ICANN: Observations from an Information Law Perspective

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I. Overview

1. Context

The Internet Corporation for Assigned Names and Numbers (ICANN) was conceptualized in 1997 during an effort by the US Government to create a “private, non-profit corporation … to assume responsibility for the technical management of the Internet Domain Name and IP addressing systems.”\(^1\) At the time, ICANN’s creators envisioned an organization that would support the development of “sound, fair, and widely accepted policies” for the management of the Domain Name System (DNS) that also reflect the input of the international community of Internet users. In 1998, ICANN was formally established as a California non-profit, public benefit corporation and was recognized by the US Department of Commerce. Since its creation, ICANN has been the primary entity responsible for managing decisions and policies relating to the DNS.

As many observers have noted, ICANN’s internal structure draws on multiple institutional models.\(^2\) Bound by fiduciary duties, under the governance of a Board of Directors, and subject to the California Corporate Code and the US court system, ICANN undoubtedly has certain characteristics of a traditional private-sector actor. It is

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1 ICANN, “History of ICANN At Large”, http://members.icann.org/history.

also a public entity that uses bottom-up, consensus-based decision-making processes aimed at incorporating inputs from government and community stakeholders into its policy making.

Occasionally, the very characteristics that define ICANN’s model act as opposing forces and result in policy decisions that are not fully supported by the global Internet community. For instance, members of the global Internet community have noted that the sheer complexity of ICANN’s organizational structure, coupled with its private-sector form and quasi-regulatory functions, have inhibited ICANN’s ability to fully meet its commitments to transparency and public participation. Indeed, despite ongoing efforts to strengthen ICANN’s decision-making processes, stakeholders continue to challenge the legitimacy and authenticity of ICANN’s decisions.

Broadly, critiques commonly relate to ICANN’s commitments to transparency as articulated in its stated policies and ICANN’s actual day-to-day practices of these policies. More specifically, the means and channels by which ICANN provides information to key stakeholders (active transparency), the means by which stakeholders can request information from ICANN (passive transparency) and the processes by which ICANN engages and incorporates community dialogue with ICANN (participatory transparency) have been the targets of criticism.

Over the course of its lifetime, ICANN has engaged in many efforts to respond to these issues. Most recently, in the September 30, 2009 Affirmation of Commitments (AoC) agreement with United States Department of Commerce and ICANN, it committed to reviewing its commitments to transparency, accountability, and public participation every three years. Pursuant to this commitment, the Chair of the ICANN Board and the Chair of the Governmental Advisory Committee (GAC) selected an Accountability and Transparency Review Team (ATRT) to perform the first of these reviews. The final report of the ATRT was delivered to the ICANN Board on December 31, 2010.

2. Outline and Approach of this Paper

Using an Information Law perspective, this paper examines the findings of this most recent review, with a particular focus on the role of transparency deficits on the perceived legitimacy of ICANN’s decision-making processes.

The first section begins with an overview of ICANN’s organizational structure, including the centrality of stakeholder inputs at key moments in the policy-making process and the role of the Board as the ultimate recipient of those inputs. Drawing on the AoC and the findings of the ATRT, the section ends with a brief summary of the main critiques that ICANN has faced regarding the transparency and accountability of its decision-making process.

The second section examines these issues in more depth using an Information Law approach, which analyzes the normative standards, normative policies, and actual practices of ICANN’s information-related activities. This lens sharpens our understanding of the norms, modes and channels which shape how information is

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3 The ATRT was specifically tasked to evaluate ICANN’s execution of its commitments to “maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholders.” ICANN, “Affirmation of Commitments”, September 30, 2009, 9.1, http://icann.org/en/documents/affirmation-of-commitments-30sep09en.htm.

4 As we discuss in more detail in Section II, the findings and recommendations of the ATRT are informed by an independent analysis undertaken by selected faculty and researchers at the Berkman Center for Internet & Society at Harvard University, including Urs Gasser and Herbert Burkert. The Final Report is available here: http://cyber.law.harvard.edu/pubrelease/icann.
created, accessed, distributed and used within the context of ICANN. In addition, it helps us to consider how certain structural and procedural transparency enhancements within ICANN’s information ecosystem might impact how decisions are received, accepted, and ultimately legitimized by ICANN stakeholders.

The third section explores how issues related to transparency may impact two concrete and fundamental aspects of ICANN’s decision making: the deliberations of the Board and the solicitation and incorporation of public inputs into that process. The paper concludes with a discussion of methods for improving the policies, channels, and visibility that underlie ICANN’s approach to information architecture and design, with an eye towards strengthening its overall transparency.

II. An Introduction to ICANN

1. ICANN’s Organizational Structure

Decisions made by ICANN affect Internet stakeholders around the world. The framework in which these decisions are made is quite unique. Although ICANN is a non-profit corporation in California, ICANN is also a bottom-up, consensus-based organization that represents global interests. As a result of these characteristics, ICANN has developed a very specific organizational structure which makes it difficult to apply the traditional best practice rules usually employed in the field of corporate governance.

ICANN’s Board of Directors consists of sixteen individual “Directors” with voting power and five non-voting “liaisons.” The Directors are responsible for exercising ICANN’s powers and managing ICANN’s property and business affairs. The Board may only take official action, on behalf of ICANN, by a majority vote of all the Directors, or, in limited circumstances, by a majority of the Directors present at a meeting of the Board. Accordingly, much of ICANN’s organizational structure is arranged to facilitate informational channels between the ICANN’s Advisory Committees and Supporting Organizations and the Board of Directors.
As is outlined in the chart above, ICANN’s organizational structure is comprised of eleven constituent bodies which can be divided into different groups:  

The **Nominating Committee** is responsible for selecting eight members of the Board of Directors. The Nominating Committee consists of twenty-three members; seventeen voting members and six non-voting members. All members are appointed or selected by other ICANN bodies. 

There are three “Supporting Organizations”: the **Address Supporting Organization** advises the Board with respect to policy issues relating to the operation, assignment and management of Internet addresses. The **Country-Code Names Supporting Organization** is responsible for developing and recommending global policies relating to country-code top-level domains (e.g.,“.us” or “.uk”); and, the **Generic Names Supporting Organization** fulfills the corresponding tasks with regard to generic top-level domains (e.g.,“.com” or “.org”).

