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ACCOUNTABILITY IN INTERNET GOVERNANCE

Rolf H. Weber

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ACCOUNTABILITY IN INTERNET GOVERNANCE

Rolf H. Weber*

Internet governance and Internet-related decision-making processes are gaining importance due to the increased use of new technological possibilities. Since a fundamental change of the present self-regulatory regime with ICANN as main organizational body is not likely to be realized in the near future, means of improvement of the present mechanisms need to be tackled. A key issue is accountability, apart from transparency. Accountability is the assumption of responsibility for actions, decisions, and policies within the scope of the designated role.

So far, accountability, helping to improve the governance regime of ICANN in order to enhance its legitimacy, has become a discussion topic within ICANN and a certain progress in its implementation can be observed. A further enhancement of accountability in Internet governance, however, is needed: On the organizational level, the introduction of specific standards designing accountability requirements should be introduced. Information has to be made more easily available to accountability-holders. Furthermore, sanctions attaching costs to the failure to meet the standards are worthwhile to consider in order to give respective incentives to comply with accountability standards.

I. INTRODUCTION

The Internet is playing a role of increasing importance in both private and business life, it has become the main platform for information exchanges and the driver for improved communications. Therefore, not surprisingly, Internet governance and participation in Internet related decision-making processes have emerged as research topics.¹

The heterogeneity of Internet users originating from different local, regional and global zones – considering anyone can become part of the network – leads to very different conceptions on how the Internet could be organized adequately.² Indeed, commensurate mechanisms should lead to increased integration of netizens and also require a certain level of transparency and accountability within the Internet legal framework.³ Since a transparent methodology for rule-

* For valuable comments and inputs I would like to thank my research assistants lic. iur. Mirina Grosz and lic. iur. Romana Weber.

¹ An excellent overview of the Internet governance research topics on the basis of a mapping scheme is given by Don MacLean, *Herding Schrödinger's Cats: Some Conceptual Tools for Thinking about Internet Governance* (Background Paper for the ITU Workshop on Internet Governance, Geneva, 26-27 February 2004), available at <http://www.itu.int/osg/spu/forum/intgov04/contributions/itu-workshop-feb-04-internet-governance-background.pdf> (last visited May 1, 2009); during the last few months, books about Internet governance spring up like mushrooms, see, e.g., SLAVKA ANTONOVA, *POWERSCAPE OF INTERNET GOVERNANCE, HOW WAS GLOBAL MULTISTAKEHOLDERISM INVENTED IN ICANN?* (2008); ELECTRONIC CONSTITUTION – SOCIAL, CULTURAL AND POLITICAL IMPLICATIONS (Francesco Amoretti ed., 2009).

² JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 32 (2008).

³ Rolf H. Weber & Romana Weber, *Inclusion of the Civil Society in the Governance of the Internet, Can Lessons be Drawn from the Environmental Legal Framework?*, 1 *COMPUTER LAW REVIEW INTERNATIONAL (CRI)* 9 (2009); the same reasoning also applies to other international organizations, e.g. to the NATO and to the OSCE, see Peter Mayer, *Civil Society Participation in International Security Organizations: The Cases of the NATO and the OSCE*, in *CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE* 116, 123 (Jens Steffek, Claudia Kissling & Patrizia Nanz eds., 2008).

making processes based on revisable procedures reduces mistrust and has a legitimizing effect, the respective efforts should be a persistent objective of any governance mechanism.⁴

As far as the organizational framework of the Internet is concerned, the present “system” is mainly designed by private bodies and organizations, i.e. a self-regulatory system applies in reality. Thereby, the key player is the Internet Corporation for Assigned Names und Numbers (ICANN), being in place since November 1998. Advantages and disadvantages of this kind of self-regulation as well as strengths and weaknesses of ICANN have already been widely discussed.⁵ Since a fundamental change of the present system cannot be expected in the near future, this contribution shall shed particular light on possible means of improvement. Insofar, many issues are at stake; subsequently, accountability is specifically addressed. Obviously, other important topics also merit attention and have been discussed in detail by the author, such as the establishment of transparency, being closely related to accountability,⁶ the realization of structures, implementing legitimacy in Internet governance,⁷ and the fulfilment of public participation requirements.⁸ Accordingly, notwithstanding the fact that the ICANN administration also needs to become more transparent and that the rulemaking procedure must improve due process,⁹ ICANN’s obligations to better account for its activities are looked at hereinafter.

II. NOTION AND IMPORTANCE OF ACCOUNTABILITY

“Accountability” stems from the Latin word *accomptare* (to account), a prefixed form of *computare* (to calculate), used in the money lending system developed in Ancient Greece and Rome. Accountability is the acknowledgement and assumption of responsibility for actions, products, decisions, and policies within the scope of the designated role. Various types of accountability can be distinguished, namely moral, administrative, political, managerial, market, legal/judicial, constituency related and professional accountability.¹⁰ The key elements are political accountability binding the government, civil servants and politicians, administrative accountability addressed to civil servants and governmental commissions, market accountability requesting the services providers to act in a “customer-driven” way and constituency relations making the public agency accountable for voices expressed outside the established channels.

⁴ Viktor Mayer-Schönberger & Malte Ziewitz, *Jefferson Rebuffed: The United States and the Future of Internet Governance*, 8 COLUM. SCI. & TECH. L. REV. 188, 193 (2007); Rolf H. Weber & Mirina Grosz, *Internet Governance – From Vague Ideas to Realistic Implementation*, [2007] MEDIALEX 119, 123.

