organizations. The Union was established as an impartial, international organization to coordinate the operation of telecommunication networks and services and advance the development of communications technology. The ITU is involved in standardization activities and has a major role in managing the radio-frequency spectrum to ensure that radio-based systems (cellular phones and pagers, aircraft and maritime navigation systems, scientific research stations, satellite communication systems, and radio and television broadcasting) function smoothly and provide reliable wireless services. The ITU considers it has a role as a catalyst for forging development partnerships between government and private industry.

F.1 The ITU Arbitration Process

The ITU arbitration process, where stakes are as high as those in ICANN, is clearly laid out in its constitution. Each party to the dispute submitted to arbitration selects one disinterested arbitrator. The two arbitrators then agree on a third. If they fail to agree, each nominates one candidate and the Secretary General chooses the third arbitrator by lot. Decisions by two out of three arbitrators are final and binding. Alternatively, parties to the dispute may agree on the appointment of a single arbitrator. Failing agreement on the individual, they may each submit one nominee to the Secretary General who chooses between the two by lot.

F.2. Relevance for the ICANN Blueprint

The ITU arbitration process is a good example of where the legitimacy of a binding arbitration process is due in large part to the opportunity that parties to a dispute have to participate in the selection of arbitrators. ICANN’s Board could direct a process involving the supporting organizations and the ALAC to provide a list of qualified arbitrators (as the WTO does for potential panelists to consider cases in the dispute resolution process).

G. THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) ARBITRATION AND MEDIATION CENTER

The WIPO Arbitration and Mediation Center was established in 1994 to offer arbitration and mediation services for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment, and other disputes involving intellectual property. It advertises itself as internationally recognized as the leading institution in the area of resolving Internet domain name disputes. Since December 1999, the Center has administered proceedings in the generic Top Level Domains (gTLDs) .com, .org, .net.

G.1 The WIPO Arbitration Process

WIPO has been working with the operators of the new gTLDs to develop domain name dispute resolution mechanisms for their domains. The Center has been designated to provide dispute resolution services for the seven new gTLDs domains admitted by ICANN's decision of November 16, 2000. In addition to its gTLD services, the Center also administers dispute procedures in a number of country code Top Level Domains (ccTLDs).

The WIPO Arbitration Rules defines the procedure to be followed by the arbitral Tribunal, the power of the Tribunal, the rights and obligations of the parties, and the role of the WIPO Arbitration and Mediation Center as administering authority.

The law applicable to the substance of the dispute is chosen by the parties. Failing a designation on the part of the parties, the Tribunal is empowered under the WIPO Arbitration Rules to apply the law that it determines to be appropriate. "The decision rendered by the Tribunal in the form of an award is final and binding on the parties and not usually subject to an appeal on the merits to a court of law. In the majority of cases of international commercial arbitration, the parties comply with the award without the need to seek court enforcement. Where court enforcement is necessary, the procedure is relatively straightforward by virtue of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Over 120 States are party to the New York Convention, which obliges contracting States to recognize and enforce foreign arbitral awards subject to a limited number of specified exceptions. It is for the parties to choose whether there will be a sole arbitrator or several arbitrators. If they do not exercise a choice, the WIPO Arbitration Rules provide for a sole arbitrator, unless the circumstances of the case are such that the Center, in its discretion, determines that a Tribunal composed of three arbitrators is appropriate."

The WIPO Arbitration Center provides for Expedited Arbitration, a form of arbitration in which modifications are introduced in order to ensure that the arbitration can be conducted and an award rendered in a shortened time frame and, consequently, at a reduced cost. To achieve those objectives, the modifications provide for a sole arbitrator (rather than a tribunal of several arbitrators), shortened time periods for each of the steps involved in the arbitration proceedings, and condensed hearings before the sole arbitrator.

G.2 Relevance for the ICANN Blueprint

WIPO's Expedited Arbitration process belies the common perception that arbitration has to be expensive and time consuming. The fees are reasonable. It also demonstrates that it is possible to arrange for parties to agree to binding arbitration. ICANN will be in a better position if it operates in an environment in which there is an avenue of appeal to its decisions and if it will engage in an arbitration process where the findings are binding.