The **Governmental Advisory Committee** (GAC) consists of representatives from a large number of national governments from all over the world. The GAC provides advice to the Board on the activities of ICANN as they relate to concerns of governments, in particular where ICANN’s policies or proposals may interact with national laws, international agreements or public policy.

The **At-Large Advisory Committee** (ALAC) considers and provides advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users around the world. The Committee consists of five members selected by the Nominating Committee and two members selected by each of the Regional At-Large Organizations (RALOs). The latter serve as the main forum and coordination points

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8 The number of constituent bodies of ICANN is not strictly limited since the Board may create one or more Advisory Committees in addition to the four Committees set forth in Article XI of the Bylaws. For a more detailed overview see Rolf H. Weber, “Accountability in Internet Governance”, 13 International Journal of Communications Law & Policy, 152 (2009).

9 ICANN Bylaws, Article VII, Section 1.

10 ICANN Bylaws, Article VII, Section 2.

11 ICANN Bylaws, Article VIII, Section 1.

12 ICANN Bylaws, Article IX, Section 1, §1.

13 ICANN Bylaws, Article X, Section 1.

14 ICANN Bylaws, Article XI, Section 2, §1(b).

15 ICANN Bylaws, Article XI, Section 2, §4(a).

16 ICANN Bylaws, Article XI, Section 2, §4(b).
for public input to ICANN from their respective geographic regions. The ALAC and the RALOs ensure that a broad set of individual Internet users’ interests are involved and represented in ICANN.

Two additional Advisory Committees deal with technical issues: the Security and Stability Advisory Committee provides advice on matters relating to the security and the integrity of the Internet’s naming and address allocation system. The Root Server System Advisory Committee advises the Board on the operation of the root name servers that execute the necessary functions to establish the domain name system and to ensure a stable and secure Internet.

The Technical Liaison Group connects the ICANN Board with sources of information concerning the technical standards that underlie ICANN’s activities. This group consists of four international organizations which are active in the field of standardization. In addition, the Internet Engineering Task Force is an organization open to any participant interested in improving the Internet’s technical standards (i.e., normative specifications).

Finally, the Ombudsman acts as a neutral dispute resolution practitioner by providing an independent internal evaluation of complaints raised by members of the ICANN community about unfair or inappropriate treatment, namely by the Board or one of the other constituent bodies.

Together with the ICANN CEO/President, each of the eleven constituent groups feed inputs into the Board, either by right to elect members to a Board seat, or through a non-voting liaison. The Board holds regular meetings three times per calendar year. In between regular meetings, the Board also holds “special meetings,” which are convened at the request or approval of “onequarter (¼) of the members of the Board or by the Chairman of the Board or the President.” So long as a quorum is present, the Board may take official actions on behalf of ICANN at either regular or special meetings after a majority vote of all Directors is cast. In some limited circumstances, where a proposal being considered for adoption does not “substantially affect the operation of the Internet or third parties,” a majority vote of members present at a meeting is sufficient for Board action on a proposal.

17 ICANN Bylaws, Article XI, Section 2, ¶4(g). According to the ICANN Bylaws, those regions are: Europe, Asia/Australia/Pacific, Latin America/The Caribbean, Africa and North America. See ICANN Bylaws, Article VI Section 5.
18 ICANN Bylaws, Article XI, Section 2, ¶2(a).
19 ICANN Bylaws, Article XI, Section 2, ¶3(a).
20 ICANN Bylaws, Article XI-A, Section 2, ¶1.
21 According to the Bylaws, these organizations are: the European Telecommunications Standards Institute (ETSI), the International Telecommunications Unions’ Telecommunication Standardization Sector (ITU-T), the World Wide Web Consortium (W3C) and the Internet Architecture Board (IAB). See ICANN Bylaws, Article XI-A, Section 2, 2.
22 ICANN Bylaws, Article VI, Section 9, ¶1(e). See also Internet Engineering Task Force (IETF), http://www.ietf.org.
23 ICANN Bylaws, Article V, Section 2.
25 ICANN Bylaws, Article VI, Sections 13-19.
26 ICANN Bylaws, Article III, Section 6.
2. A Summary of the Central Critiques of ICANN Decision-Making Processes

As noted in Section I, ICANN has engaged in numerous efforts in recent years to analyze and enhance the legitimacy of the decision-making processes that course through this complex structure, including the recently completed review process mandated by the AoC.27 The ATRT was charged with assessing three aspects of ICANN’s current approach to accountability, including transparency, public participation and Board governance. This analysis was supplemented by an independent study (the Berkman report) undertaken by selected faculty and researchers at the Berkman Center for Internet & Society at Harvard University (the Berkman team).28 Three of the authors of this contribution have been heavily involved in Berkman’s independent review effort.

The ATRT and the Berkman team utilized distinct methodologies and analytical tools. To organize its review, the ATRT established four working groups composed of ATRT members, each analyzing specific topical areas of review, as identified in the AoC, including: (1) the governance, performance, and composition of the ICANN Board; (2) the role and effectiveness of the GAC and its interaction with the Board; (3) public input processes and the policy development process; and (4) review mechanism(s) for Board decisions.29

Each working group examined materials that were relevant to their area of inquiry, including ICANN bylaws, policies, procedures, etc.; analyzed public comments and inputs from the community; conducted interviews and analyzed relevant data; and consulted directly with the broader ICANN community. The ATRT also noted current ICANN activities that are underway to meet ongoing AoC commitments.

The Berkman team combined a number of qualitative research methods into its approach. Efforts included, among other things, primary research, such as various structured (questionnaire-based) interviews with experts and stakeholder representatives, secondary research of extensive Web and database searches, an exploratory English-language literature review, and the drafting of case studies.30 The Berkman team also conducted a review of a diverse range of publicly available materials, including public comments, ICANN documents and policies, institutional reports, academic studies, media reports, and expert opinions. It also took account of other current ICANN initiatives related to AoC commitments.