⁵ See ROLF H. WEBER, REGULATORY MODELS FOR THE ONLINE WORLD, 106-109 (2002) (with further references); Rolf H. Weber, *Internet Corporation for Assigned Names and Numbers (ICANN)*, in HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES (Christian Tietje & Alan Brouder eds., forthcoming 2009); JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM 18-27, 175-179 & 207-210 (2008) (with further references).

⁶ Rolf H. Weber, *Transparency and the governance of the Internet*, [2008] COMPUTER LAW & SECURITY REPORT 342.

⁷ Rolf H. Weber & Mirina Grosz, *Legitimate Governing of the Internet*, in SYNERGIES AND CONFLICTS IN CYBERLAW 300 (Sylvia Mercado Kierkegaard ed., 2008).

⁸ Weber & Weber, *supra* note 3, at 9-15.

⁹ WEBER, 2002, *supra* note 5, at 109.

¹⁰ See O. P. DURIVEDI & JOSEPH G. JABBRA, *Introduction: Public Service Responsibility and Accountability*, in PUBLIC SERVICE ACCOUNTABILITY 1, 5-8 (1989).

In the meantime, accountability has become an important topic in the discussion about the legitimacy of international institutions.¹¹ Due to the lack of a “global democracy” to which organizations must account, global administrative bodies are confronted with requests to overcome accountability gaps. Even non-governmental agencies are beginning to prepare and sign “accountability charters”.¹²

As mentioned, accountability is a pervasive concept, encompassing political, legal, philosophical and other aspects; each context casts a different shade on the meaning of accountability. Nevertheless, a general definition incorporating basic elements remains recognizable in the sense that accountability consists in the obligation of a person (the accountable) to another (the accountee), according to which the former must give account of, explain and justify his actions or decisions against criteria of the same kind, as well as take responsibility for any fault or damage.¹³

Accountability of Internet governing bodies is not only important for the public to oversee the organizations’ activities, but also serves the self-interest of the respective entities. A clear definition of the authority of each governing body and a justification for actions taken contributes to their respective effectiveness and credibility.¹⁴

III. ACCOUNTABILITY IN INTERNET GOVERNANCE AT PRESENT

A. Reference to Accountability in ICANN’ Documentation

Up to now, debates about accountability have particularly focused on ICANN’s role in Internet governance. ICANN used to operate based on a Memorandum of Understanding with the US Department of Commerce; this Memorandum has been replaced by the Joint Project Agreement between ICANN and the US Department of Commerce elapsing in fall 2009.¹⁵ However, it should not be overlooked that similar issues are bound to arise with regard to other Internet organizations, being often in a relation to ICANN (for example ISOC, IEFF, W3C).¹⁶ The following chart shows the organizational structure of ICANN:

¹¹ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 APSR 29 (2005).

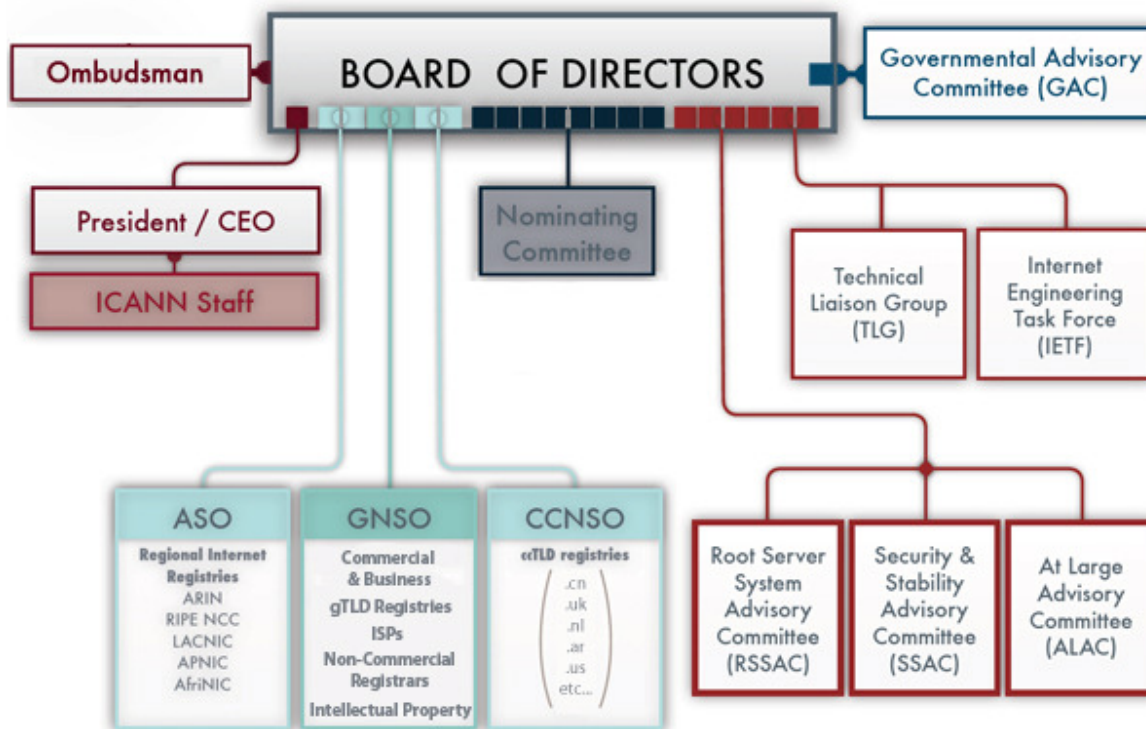
¹² See, e.g., HAPI (Human Accountability Partnership International).