H. SYNTHESIS OF BEST PRACTICES IN ACCOUNTABILITY

Building upon the work of Burr, an ombudsman, recruited with external input, imbued with powers such as the BC Ombudsman (such as the "subpoena" power), and backed by a Charter, would provide a focal point for accountability issues in ICANN. The Ombudsman should have a five or six-year term and be mandated to follow state of the art operational practices with respect to the complaint process. In addition to the Ombudsman position, there is also a need for a Reconsideration process that will allow independent review of decisions made by the Board and staff. The independence required entails that the Committee include individuals not on the current Board. It would be helpful if the recommendations of the Reconsideration Committee were binding. Finally, some of the practices of TRUSTe, the ITU, and the WIPO, when taken together, will increase the perception that the arbitration process can achieve both fairness, and the appearance of fairness, while retaining the expediency required.

Conclusion

Institutions that govern global processes are increasingly vulnerable to criticism. ICANN will be no exception. It will be subject to ongoing, intense public scrutiny. ICANN mechanisms and rules should actively engage its stakeholders — the public and private sectors, and local, national, and international NGOs — in its operation and governance structure.

ICANN's success and ability to remove the controversy surrounding its operations depend in great part on enhancing legitimacy and providing more opportunities for public participation, especially in the developing world.

The ICANN Blueprint can be improved along several dimensions, increasing its credibility and legitimacy without compromising its ability to fulfill its mission in a timely and responsive manner. This report has identified many ideas for the constitution of the Board, and for enhancing participation transparency and accountability. Rather than repeat all the ideas described in the various “synthesis sections” above, the conclusion lists seven ideas that should be pursued as a matter of priority:

1. The Bylaws should provide that the Nominating Committee be composed of a specific minimum number of delegates from developing countries and from civil society/ non profit organizations. A developing country constituency should be established on the Board, and the Nominating Committee should have the duty to ensure that a specified number (four?) of the total number of voting Directors are from developing countries.
2. The concept of double majorities should be introduced to the voting mechanism for Bylaw amendments. In addition to the current requirement of 2/3 majority of the Board of Directors for Bylaw amendments, decisions should also be approved by a majority of the Supporting Organizations.
3. The proposed Manager of Public Participation (MPP) should be supported by a formal ICANN Declaration, if not a “Participation Charter,” along the lines of the Charter proposed for the Ombudsman. This Participation Charter should be included in the Bylaws. The Declaration or Charter should specify the responsibility of the MPP to draft Guidelines regarding participation. As a start, ICANN's Board should declare the intent (a) to hold regional workshops; (b) to allow representatives of the At- Large community to participate at a session added to each Board Meeting; and (c) to nurture the development of an active global network of interested parties. The MPP should be encouraged to seek partnerships with the appropriate divisions of international organizations (beyond ITU and WIPO), such as the World Bank and the OECD.
4. ICANN should make available on its web site the contact information (telephone numbers and e-mail addresses) for each Board and staff member; guidelines for future decision-making and policy development processes should be made available to the public.

5. The Ombudsman should be hired for a term of five years with the advice and consent of a nominating committee of the same composition as the Nominating Committee that selects the Board, or by a search committee external to the Board. The Ombudsman's powers of inquiry should be defined and formally adopted in the Charter (envisioned in the ICANN Blueprint), and incorporated in ICANN's Bylaws. ICANN should commit to publishing information on the complaint process and standards for responses, and provision of multilingual access. The Ombudsman Office should publish its Annual Report without prior Board Review.
6. The Reconsideration Committee should be composed of two former Board members, rather than serving members, and an independent representative selected from a consumer protection organization. The Reconsideration Committee should be empowered to report on its activities and findings, including minority views, as frequently as it sees fit, with its reports made public as they are submitted.
7. The Arbitration process should provide for parties to select among possible modes of arbitration (for example, the number of arbitrators), using a pool of pre-certified arbitrators, and be clearly defined in the Bylaws.

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