While there is variation in the manner in which each report conceptualizes and organizes its analysis (and therefore in how that analysis informs each set of recommendations), it is possible to summarize key criticisms related to ICANN’s decision-making processes in the following ways:


28 The independent recommendations were limited to the scope of activities described in paragraph 9.1 of the AoC.


Transparency: While ICANN continues to make progress in terms of the transparency of its information processes, both the ATRT and the Berkman report identify a number of areas where improvements can be made in terms of related policy and practice as well as information design. For example, both reports noted community concerns regarding “the ways in which a massive amount of information is presented; the lack of clear information about methods to obtain unpublished information; overly broad transparency exemptions regarding document requests; and the lack of a transparency audit.”

Public Participation: Although both reports note the improvements that ICANN has made in recent years with regard to public participation processes, additional changes are needed to address the key concerns of the ICANN community, particularly with regard to the actual influence of public inputs on Board decision making. Common community concerns center on: the lack of clarity of ICANN’s primary tools for soliciting public input, for summarizing, aggregating and responding to public contributions, and for demonstrating their actual impact on Board decisions. Both reports suggest that the policies and procedures describing how public inputs move through ICANN’s organizational structure must also be improved, along with the process for engaging across different communities and constituencies in the decision-making process.

Corporate and Board Governance: In the realm of Board Governance, both reports identify a number of issues regarding how the Board is composed (and what policies and standards inform that process); how the Board interacts with ICANN staff and with its constituent bodies; how Board decisions might be reviewed; and how its decision-making processes are rendered transparent. Issues related to the role and effectiveness of the Governmental Advisory Committee (GAC) are also identified; in particular, how the Board interacts with the GAC and considers its input and vice versa, what constitutes GAC advice and opinion, how communication occurs between the GAC and the Board, and at what stage in the decisionmaking process.

3. Analyzing these Critiques via an Information Law Approach

The findings of the Berkman report and those of the ATRT demonstrate the value of applying different analytical tools and research methodologies to better understand the very complex landscape of ICANN decision-making processes. As demonstrated by the high-level summary above, both approaches provide generalizable findings concerning each of the focal points identified in the AoC. Their slightly different conceptual frameworks also result in distinctly formulated recommendations, some of which are aimed at structural improvements (i.e., those aimed at issues linked to ICANN’s organizational mission and identity, including its legal structures, its organizational structure, the role of the different constituencies and supporting organizations, and its Bylaws) and others suggested on procedural enhancements (i.e., those related to procedures within a given institutional framework, including for example, the clarity, timeliness, or predictability of decisions, when and how information flows through an organizational framework, etc.).

31 Ibid., 2.
32 Ibid.
33 Ibid, 3.
34 See Berkman Report (note 30), 47 f.; ATRT Report (note 29), 3 f.
35 This taxonomy draws on the taxonomy outlined in the Berkman Report (note 30), 21.

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In this paper, we apply a third methodology to some of the transparency challenges that ICANN faces via an Information Law approach. This framework uses three overlapping modes of analysis to evaluate ICANN’s information-related activities, including:

Normative Analysis: which analyzes an organization’s normative policies against aggregated normative standards in a comparable environment.

This analysis seeks to identify contradictions between aggregated environment practices and organization-specific policies or commitments.

Normative Synthesis: which generally evaluates the organization’s normative policies. This analysis seeks to identify where provisions within normative policies can be modified to improve overall information distribution and quality.

Compliance Analysis: which analyzes an organization’s normative policies against its actual practices. This analysis seeks to identify disparities between commitments and practices.

Analyzing these three layers enables us to have a more nuanced understanding of the role of information-handling norms, practices and policies, which have implications for the success - and legitimacy - of ICANN’s approaches to public participation, transparency, and accountability.

III. Analyzing ICANN Transparency from an Information Law Perspective

1. Applying the Information Law Approach to ICANN

ICANN’s continued existence and role as the technical coordinator of the DNS is premised on a series of agreements with the US Government, including the Memorandum of Understanding (MoU) and the Affirmation of Commitments (AoC).36 Within these agreements, the government conditions ICANN’s authority on explicit commitments to, inter alia, ensuring that policy decisions are made in the public interest that are accountable and transparent. These agreements are so fundamental to ICANN’s existence that they can be regarded as a “constitutional framework” for the organization’s internal policies and regulations. These agreements provide particularly explicit guidance towards the creation and maintenance of ICANN’s institutional policies relating to transparency, including policies reflected in the Articles of


37 Specifically, in Section 9.1 of the Affirmation of Commitments, ICANN is obligated to “maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholder.” To meet these obligations, the Affirmation of Commitments requires ICANN to “continually assess[] and improve[]” internal processes and decision making related to: the ICANN Board of Directors, the role and effectiveness of the GAC, ICANN’s public input processes, ICANN community’s support of ICANN decisions, ICANN’s policy development policies, as well as other areas discussed in the agreements. See ICANN, “Affirmation of Commitments”, September 30, 2009; ICANN, “ICANN Announcements – Affirmation of Commitments”, September 30, 2009, http://www.icann.org/en/announcements/announcement-30sep09-en.htm.
Incorporation, and information policies, such as the Documentary Information Disclosure Policy (DIDP).

Conducting a compliance analysis on ICANN’s actual practices faces two problems. First, ICANN does not currently conduct an annual audit or review of its own transparency practices or make empirical information relating to its transparency practices available to the public. Because of this, there are no data points to evaluate ICANN’s actual practices against its normative policies. Second, ICANN’s “constitutional framework” adds certain dynamic elements into ICANN’s normative policies. For instance, the AoC requires ICANN to continuously assess and improve its normative policies to ensure they reflect robust mechanisms for transparency and accountability. Additionally, ICANN is required to be open to, and in some cases solicit, the advice of the US government as well as the GAC. In turn, these dynamic elements open additional channels of influences on ICANN’s normative policies.