¹³ Rosa María Lastra & Heba Shams, *Public Accountability in the Financial Sector*, in REGULATING FINANCIAL SERVICES AND MARKETS IN THE 21ST CENTURY 165, 167 (Eilis Ferran & Charles A. E. Goodhart eds., 2001); MALCOLM, *supra* note 5, at 262.

¹⁴ Zoë Baird, *Governing the Internet*, 81 FOREIGN AFFAIRS 15, 18 (2002).

¹⁵ Joint Project Agreement between the US Department of Commerce and the Internet Corporation for Assigned Names and Numbers (Sept. 29, 2006), http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm. See Weber, 2009, *supra* note 5; see also Erich Schweighofer, *A Review of the Uniform Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers (ICANN)*, 6 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 91, 96-97 (2001).

¹⁶ Mirina Grosz, *Internet Society (ISOC)*, in HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES (Christian Tietje & Alan Brouder eds., forthcoming 2009); Mirina Grosz, *World Wide Web Consortium (W3C)*, in HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES (Christian Tietje & Alan Brouder eds., forthcoming 2009).



Organizational Structure ICANN (available at <<http://www.icann.org/en/structure>>)

The tasks to be fulfilled by ICANN are described in the Memorandum and the subsequent Agreement, as well as ICANN's corporate organization. Nevertheless, the self-regulatory legal framework is quite meager. Topics such as the accountability of the Internet governing bodies for many years have not, or at least only vaguely, been addressed.¹⁷ Therefore, the civil society has been pushing towards more accountability, even if it cannot be overlooked that ICANN's accountability structures do not easily fit into any traditional definition.

ICANN has realized the importance of transparency and accountability provisions being at least indirectly reflected in the following documents:¹⁸

1. In Art. III Sec. 1, the Bylaws of ICANN state that the corporation "shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness". Furthermore, Art. I Sec. 2 includes several objectives such as "remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness" (no. 10).¹⁹

¹⁷ See also Weber, *supra* note 6, at 347.

¹⁸ See also ICANN, FINAL MANAGEMENT OPERATING PRINCIPLES, ACCOUNTABILITY & TRANSPARENCY, FRAMEWORK AND PRINCIPLES (Jan. 2008), available at <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf> (last visited May 1, 2009); ICANN, ANNUAL REPORT 2006-2007 6, 34-35, available at <http://www.icann.org/en/annualreport/annual-report-2006-2007.pdf> (last visited May 1, 2009); ICANN, ANNUAL REPORT 2008 106-127, available at <http://www.icann.org/en/annualreport/annual-report-2008-en.pdf> (last visited May 1, 2009).

¹⁹ Bylaws for Internet Corporation for Assigned Names and Numbers (Feb. 15, 2008), available at <http://www.icann.org/general/bylaws.htm>. See also Erich Schweighofer, *Role and Perspectives of ICANN*, in

2. The new Joint Project Agreement with the US Department of Commerce contains the following provision (no. 2): “ICANN shall continue to develop, test, and improve processes and procedures to encourage improved transparency, accessibility, efficiency and timeliness in the consideration and adoption of policies ...”.²⁰
3. In the Annual Report of 2005-2006, ICANN describes the transparency and accountability principles as follows: “There have been changes to the website, but it is clear that the site needs substantial rework, concentrating on building a content management system and information architecture”.²¹
4. The President’s Strategy Committee (PSC) paper “Improving Institutional Confidence in ICANN” names ICANN’s accountability towards its multi-stakeholder community as a key area to be addressed for structural improvements. A proposal for discussion included the establishment of “additional accountability mechanisms that allow the community to request reconsideration of a decision from the Board, and, as an ultimate sanction, to remove the Board collectively and reconstitute it”.²²

Consequently, ICANN and other Internet governing bodies are in the process of improving transparency and accountability. ICANN has introduced two new mechanisms, namely:²³

1. An independent review of ICANN’s accountability and transparency principles (related to structures and practices) and
2. the execution of management operating principles for consultation of civil society enabling its members to participate in responsive procedures.

ICANN’s Management Operating Principles of January 2008, refer to “accountability” and “transparency” as the foundations that support the elements of the corporation’s operating model.²⁴

B. Relevant Accountability Types

In its own documentation, ICANN distinguishes between three types of accountability encompassing three ways of action, thereby addressing some of the major already mentioned accountability elements:²⁵

1. *Public sphere accountability* which deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly;

INTERNET GOVERNANCE AND THE INFORMATION SOCIETY 79, 85 (Wolfgang Benedek, Veronika Bauer & Matthias C. Kettemann eds., 2008).

²⁰ See Joint Project Agreement, *supra* note 15.

²¹ ANNUAL REPORT 2005-2006 27, available at <http://www.icann.org/en/annualreport/annual-report-2005-2006.pdf> (last visited May 1, 2009).

²² ICANN, IMPROVING INSTITUTIONAL CONFIDENCE IN ICANN 1, 3-4 (2008), available at <http://www.icann.org/en/psc/iic/improving-confidence-en.pdf> (last visited May 1, 2009).

²³ See also ICANN, ANNUAL REPORT 2005-2006, *supra* note 18, at 25-27.

²⁴ See ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 3.