In sum, due to the political character of the environment in which ICANN operates, and the lack of adequate empirical data, any compliance analysis has to be preceded by a normative analysis to ensure that ICANN’s normative policies themselves are an adequate interpretation of its “constitutional framework.” The compliance analysis then – due to a lack of adequate empirical data – has to rely mainly on “appearances” such as the material provided on ICANN’s website. Consequently, the Information Law analysis will proceed by identifying normative standards in environments analogous to ICANN, then identify ICANN’s relevant normative policies, and conclude with an assessment of ICANN’s normative policies and actual practices, to the extent that the latter can be determined. These assessments will be bifurcated into ICANN’s distinct modes of transparency: (1) “active transparency practices,” which are ICANN’s policies/practices related to proactive information dissemination, and (2) “passive transparency practices,” which are

ICANN’s policies/practices related to providing access to information that is not proactively disseminated.

2. The Normative Standards for ICANN’s Transparency

a) Analogous Public Sector Role Models

The normative framework provided in the MOU, the AoC, and by observations in the GAC, suggest that ICANN’s rules and practices take guidance from analogous public-sector models. ICANN, however, is structured as a private-sector corporation. As such, ICANN is not subject to US federal or state access-to-government information

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regulations, like the Freedom of Information Act. However, public sector developments in the area of transparency may provide valid normative role models. Looking internationally, we can also note changes in the private sector: South Africa’s freedom of information legislation for example has been the first to lay down information disclosure obligations on private-sector entities under certain conditions.

The expansion of freedom of information legislation to entities in the private sector has caused companies to create and maintain active information policies in order to be prepared for information requests that seek access to information via a government institution where relevant information has been deposited. Semi-public international organizations like the World Bank or the Asian Development Bank have also adopted similar comprehensive information policies.

b) Normative Synthesis and Analysis: “Ground Rules”

As to the substance of such transparency rules insight can be gained from international regional instruments on access to government information, e.g., Council of Europe documents, as well as from institutional and procedural changes in the European Union, or initiatives in Canada and the US to revitalize freedom of information regulations by implementing experiences from electronic democracy and electronic government initiatives.

After taking into account ICANN’s unique nature and operating environment, a set of basic “ground rules” emerge which function as guideposts that reflect normative standards for relevant policies and practices in the field of transparency. In general, these ground rules require that the transparency policies themselves are transparent to those who should benefit from them – meaning, that they are published to an easily accessible location, and that they are written in clear and understandable manner.

44 ICANN’s current corporate form as a non-profit California corporation excludes it from being the requirements in The Freedom of Information Act (FOIA), which generally applies to US agencies and other enumerated authorities of the United States government. 5 U.S.C. §§ 551, 552 (2009).


46 See PAIA 2, Section 3, Ch. 1.


52 For a more comprehensive analysis of this state of the arts see e.g., Herbert Burkert, Die Transparenz der Europäischen Union, in: Thomas Hart/Carolin Welzel/Hansjürgen Garstka (Hrsg.), Informationsfreiheit. Die “Gläserne” Bürokratie als Bürgerrecht?!, Gütersloh 2004, 117 ff.
These procedures should address how information requests can be made (passive transparency), and ensure that the procedures explain how responses to such requests are issued, including the specific timeline in which a response will be issued. Responses should be issued to every request and either release the requested information or explain why the information cannot be released. Considering ICANN’s technical role, and the current best practices of website design, ICANN should have a well organized, user-friendly means of communicating information through its website. In light of ICANN’s international involvement, language should not limit the community’s ability to submit information requests or receive information disclosures.

Formalized procedures should be in place that ensure a regular review and assessment of the substantive transparency policies and actual practices. Such a review of internal information management procedures and practices ensure diligent corporate governance and that the organization remains accountable to its stated policies. All decisions by ICANN should be subject to a review mechanism to ensure that high quality decisions are being made and to strengthen the legitimacy of such decisions to the public. Such a review mechanism should be institutionalized; and, at a minimum, ICANN should publish publicly-accessible records to demonstrate how such procedures are being handled.

The substantive rules relating to the conditions under which information will be released or withheld (under the “conditions of non-disclosure”) should be clearly formulated. These rules should also differentiate conditions of disclosure and non-disclosure according to the risks associated with disclosure of the information. For example, these conditions might include circumstances where corporate legal duties, the privacy interests of individuals, or confidential information (e.g., trade secrets) obligates ICANN to withhold the disclosure of information. Furthermore, these conditions should not be absolute; rather, they should be open to weighing public interests against risks of disclosure on a case-by-case basis. When the circumstances merit nondisclosure of a part less than the whole, information suitable for disclosure should be released in part.

IV. Assessment of Normative Policies and Actual Practices

1. ICANN’s Active Transparency

According to its information policies ICANN proactively publishes “a comprehensive set of materials” that are considered to be of key importance for the ICANN process, including:

- Annual Reports
- Articles of Incorporation
- Board Meeting Transcripts, Minutes and Resolutions
- Budget
- Bylaws (current)
- Bylaws (archives)
- Correspondence
- Financial Information
- Litigation documents
- Major agreements
- Monthly Registry reports
- Operating Plan

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Policy documents
Speeches, Presentations & Publications
Strategic Plan
Material information relating to the Address Supporting Organization
Material information relating to the Generic Supporting Organization
Material information relating to the country code Names Supporting Organization

Material information relating to the At Large Advisory Committee
Material information relating to the Governmental Advisory Committee
Material information relating to the Root Server Advisory Committee
Material information relating to the Security and Stability Advisory Committee

According to the DIDP, ICANN makes this material accessible to the public “in due course.” Although the DIDP does not actually specify the availability of translations related to the publications of these materials, ICANN does have a general policy that states a commitment to “translat[ing] core strategic and business documentation” into UN languages and to “work collaboratively with the community and experts to develop tools for multi-lingual dialogue.”

The active publication of an organization’s operative material does meet international standards in terms of current practices as well as in terms of desirable future developments. In this case ICANN’s own rules are in accordance with the normative framework in which it operates. However, three additional issues remain problematic, the first two are normative issues that relate to the timing of making such material available (i.e., unclear definition of “due course”) and the lack of an audit to monitor the actual practices against ICANN’s stated policies. The third issue relates more to the method by which ICANN makes this material available; this is primarily an issue of compliance.

The term “due course” is too general to provide sufficient guidance for an active information disclosure policy. This issue is also compounded by the lack of oversight and the way by which information is being made available. Since there is no easy way for the user to compare the date of finalization with the date of publication, and ICANN does not have an independent audit in place, there is no sufficient incentive to keep the “due course” due.

ICANN’s DIDP does not reference a yearly audit of its transparency practices. Such audits are - as we pointed out above - part of the standard practices.

For example, the US Freedom of Information Act (FOIA) stipulates in 5 U.S.C. § 552(a)(1)(A) that agencies must publish in the Federal Register “descriptions of its central and field organization, … statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures … rules of procedure, descriptions of forms available … substantive rules of general applicability adopted.”


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for ensuring transparency in the public sector. Even where there is no specific oversight agency, there are at least administrative audits the results of which are publicly available. The absence of such a policy is even more surprising because following the One World Trust review in 2007, ICANN had committed itself to such an audit. ICANN's most recently published Annual Report does not reference such an audit.

Finally, the way in which active information duties are being delivered does not contribute to the overall commitment of transparency. While this is primarily an issue of information design, the role of usability should not to be underestimated. Transparency is not merely about the sequential presentation of documents; rather, transparency comprises many functions which need to be addressed by an adequate information design. Transparency may, for example, aim at providing structural information (relating to processes and structures of the organization in question), topical information (relating to the issues at stake in the information handling, decision-making and presentation processes), decision-making information proper (relating to the way decisions are being made in different specific procedures), or contextual information (relating to the criteria of decision making and the information used for decision making as well as information relating to the persons and institutions and other relevant context elements involved in decision making). Adequate information design should take these functional considerations into account. Moreover, ICANN has also acknowledged the design problem. In July 2006, ICANN announced plans to make its website more user friendly. Two years later in 2009, a usability survey conducted by ICANN lead to a full redesign plan which, notably, remains unexecuted.

When measured against the normative standards of active transparency, ICANN lacks an appropriate oversight procedure and a meaningful timeline for actively disclosing certain information. As to compliance the informational design of these information provisions needs to become more orientated towards the various functions of transparency.

2. ICANN's Passive Transparency

In contrast to ICANN's active transparency policies, both the procedural description and timeline for dealing with passive information requests are much less ambiguous. This procedure, however, suffers from two normative problems.

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62 “If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.” AT Frameworks and Principles, 2008, 10 f.
First, while the procedure is described, it is very difficult for the average user to become aware of the existence of this procedure and of what it entails. Ultimately, we believe that this is an issue that affects the basic existence of such an access right and not a mere issue of compliance or information design.

Second, based on wording of the “appeal” procedures, it appears that the appeal mechanisms may not be available to denied requestors in every circumstance. The DIDP states that a requestor may appeal the denial through the Reconsideration Request procedures or Independent Review procedures to the extent applicable. Upon closer look, the wording of these procedures is not only ambiguous, but also raises questions concerning their actual availability as a remedy since they both impose threshold requirements.

Similar to active transparency, the lack of a prescribed audit or oversight procedure is a serious normative fault for passive transparency. Furthermore, the lack of a clearly and appropriately designed review procedure for information refusals also poses a normative fault.

3. The Disclosure Exemption Policy

ICANN’s information disclosure exemptions give rise to a normative problem that affects both active and passive transparency. The exemptions apply both to the decision on which information is being made proactively published to ICANN’s website and to information that is the subject of a submitted request.

The exemptions are identified in the DIDP as a “set of conditions for the nondisclosure of information.” In practical terms, these exemptions highlight certain types of information, occasionally coupled with attendant circumstances, which ICANN will not make available to a member of the public, by way of an information request or other means. For example, the exemptions exclude the disclosure of: trade secrets, information related to health, life or safety, information subject to legal disclosure requirements, and information relating to the security and stability of the Internet, or information where an expectation of privacy of confidentiality is typically expected.

In conformity with the “ground rules,” many of these exemptions protect such categories of information that we find protected in most access-to-information legislative enactments. However, two exempted categories are somewhat troubling because of their broad formulation: commercial and financial information not publicly

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63 AT Frameworks and Principles, 2008, 10 (emphasis supplied).

64 According to the Bylaws, Reconsideration Requests may be submitted by a person or entity which has been “materially affected by an action of ICANN.” ICANN Bylaws, Article IV, Section 2, ¶1. The following paragraph in this section states that “[a]ny person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by:” either (a) “staff actions or inactions that contradict established ICANN policy(ies); or” (b) “one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information[.]” ICANN Bylaws, Article IV, Section 2, ¶2 (emphasis supplied). It is unclear if the phrase “adversely affected by” as opposed to “materially affected” is intended to distinguish or establish threshold standing requirements for persons submitting Reconsideration Requests. In addition to ambiguity in the Bylaw description of the Reconsideration Request, the Independent Review procedure provides a separate process by which “any person materially affected by a [Board] action or inaction”, which he or she believes to be “inconsistent with the Articles of Incorporation or Bylaws”, to submit a Request for an “independent third-party review” of those actions or inactions. ICANN Bylaws, Article IV, Section 3, ¶¶1, 2. The threshold requirement for submitting a request for an Independent Review requires that a violation of the Articles of Incorporation or Bylaws occur as a result of a Board action or inaction. However, the DIDP does not indicate how the Board is involved with a DIDP request.
disclosed by ICANN, and information requests which are a disturbance. Also, some of the other exemption categories are somewhat broadly worded in their formulations and, in contrast to the highly sophisticated exemptions in the Canada’s Access to Information Act, there are no weighing mechanisms to balance the public interest in disclosure against those protected interests.

The exemption policy does not entirely prohibit the disclosure of information that falls within the enumerated categories. The policy contains a specific “override provision” that information subject to an exemption “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such a disclosure.” This catch-all clause implies that in each application of exemption category ICANN is required to make such a balance assessment. This override would thus have a similar function as the tests included in many of the access to government information laws. By the same token, the policy also includes a provision whereby ICANN may exempt the “disclosure of information under circumstances not designated [within the policy] if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.” This sort of override, with which ICANN reserves final authority to withhold information even when none of the exemptions apply, questions the purpose of formulating exemption policies altogether.