²⁵ *Id.*, at 4; see also ICANN ANNUAL REPORT 2008, *supra* note 18, at 106 and *supra* Part II.

2. *Corporate and legal accountability* which covers ICANN's obligations under the legal system and its Bylaws;
3. *Participating community accountability* that ensures that the Board and the executive perform functions in line with the wishes and expectations of the ICANN community.

ICANN is aware of the fact that inherent tensions exist between the three types of accountability, making it necessary to establish effective navigation mechanisms allowing to carefully deal with the points of tensions:²⁶

(i) *Tensions between corporate/legal accountability and accountability to the participating community*: ICANN is accountable to the global community, however, the governing bodies are of the opinion that its unique mission does not permit "members" of the organization exerting undue influence and control over its activities, meaning that ICANN is accountable to the public at-large rather than to any specific "member" or group of "members".²⁷ Furthermore, ICANN might collaborate and not really compete with other constituents of the Internet community. In addition, board members are responsible to the community at-large for the due fulfilment of their obligations (duty of care, loyalty and prudence), not necessarily to the members or groups having elected them. Consequently, the decision-making bodies can advance views which run counter to the interests of individuals or groups as long as the interests of the whole community are met.²⁸

(ii) *Tensions between public trust accountability and corporate/legal accountability*: This tension is quite obvious in the area of information disclosure; the decision-making bodies are accountable to the public at-large, but at the same time, just as in other organizations, a director generally has a legal and fiduciary obligation to hold some types of information confidential.²⁹

These attempts towards establishing improved accountability may be considered as first steps in the realization of a new structural framework. Accessibility of information and accuracy of available data are now recognized as significant issues of good regulatory governance and have become increasingly important in public policies. The explicit reference to accountability in the Joint Agreement³⁰ makes it clear that the Internet governing bodies, and ICANN in particular, need to concentrate more on this issue.³¹ However, further progress must be made in a broader context; therefore, in view of the ongoing developments, it appears to be worthwhile to shed light on the general discussions related to accountability in regulated markets.

IV. EVALUATION OF ACCOUNTABILITY ELEMENTS

The given accountability elements related to ICANN need to be improved along the lines of the general discussion in respect of holding international organizations more accountable. Thereby, inspiration cannot only be drawn from the accountancy segment as such, but also from

²⁶ ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 5-6.

²⁷ "Membership" is not the formally correct term, since ICANN does not have members, according to Article XVII of ICANN's Bylaws, *supra* note 19, and as defined in the California Nonprofit Public Benefit Corporation Law, notwithstanding the use of the word in different ICANN documents.

²⁸ ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 5.

²⁹ ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 6.

³⁰ See Articles V.B.1. and V.C.1. Joint Agreement.

³¹ A specific issue is the financial accountability; see ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 14.

the attempts undertaken by other globally active organizations being the target of respective discussions.

A. Organization Level Aspects

As far as the “organization” of the Internet is concerned, accountability problems can arise on different levels. In terms of a democratic governance understanding, the most important elements of the decision-making processes should lie in the hands of the “body” establishing a constitutional level or international agreements, respectively, which can traditionally be traced back to the states’ citizens. In the Internet world, the term “citizens” is often translated with “netizens”. On this level, a certain democratic deficit cannot be overlooked.³² Civil society has only a restricted influence on the highest bodies of the Internet’s “organization”; furthermore, so far, possibilities for direct influence of civil society on the rule-making processes are virtually non-existent.

Going further to the roots of a voting system, the question could be asked to what extent the traditional one-person = one-vote principle is adequate in Internet governance. Other international organizations, such as the International Monetary Fund (IMF) and the World Bank, allocate votes according to the economic strength of a country in a structured process; major critics have pointed to the disadvantages of this disproportionate allocation of voting shares, putting developing countries in a worse situation and causing a moral hazard problem.³³ Therefore, a middle way between the two mentioned systems should be envisaged for realization.

Accountability is further affected by the weaknesses of transparency with respect to deliberations of the decision-making bodies in Internet governance. Obviously, secrecy provisions for statements made by individuals in established bodies of an organization play a certain role. Such secrecy clauses, however, should not be used as pretext for not revealing how decisions were made, i.e. on what grounds and with which objectives. Transparency in this sense is an important part of overall accountability.³⁴

In democratic nation States, governments typically bolster public accountability through measures of instructional checks and balances in which certain branches or agencies of the government are empowered to oversee and sanction others. No such “horizontal” mechanism exists in relation to Internet governance. In particular, review bodies are not available and traditional control does not exist in respect of “governmental” decisions by the highest bodies of the Internet.³⁵ Furthermore, virtually no judicial review is given in Internet governance matters; governance rules are therefore not accountable to judges.³⁶

Finally, no strict structures have been established on the staff level. Due to the weak structuring of the “organization”, the staff members’ independency is relatively large;

³² See Weber & Grosz, *supra* note 4, at 133-134 with further references.

³³ Alnoor Ebrahim & Steve Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* 13-14 (John F. Kennedy School of Government, Harvard University, Working Paper No. RWP07-060, December 2007), available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-060> (last visited May 1, 2009).

³⁴ See also ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, at 9-11.

³⁵ Ebrahim & Herz, *supra* note 33, at 16 (related to the World Bank Group).