4. Summary

In applying the Information Law approach to ICANN’s active and passive transparency policies and practices we identified both normative problems and compliance problems. The normative problems create a tension between the normative policy directives in which ICANN operates and the guidance it has formulated for itself. These tension points relate to the absence of appropriate audit/oversight mechanisms for active and passive transparency, the ambiguity of a review procedure in case of refused access requests, and most important of all the unprecedented and unacceptable possibility to override all specific exemptions of information disclosure. Compliance problems, in as far as they are discernable at all due to the lack of sufficient audit material, mainly relate to the information design of ICANN's interface with the general public.

V. Transparency in Practice I: Board Decision Making

1. The Framework of the Board of Directors

a) The Board’s Composition

The Board of Directors consists of sixteen voting members (the Directors) and five non-voting liaisons. Eight voting members are selected by the Nominating Committee (NomCom), two voting members each are selected by the Address Supporting Organization (ASO), the Country-Code Names Supporting Organization

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66 “Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.” AT Frameworks and Principles, 2008, 10 f.
67 See Access to Information Act, R.S.C. Ch. A-1. § 13 et seq.
68 AT Frameworks and Principles, 2008, 10 f.
70 ICANN Bylaws, Article VI, Section 1.
(CCNSO) and the Generic Names Supporting Organization (GNSO); one additional voting member is selected by the At-Large Advisory Committee (ALAC). Furthermore, ICANN’s President, who is elected by the Board, is a voting member of the Board ex officio.

The five non-voting liaisons are appointed by the Governmental Advisory Committee (GAC), the Root Server System Advisory Committee (RSSAC), the Security and Stability Advisory Committee (SSAC), the Technical Liaison Group (TLG) and the Engineering Task Force (IETF). The liaisons attend Board meetings and participate in the discussions and deliberations in order to bring the views of their respective groups to the Board table. The liaisons have access to the material provided to the Directors but they do not have any of the other rights and privileges of the Directors.

b) Selection Criteria for Directors

The ICANN Bylaws provide for a diverse set of selection criteria for ICANN’s Directors. According to the Bylaws, Directors should be accomplished persons of integrity, objectivity and intelligence with a reputation for sound judgment and open minds; moreover they should have demonstrated their capacity for thoughtful group decision making. Not surprisingly, Directors are expected to be committed to the success of ICANN and have an understanding of its mission and the potential impact of its decisions on the global Internet community. Furthermore, Directors must be willing to serve as volunteers receiving no compensation other than the reimbursement of certain expenses, and they must be able to work and communicate in English.

The Bylaws note that ICANN’s Directors must have an aggregate understanding of topics related to ICANN’s activities and the Internet community such as the operation of generic and country code Top Level Domain registries, Internet technical standards and protocols, policy-development procedures, legal traditions and the public interest, as well as the interests of business, individual, academic and non-commercial users of the Internet. Finally, the Directors should be selected so as to ensure the broadest cultural and geographic diversity on the Board consistent with meeting the other selection criteria mentioned above. In order to guarantee broad international representation, each geographic region must have at least one but no more than five Directors at all times.

These criteria fall into different categories: some are of an individual nature (e.g., integrity, commitment and understanding of ICANN’s mission), while others are of a collective nature (e.g., cultural and geographic diversity and familiarity with ICANN topics); some can be verified rather easily (e.g., willingness to serve as volunteers, language skills, geographic diversity),

71 ICANN Bylaws, Article XIII, Section 2.
72 ICANN Bylaws, Article VI, Section 2, ¶1(f).
73 ICANN Bylaws, Article VI, Section 3, ¶1.
74 ICANN Bylaws, Article VI, Section 3, ¶2.
75 ICANN Bylaws, Article VI, Section 3, ¶5.
76 ICANN Bylaws, Article VI, Section 3, ¶6.
77 ICANN Bylaws, Article VI, Section 3, ¶4.
78 ICANN Bylaws, Article VI, Section 3, ¶3.
79 The Bylaws contemplate five distinct geographic regions: (1) Europe, (2) Asia/Australia/Pacific, (3) Latin America/Caribbean Islands, (4) Africa, (5) North America. See Article VI, Section 5.
while others require difficult subjective assessments (e.g., being open-minded and sufficiently familiar with ICANN’s activities and the Board’s topics).

Improving the decision making of its Board is probably one of the greatest challenges ICANN will have to meet in the near future. From an Information Law perspective, two key issues can be identified: the transparency of the selection process with regard to the expertise and skills of potential Board members, and the transparency of the Board’s decision making as such.

2. Current Issues

a) Transparency of Selection Process

The ICANN Bylaws provide for both a diverse set of selection criteria and a complex process for the selection of Board members with no less than six different selecting bodies for the voting Directors and five different bodies for the non-voting liaisons. The interplay of these two factors leads to significant difficulties in selecting an appropriately composed Board.

Since different bodies select Directors who have to meet both individual and collective criteria, and as some of these criteria are much easier to assess than others, the selecting bodies tend to focus on individual and easily verifiable criteria rather than on those to be fulfilled collectively which are harder to assess. As a consequence, the expertise and skills of the Board members and their familiarity with ICANN topics tend to have less impact on the selection process than other criteria such as language skills and geographic diversity which are either individual, easy to verify or both.

The de facto preferences of the selecting bodies for some of the selection criteria are, however, neither provided for by ICANN’s Bylaws nor are they usually transparent. Rather, they are an unintended consequence of the complex structure of the selection process and the diversity of the selection criteria. As a result, it may sometimes remain unclear for third parties why certain candidates were selected and others not. In addition and above all, the hidden preferences of the selecting bodies tend to undermine the aggregate management skills and technical expertise represented on the Board.

b) Transparency of Decision Making

Similar to the philosophical concept of a contrat social between the members of the Internet community, ICANN operates on a multi-stakeholder basis that brings all interested parties together to discuss the relevant policy issues.

Accordingly, ICANN follows a bottom-up model of policy development and relies on public participation and consensus amongst its stakeholders. For this model to work effectively, ICANN needs to encourage participation, instill trust and make information

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80 ICANN Bylaws, Article VI, Sections 3.
81 ICANN Bylaws, Article VI, Section 9.
83 With regard to the importance of multi-stakeholder process, the ICANN Expected Standards of Behaviour (Code of Conduct), states: “Those who take part in ICANN multi-stakeholder process including Board, staff and all those involved in Supporting Organization and Advisory Committee councils undertake to … [l]isten to the views of all stakeholders when considering policy issues. ICANN is a unique multi-stakeholder environment. Those who take part in the ICANN process must acknowledge the importance of all stakeholders and seek to understand their points of view.” See ICANN, “Expected Standards of Behaviour”, http://www.icann.org/en/documents/code-of-conduct-10jan08-en.pdf.
With regard to its policy development and decision-making process ICANN’s Bylaws explicitly state that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”

As these principles also apply to the Board, ICANN has adopted various measures to promote transparency of the Board’s decision making: the minutes of the Board meetings are published on the website, non-confidential sections of Board briefing materials are published, and a wiki provides easily accessible information on every substantive resolution approved by the Board. In addition, ICANN is committed to responding, to the extent feasible, to requests for information not publicly available provided that the request is reasonable and not subject to specific conditions for nondisclosure.

Despite these various attempts, the Board’s decision making still lacks transparency. Since the minutes of the Board meetings neither capture the full basis for a decision nor provide sufficient detail and adequate explanations, the logic used to arrive at a final decision often remains unclear. Altogether, the transparency of the decision-making process often has a formal, rather than substantive, appearance.

3. Possible Solutions

As to the process of selecting Board members, three options to increase transparency should be considered. First and most obviously, the selecting bodies must always be provided with comprehensive information on the skills and expertise of all candidates. Second, the selecting bodies should establish an informal ranking of the selection criteria stating that management skills, technical expertise, and familiarity with the ICANN topics are of paramount importance. Third, the selecting bodies should set up a mechanism for identifying the collective skill set required, and provide for informal exchange between the bodies which enables them to pre-assess whether the nominees fulfill the respective requirements, at least in the aggregate.

The transparency of the Board’s decision making should be improved by providing detailed explanations of the rationale for all decisions adopted including explanations of other proposals considered (e.g., alternatives proposed to an adopted resolution) and rationale for their rejection. In the long run, bottom-up policy making relying on broad public participation can only be ensured if third parties are given the opportunity to
understand why the Board has decided in one way or the other. Therefore, the information published by the Board should also reveal to what extent expert opinion and community input have been considered.

VI. Transparency in Practice II: Public Participation

As noted in Section I, ICANN’s commitment to broad-based community and stakeholder engagement in its decision-making processes are embedded in its DNA; these values are enshrined in its founding principles, reiterated by theAoC, and embodied in the multitude of solicitations, channels, and opportunities made available for public comment and input. However, despite marked improvements and targeted efforts to improve ICANN’s public participation processes, there is still the perception among many ICANN stakeholder groups that their inputs are not reflected in the final decisions of the Board.

Critics point to deficits in ICANN’s capacity to truly receive, respond to, and demonstrate the manner in which it effectively and visibly incorporates the views of the broader community in its decision-making processes. Issues related to opaqueness – regarding how the staff interprets public comments, for example, or how the Board actually digests and incorporates those inputs – translate into skepticism regarding the “meaningfulness” of public contributions and the possibility of truly bottom-up approaches on a global scale.

The volume of information can also be a factor – too much information, too many comment periods, an overwhelming number of simultaneous invitations to participate. Public participation barriers can also be exacerbated by the complexity of ICANN’s organizational structure, or other “bureaucratic” hurdles, which may translate into a lack of consistency in how public inputs are structured across different bodies or a slow pace in how such inputs ultimately reach the Board.

Despite different bases for these observations, each of them center on a critical question: does ICANN’s commitment to “participatory evangelism” translate into a guise of broad stakeholder influence into ICANN decisions, rather than true impact?

Within the context of this article, we are primarily concerned with the role of transparency in facilitating or undermining public participation mechanisms and trajectories, and therefore, in how ICANN decisions are received and perceived as legitimate by its community members. As numerous scholars have noted, transparency is only one tool that can enhance the efficacy of public participation processes. In order to be effective, it must be combined with other ICANN efforts to ensure the ability of

93 Ibid., 5, 17.
95 Berkman Report (note 30), 29 f.
97 Berkman Report (note 30), 31, 32, and 34.
98 See “Active Transparency” supra Section IV.1.

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civil society to: “(i) understand and critique technical issues, (ii) (gain) sufficient knowledge on the given structures and potentials, and (iii) (develop) sufficient skills to negotiate with more powerful actors.”

In addition, as observed by the Berkman report and others, increased opportunities for “public comment, public review, and public participation should not be understood as a substitute for true accountability in the form of more direct recourse to ICANN’s decision-making processes.”

1. A Traceable Path for Public Inputs

An Information Law approach suggests that increased transparency regarding how information is handled and how inputs flow through ICANN’s organizational structure may greatly enhance the perceived credibility of ICANN decision-making processes. As described above, some of the most common complaints regarding ICANN participation processes are linked with both active and passive transparency - the ways in which public contributions are solicited, messaged and made accessible to the provision of relevant materials and documents upon which to formulate opinions and input, the policies and responsiveness with which ICANN replies to requests for information.

Despite some of the tensions at work within ICANN’s institutional identity, including the challenges of operating as a California non-profit corporation responsible for decision making on behalf of global private and public interests, ICANN community members and observers continue to support ICANN’s commitment to incorporate public inputs into Board decisions.

There are a number of opportunities along the trajectory of a public input, where procedural improvements, experimentation, and increased transparency could enhance the legitimacy of public participation mechanisms. An initial survey of emerging forms of public participation mechanisms and new governance models, including EU rule-making processes or the US Open Government Initiative, or Wikimedia’s open strategic planning exercise, provide useful comparisons to draw upon, particularly with regard to how to reflect, make visible, and respond to public inputs.

This section evaluates transparency considerations along the “lifecycle” of a public input. We have categorized the process in terms of general zones:

The Call for Public Inputs
**Clarity of structure and input process:** What are the channels and processes for public input into this particular decision? Are they clear, accessible, available to individual users? How and when did the call for public comments take place?

**Relevant Information and Data:** How much information is available to the public regarding the decision in question? Is it presented in a timely way (with enough opportunity to digest the information and respond)? Do opportunities for education and learning about the particular decision exist? Are translations available?