³⁶ See generally Alan Page, *Regulating the Regulator – A Lawyer’s Perspective on Accountability and Control*, in REGULATING FINANCIAL SERVICES AND MARKETS IN THE 21ST CENTURY 127, 144-145 (Eilis Ferran & Charles A. E. Goodhart eds., 2001).

furthermore, many volunteers are involved which are not tied into specific organizational structures. In addition, on the staff level, the knowledge provided is mainly of a technocratic nature due to the emphasis laid on technical skills and experience; therefore, the main focus of the staff is not directed towards cooperation with the citizen groups. In other words, the staff does not have incentives to spend scarce time and resources on developing means of downward accountability to the netizens. For obvious reasons, this concept does not meet the normal accountability criteria, even if the degree of efficiency achieved instead may be quite high.³⁷

B. Project Level Aspects

The technological changes and business needs in the use of the Internet require substantial project work to be performed by the Internet governing bodies. Many working groups exist, each of them developing techniques and technological models.

In principle, it would be possible to design specific information disclosure or other safeguard policies, which could contribute to public information on such developments and thereby increase accountability.³⁸ However, such a compliance regime does not exist for the time being. For example, the board of ICANN has not yet established quality assurance bodies addressing the manifold aspects of accountability. Insofar, it is quite difficult for civil society to evaluate conduct (and misconduct) of the project working groups and to hold the respective bodies to account.

An additional problem consists in the fact that technical expertise does not seem to be asked for within the procedural framework of ICANN. Correspondingly, civil society is playing a role in the context of the Internet Governance Forum (IGF) rather than within ICANN's activities. Insofar, cooperation between the institutionalized bodies and the civil society is not encouraged and also not seen as a valuable option, instead perceived as investments of time and capacity.³⁹

C. Policy Level Aspects

The policies chosen by the competent bodies of the Internet have a major input on the future of infrastructure networks. Therefore, such policies should be checked against the needs and wishes of the netizens. Practically, this objective could be achieved through feedback mechanisms which are designed to play an important role also regarding accountability. Policy processes should be consultative in the sense that civil society is invited to comment policy proposals.⁴⁰ In substance, mainly the respective processes need to be improved accordingly, not necessarily the outcomes.⁴¹

A first possibility to observe the feedback approach would consist in the distribution of iterative drafts of policy provisions for comments by civil society prior to their release. Since the Internet allows responding in a broad variety of ways, comments should be enabled from many different sources in various regions of the world. According to its own documentation, the

³⁷ Ebrahim & Herz, *supra* note 33, at 5-8 (generally to international financial institutions).

³⁸ *Id.*, at 9-10 & 18-27.

³⁹ See also Weber & Weber, *supra* note 3, at 9.

⁴⁰ Ebrahim & Herz, *supra* note 33, at 11.

⁴¹ See also Charles A. E. Goodhart, *Regulating the Regulator – An Economist's Perspective on Accountability and Control*, in REGULATING FINANCIAL SERVICES AND MARKETS IN THE 21ST CENTURY 151, 162-163 (Eilis Ferran & Charles A. E. Goodhart eds., 2001).

board of ICANN is indeed asked to look for comments from civil society: Art. I Sec. 2 of the Bylaws provides for consultation processes in order to achieve the aim of “seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the internet at all levels of policy development and decision-making” (no. 4) as well as “employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process” (no. 7).

Another mechanism would consist in the publication of a matrix which compiles all comments and explains how each input was addressed in the policy review, or why it was not approved of. Thereby, civil society would become aware of their input’s potential effect on the reasoning of the competent bodies in accepting or not accepting comments. Such an approach would establish a high level of accountability.

V. APPROACHES FOR IMPROVING ACCOUNTABILITY

As mentioned,⁴² ICANN and other Internet governing bodies have become aware of the need to shed light on accountability issues and to deepen the question of to what extent their accountability in respect of exercised activities could be ameliorated and their constituents, particularly the netizens, be motivated to enhance their participation in the manifold decision-making processes. Generally, any form of accountability is based on the assumption that objectives and standards exist to which an action or decision may be assessed.⁴³ Such improved accountability, be it *ex ante* (a priori), be it *ex post* (a posteriori),⁴⁴ would also help to overcome the intensively discussed problem of democratic legitimacy of Internet governing bodies and to increase the effectiveness of activities. Thereby, experiences made in other market segments should be taken into account, for example more transparent structures need to be introduced on the organizational level, more cooperative technical expertise is needed on the policy level, and more extended inclusion of all the involved “market players” seems desirable.⁴⁵

A. Extended Consultation with Civil Society

In democratic nation States, governments typically bolster public accountability through institutional checks and balances based on transparent information; supervisory authorities have the capacity to oversee certain activities which have been undertaken by lower-ranked bodies and to sanction misleading activities.⁴⁶

In the field of the Internet, according procedures do not yet exist. There is no body with the power to oversee the activities of other bodies. In order to avoid movements into undesired directions, new developments should be examined in advance and consultation processes should be put into effect to help streamline the establishment and implementation of policies. Consultation with civil society allows to address potential disputes at an early stage and to look for solutions in due time.⁴⁷

⁴² See *supra* Part III.

⁴³ Lastra & Shams, *supra* note 13, at 168.

⁴⁴ For further details, see *id.*, at 169-170.

⁴⁵ See *supra* Part IV.

⁴⁶ See generally Grant & Keohane, *supra* note 11, at 29-33.

⁴⁷ Ebrahim & Herz, *supra* note 33, at 23.

The design of consultation processes depends on the matters involved and on the availability of active netizens' groups. However, netizens should not only be consulted in the preparation phase of projects, but also be informed after their launch. Feedback mechanisms in reviewing processes need to be consistently utilized which would also allow the participants in the process to understand how their insights and expertise have influenced the policy outcomes.⁴⁸ Final decisions of the governing bodies, together with the considerations that led to them, are to be published. Only in an accordant framework can the public exercise a certain control over the decision-making process. Indeed, by presenting the results of the negotiations, communication and dialogue within civil society would be enhanced and facilitated.⁴⁹

Consultation processes require the disclosure of information. Concerns of civil society regarding accountability, in particular at the project level, usually address transparency issues.⁵⁰ Several means can be considered in order to tackle the lack of transparency.⁵¹ In the meantime, ICANN has realized the importance of transparency and has initiated certain measures to improve the situation.⁵² For example, according to the framework of ICANN's Documentary Information Disclosure Policy (DIDP), ICANN makes information concerning its operational activities available on its website, unless there is a compelling reason for confidentiality. Furthermore, ICANN responds, to the extent feasible, within thirty days to information requests from the public.⁵³

B. Improved Inclusion of Civil Society

Making activities and achieved results accountable to the "public" is important in respect of participation of civil society.⁵⁴ The Internet governing bodies can only be held to account if their activities are visible and subject to evaluation. Therefore, accountability should also extend to the monitoring stages of a project's realization and empower the development of effectiveness through citizen participation.⁵⁵

In light of the technical improvements allowing large groups of netizens to access debates synchronously,⁵⁶ different kinds of capacities need to be made available in order to meaningfully improve participation in a decision-making process, namely (i) the ability to understand and critique technical issues, (ii) sufficient knowledge on the given structures and potentials, and (iii) the skills necessary to negotiate with more powerful actors.⁵⁷ Therefore, respective assistance to civil society has to be provided by the competent body. Either States could inform their citizens through channels already in use for other (domestic) information, or it could be the task

⁴⁸ See *id.*, at 25-26; Graham Saul, *Transparency and Accountability in International Financial Institutions*, in *THE RIGHT TO KNOW, THE RIGHT TO LIVE: ACCESS TO INFORMATION AND SOCIO-ECONOMIC JUSTICE* 127, 134 (Richard Calland & Alison Tilley eds., 2002).

⁴⁹ Weber & Weber, *supra* note 3, at 15.

⁵⁰ See generally Rolf H. Weber, *The Enhancement of Transparency in Internet Governance*, in *CYBERLAW, SECURITY & PRIVACY* 312, 314-316 (Sylvia Mercado Kierkegaard ed., 2007).

⁵¹ Transparency is dealt with in the same report of ICANN as accountability; see ICANN, *MANAGEMENT OPERATING PRINCIPLES*, *supra* note 18,

⁵² To the aspects of transparency, see Weber, *supra* note 6, at 346-348.

⁵³ See also ICANN, *MANAGEMENT OPERATING PRINCIPLES*, *supra* note 18, at 9-11.

⁵⁴ See also *id.*, at 20-24.

⁵⁵ Saul, *supra* note 48, at 5.

⁵⁶ MALCOLM, *supra* note 5, at 277-278; see also ZITTRAIN, *supra* note 2, at 162-163.

⁵⁷ Ebrahim & Herz, *supra* note 33, at 26.

of an internationally active organization to establish contact points for interested persons. The first method would have the advantage that the governments are able to inform their citizens in their own language as opposed to an international organization, which would most likely publish information only in a few languages, as extensive translations would be too excessive to manage. As a consequence, the exclusion of certain groups could not be avoided.

If the participatory processes are considered to be insufficient or if concerns and comments by the public have not been adequately addressed by the competent Internet bodies, civil society should also be able to get redress. Such avenues for redress could help to facilitate the implementation of projects at a later stage.⁵⁸

According to its Management Operating Principles on Accountability and Transparency Frameworks and Principles, ICANN aims at maximizing the ease of participation in any consultation by:⁵⁹

1. Providing information on upcoming issues as far in advance as possible to give the Internet community time to respond;
2. Maintaining a calendar of current consultations and, where practicable, forthcoming consultations;
3. Using online forums as the basic mechanism for conducting consultation;
4. Providing sufficient context and background material to enable participants to understand the issues on which they are being asked to comment;
5. Making clear the purpose of the consultation and the way in which comments will be used;
6. Using developments in technology to enhance the consultation process;
7. Maintaining a public participation site that encourages the community to discuss particular issues ahead of time and to clarify arguments and positions early on.

A specific approach adopted from national-democratic frameworks consists in the implementation of direct elections of (a part of) ICANN's board of directors. Generally, direct elections are seen as a mechanism to reduce the accountability deficit and the legitimacy problem. After strong political pressure in the aftermath of ICANN's incorporation and its assumption of the functions related to the Domain Name System, ICANN decided to have five out of nine user representatives directly elected by the Internet community. In theory, this proposal looked very promising, however, in practice the project failed: Of the estimated 375 million Internet users at the time, less than 0,01% actually voted. In light of this quite negative experience ICANN decided to abandon the idea of direct elections in 2002 and closed the experiment.⁶⁰

However, it may be questionable whether the termination of the experiment was in fact the right decision or whether other means encouraging the public to vote could have been found, enabling proper elections and therewith actually contributing to accountability enhancement.

⁵⁸ *Id.*, at 27 (referring to "social accountability").

⁵⁹ ICANN, MANAGEMENT OPERATING PRINCIPLES, *supra* note 18, 25-26.