**Consistency:** Does there appear to be a consistent methodology for how public input is solicited and through what channels? Is there a consistent protocol regarding what kinds of decisions might require public input, and at what stage in the decision-making process?

**Volume and Timing:** How many calls for comments might be occurring simultaneously? In this particular case, were there competing opportunities for input? Were there other important decisions occurring that requested public comment?

**Differentiation:** Where possible, are different categories of policy or other decisions noted and communicated? Are there standards for adjusting the timetable or perceived hierarchies of such decisions accordingly?  

**Synthesis and Communication**

**Summarization and the Role of the Staff:** Once public comments periods are closed, how are they processed, summarized, and organized internally? Is there a consistent practice, methodology, or timetable? Is this evident to external participants? Does it vary across different types of decisions? (Should it?)

**The Response of the Board**

**Input to the Board:** Is it evident that public inputs made their way to the Board decision-making process? Is there a sense that the Board responded to, took into consideration, or otherwise considered the information in the context of its decision making?

In the first zone, in terms of eliciting public input, ICANN has made a number of improvements related to decreasing information-based barriers. Specifically, ICANN has reduced linguistic hurdles by providing more frequent and timely translations of key documents. Overall accessibility has been improved by streamlining remote participation options for both public forums and other meetings via chat rooms and live audio feeds and by offering distance learning regarding key ICANN policy initiatives. ICANN has also sought to diversify its stakeholder base by developing a fellowship program

and soliciting inputs from stakeholders from under-represented areas of the world.

However, procedural simplifications and clarifications (where possible and appropriate) could greatly improve how the public interacts with ICANN. The development of standards and processes related to the structure and timing of public comments periods would provide for consistency of practice and therefore of expectations for potential contributors. Where possible, coordination regarding timing of various comments periods on behalf of ICANN staff, in consultation with key stakeholders, could respond to issues related to volume. Differentiating and prioritizing...
of the various types of decisions that ICANN is grappling with could also help inform stakeholder engagement. Dialogue among different stakeholders could also be improved across different constituent bodies and among individuals within the context of various public comments periods and fora. Threaded comment periods and other online mechanisms could play a role in engaging community members with one another, which may in turn inform their opinion or understanding of a key policy decision as it makes its way to the Board.108

Consistent standards, templates and other information-based transparency mechanisms may also lead to improvements in the second zone, regarding the role of the ICANN staff in aggregating, summarizing, and responding to comments. While there can be no one-size-fits-all methodology for how to approach or weigh public inputs, a mapping of general approaches could address concerns that public inputs are not reflected in final summaries. Enhanced traceability and visibility of comments where they are reflected in summaries might also help stakeholders better understand the impact of their input.109 Continuing experimentation in this area might also surface new opportunities to engage the community (crowd) in helping sift, prioritize, respond to, and interpret comments, and may in turn lessen concerns regarding the role or influence of the staff in interpreting public inputs. Again, public sector models, including, for example, the US governments online participation forums, allow participants to vote on, help categorize, rank, and score the votes that may relate to a specific issue or policy issue.110

In the third zone, enhancing transparency in terms of how public inputs are utilized in the Board decision-making processes may also strengthen the legitimacy of ICANN’s decision-making mechanisms. As observed and documented by both the Berkman report and the comments to the ATRT, ICANN is often plagued by the perception that, despite the multitude of mechanisms and opportunities to solicit feedback from the community, such opinions are often not reflected in the final decisions of the Board. As noted in open innovation literature and other fora, such transparency need not solely demonstrate support for a certain view or opinion. Rather, the process itself is often legitimized if participants feel that they have been fairly heard.111 Indeed, studies within the dispute resolution field suggest that when community members can recognize that their interests have been thoughtfully considered, they are generally more satisfied, regardless of the ultimate outcome.112

2. A Coherent Theory of Public Participation

In addition to the organizational and procedural issues that may play a role in how public inputs factor into Board decision making, it is also important to consider what the ultimate goals for such inputs are, as those objectives shape stakeholder expectations and the institutional culture around how such expectations are met. Observers note possible tensions at work between a theory of public participation that

108 See ibid., 29 ff., 37 ff., 39 ff.

109 ICANN has experimented with and trialed a variety of innovative solutions to issues regarding the opacity of the summarization process with regard to public comments. For example, in the context of the new gTLD program, amendments to the Draft Applicant Handbook, summary/analysis of public comments where developed related to the key sections of the report. See the Berkman new gTLD casestudy for additional information.


enable stakeholders to observe, in a timely, transparent, and easily accessible way, the
details and processes that factor into a decision, and one that is more focused on the
ability of the public to “affect, in a meaningful fashion” that decision. While
ICANN must not necessarily resolve these theories in the context of its public
participation processes (and indeed, one may have higher priority than the other
depending on the context, timetable, and nature of a particular decision), it should be
aware of the different expectations that both respond to. Such theories also inform the
institutional culture within which public participation processes occur. To that end, the
potential process improvements and other procedural experiments outlined in the
previous section can only have an impact if they are implemented within a culture of
transparency and openness and embraced by stakeholders, ICANN staff, and ICANN
Board members.

VII. Conclusions

An Information Law analysis provides a unique lens through which to view the central
role of transparency in shaping ICANN’s decision-making processes, and, in particular,
its approach to public participation and Board governance. The normative standards,
normative policies, and actual practices of ICANN’s information-related activities, as
demonstrated by this analysis, have direct bearing on stakeholder perceptions of the
efficacy of its transparency, public participation, and accountability processes, and
therefore on the legitimacy of its decisions.

In its capacity as an information-handling entity, ICANN can (and is indeed in the
process of) making improvements that ideally will enable stakeholders to understand
and visualize where their inputs (via public participation channels) ultimately shape or
factor into Board decisions. Improving the decision making of ICANN requires
tailor-made solutions that take into account the specific framework of ICANN and its
responsibility towards the global Internet community. From an Information Law
perspective, the acceptance of ICANN’s decisions could be improved by increasing the
transparency of the decision making of its Board of Directors and the visibility,
accessibility, and impact of its public participation processes.

113 Palfrey (note 2), 15.