⁶⁰ For further details, see Kees De Vey Mestdagh & Rudolf W. Rijgersberg, *Rethinking Accountability in Cyberspace: A New Perspective on ICANN*, 21 INTERNATIONAL REVIEW OF LAW COMPUTERS & TECHNOLOGY 27, 29 (2007).

Information about the possibility to vote could have been disseminated through the Internet itself, but also through other channels such as newspapers, radio and television. Therewith, a broader public might have been approached. If individuals only use the Internet for specific purposes, or very infrequently, they most probably do not visit ICANN's webpage and therefore may not have known about the elections. However, these individuals might still be interested in the subject and likely to vote if they were informed of the respective possibility.

C. Intergovernmental Supervision

Another possibility to increase the accountability of the Internet governing bodies and to tackle the apparent legitimacy problem consists in the introduction of some kind of intergovernmental supervision (treaty-related model of governance). Thereby, in theory, organizations such as ICANN would become accountable to the international community.⁶¹ A cluster of proposals has been presented by the UN Working Group on Internet Governance (WGIG); the roots of this type of proposal can be seen in the concern regarding the (allegedly unilateral) US power in the Internet field. Furthermore, members of civil society believe that the internationalization of Internet governance is a first step in overcoming the digital divide.⁶²

The aspect of an intergovernmental supervision over ICANN has been a hotly debated topic during the UN World Summit on the Information Society (WSIS) in November 2005 in Tunis.⁶³ Pressure to internationalize ICANN has come from countries such as Russia, China and Brazil; nevertheless, at the end of the summit an agreement was reached not to fundamentally change the status quo.

However, a discussion body was established, namely the Internet Governance Forum (IGF),⁶⁴ which has the objective to collect the voices of civil society and to bring forward proposals for the improvement of Internet governance.⁶⁵ Participatory processes and regular, democratic elections enhance accountability within the IGF.⁶⁶ Though, certain limitations to the mechanisms of the IGF can be noticed. First, reports should be better prepared and contributions synthesized in order to give the public the chance to understand the content of consultations. Second, documents and reasons leading to a particular decision should be provided to the public in more detail. Third, ways for the public to object to decisions of the Secretariat or Advisory Group which are not in accord with the consensus of the plenary body need to be established.⁶⁷

The Secretariat of the IGF should also enhance transparency concerning its activities in order to be more accountable. The, up to now, very limited transparency combined with the appointment of the Secretariat solely by the UN Secretary-General restricts the possibilities of netizens to oversee the actions of the Secretariat.⁶⁸ The installation of internal hierarchies within the IGF, introducing a structure for accountability, would be desirable and would improve

⁶¹ See De Vey Mestdagh & Rijgersberg, *supra* note 60, at 29.

⁶² See also ROLF H. WEBER & VALÉRIE MENOUD, *THE INFORMATION SOCIETY AND THE DIGITAL DIVIDE* 3-20 (2008).

⁶³ De Vey Mestdagh & Rijgersberg, *supra* note 60, at 29.

⁶⁴ For the establishment process of the IGF, see Chengetai Masango, *The Internet Governance Forum: its Development, Function and Future*, in *INTERNET GOVERNANCE AND THE INFORMATION SOCIETY* 63 (Wolfgang Benedek, Veronika Bauer & Matthias C. Kettemann eds., 2008).

⁶⁵ Weber & Grosz, *supra* note 4, at 124-127.

⁶⁶ MALCOLM, *supra* note 5, at 498.

⁶⁷ *Id.*, at 498-499.

⁶⁸ *Id.*, at 451-452.

today's oversight by the Secretary-General.⁶⁹ Accountability can be provided for best if independence between the decision-making body and the body reviewing its decisions is guaranteed.⁷⁰

Intergovernmental supervision has to be distinguished from democratic supervision processes, which were originally designed to avoid governmental power abuse by letting the public participate in policy matters. However, intergovernmental supervision does not encompass civil society, but rather state officials speaking on behalf of international organizations, since, regularly, these state officials are not elected by the community, but by the concerned government. Looking at this fact, such international supervision of ICANN would not enhance participation of civil society in Internet governance matters.⁷¹

D. Market-Oriented Accountability

In view of the fact that normative state-oriented models of accountability cannot easily overcome the problems of the present situation, alternatives have to be taken into account. Market-oriented aspects of accountability might shed light on the specific accountability requirements of ICANN and its curious hybrid organizational structure.⁷²

Contrary to the traditional political accountability, market accountability is based on informal economic mechanisms rather than on highly formal hierarchical control types. A private enterprise principally focuses on its role with regard to the demand side; its ability to attract and maintain customers is a central indicator of its accountability to the public in the market place, i.e. the main accountability mechanism is reflected in the responsiveness to the "customer" needs; insofar, choices of the concerned market players are the key constituents for the organization.⁷³ Applying this concept to the Internet would imply that the Internet governing bodies assume the role of private enterprises, and the Internet users the role of the "customers", i.e. the demand side. Internet governing bodies should then focus on the wishes and desires of the Internet users if they want the Internet to continue being an important framework for today's communications needs, amongst others by being responsive to netizens as primarily their choices influence the smooth functioning of the Internet.

Since the needs of the market participants might not always be easily understandable and the definition of the relevant markets difficult to achieve in a global framework such as the Internet, participation of civil society and the "customer-side" in the decision-making bodies should be increased to help crystallize the different market participants' needs and interests. In particular, ICANN's At-Large Advisory Committee (ALAC) stands out as a suitable body to collect the ideas and inputs of the Internet community, since it is ALAC's primary role to consider and provide advice on the activities of ICANN, insofar as the advice relates to the interests of individual Internet users.⁷⁴ Consequently, membership in the ALAC reflects different world regions: The ALAC consists of two members selected by the Regional At-Large Organizations (RALO's), which are established for the different geographic regions, and five members selected by the Nominating Committee originating from the five geographic regions.

⁶⁹ *Id.*, at 499.

⁷⁰ *Id.*, at 502.

⁷¹ De Vey Mestdagh & Rijgersberg, *supra* note 60, at 29.

⁷² *Id.*, at 32.

⁷³ *Id.*, at 32.

⁷⁴ See Article XI, Section 2 (4.a) of ICANN's Bylaws, *supra* note 19.

Indeed, the Internet users are also represented in the Nominating Committee, and in this position they have a say in the appointment of ICANN's directors and of the Country Code Name Supporting Organization's (CCNSO) Council responsible for developing ccTLD policies. Furthermore, they are represented by the voting members in the Generic Names Supporting Organization (GNSO).⁷⁵ Insofar, the Internet users influence the appointment of the majority of ICANN's directors and the development of the organization's policies.⁷⁶ ICANN's organizational structures also include State representatives in addition to Internet users, thereby effectively implementing a multi-stakeholder approach. Both representative categories are domain name consumers and, thus, affected by ICANN's policies. For these reasons, ICANN's market-oriented accountability mechanisms attract positive attention;⁷⁷ nevertheless, the task remains to make the different procedural aspects fully transparent and to encompass them into an accountability framework.

The market-oriented accountability model could also benefit from the potential availability of alternative root server systems and competing TLD provisions, however, rules need to be established in this context which avoid the occurrence of market abuses if a few providers of the technical infrastructure are controlling access to the network without regard to the basic "checks and balances" principles. Consequently, even if the traditional state based mechanisms cannot be the only means to ensure accountability for ICANN's governance, market "regulations" alone might not render the needs of political accountability superfluous, as for example financial and capital markets have shown during the last few years.

VI. OUTLOOK

Accountability is regularly called for to improve the governance regimes of organizations in the field of the Internet in terms of enhancing their legitimacy. As the pre-eminent organization in the field of Internet governance, accountability has been principally addressed and developed within ICANN. However, the difficulties in establishing accountability principles as part of an adequate Internet governance model for the virtual sphere should not be underestimated, as manifold aspects of this contribution have shown. Improvements of the accountability elements are possible, but the details need thorough discussions.

One difficulty that needs to be tackled particularly in the context of accountability as a seemingly uniform standard arises from the vast and transnational nature of the Internet, struggling with the same complexities in the virtual cyberspace as already known in the physical world. This heterogeneity is reflected in the existence of various organizations addressing different subject areas. Additionally, the predominant multi-stakeholder governance approaches highlight the diverse constitution of the accountees, or in terms of market-oriented accountability, the "customers", with different interests and different needs that all play a role when framing accountability. As a consequence, accountability mechanisms should also reflect the different particularities in the various segments of civil society on a case-by-case basis.

⁷⁵ See Article X Section 3(1) and Section 5 of ICANN's Bylaws, *supra* note 19.

⁷⁶ See also De Vey Mestdagh & Rijgersberg, *supra* note 60, at 33-34.

⁷⁷ See *id.*, at 34.

For the enhancement of accountability in Internet governance, it is helpful to frame accountability as including the following three elements:⁷⁸

1. Standards need to be introduced which hold governing bodies better accountable; at least on the organizational level, such standards help to improve accountability.⁷⁹
2. Information should be made more easily available to accountability-holders, enabling them to apply the standards in question to the performance of those who are held to account;⁸⁰ in order to make information flows more active than passive (seen from a recipient's point of view) consultation procedures are to be established.⁸¹
3. Accountability-holders must be able to impose some sort of sanction, thus attaching costs to the failure to meet the standards; such kind of "sanctioning" is only possible if adequate participation schemes are realized through direct voting channels⁸² and indirect representation schemes.⁸³

In particular the establishment of standards in terms of specific values that lay the foundation of accountability could provide for a viable way forward. Similarly to a Magna Charta or a constitutional approach, such standards could help implement a legitimizing structure and a guideline for Internet governance in general. Furthermore, they would be suitable to entail significant self-constraints for the policy-making institutions, and, hence, move towards substantiating the realistic implementation of accountability.⁸⁴ Nevertheless, the strengthening of the legal framework by a treaty-related model of governance, encompassing some kind of intergovernmental supervision, would have supplemental merits, since pressure on privately introduced structures usually improves compliance by the "market players".⁸⁵ Consequently, private initiatives are to be complemented by functional surveillance, for example under the auspices of the Internet Governance Forum (IGF) or a newly established intergovernmental body.

⁷⁸ See Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, in LEGITIMACY IN INTERNATIONAL LAW 25, 51 (Rüdiger Wolfrum & Volker Röben eds., 2008).

⁷⁹ See *supra* Part IV.A.

⁸⁰ See *supra* Part IV.B.

⁸¹ See *supra* Part V.A.

⁸² The application of the voting procedures has been given up at a too early stage (see *supra* Part V.B).

⁸³ See *supra* Part IV.C and V.B.

⁸⁴ See also Weber & Grosz, *supra* note 4, at 128.

⁸⁵ See *supra* Part V.C.