

# ICANN, Legitimacy, and the Public Voice: Making Global Participation and Representation Work

## Report of the NGO and Academic ICANN Study

August 2001

The **NGO and Academic ICANN Study (NAIS)** is a collaboration of experts from around the world, formed to explore public participation in ICANN and the selection of At-Large Directors on ICANN's governing board. NAIS mirrors ICANN's own study effort, and was created to provide an independent examination, global in scope and grounded in a belief in the importance of public representation. Its members are:

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A complete version of this report is available online at

<http://www.naisproject.org>

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\* All appendices are electronically available at the NAIS web site.

# Executive Summary

## Introduction

As the Internet becomes increasingly important to people around the globe, a critical question has been raised: How can the voice of a growing community of stakeholders be appropriately included in new mechanisms for the coordination or “governance” of key Internet technical functions? This question is posed today in one such coordination body, the Internet Corporation for Assigned Names and Numbers (ICANN), which is tasked with managing aspects of the Internet’s naming system and other critical technical functions.

In 2000, ICANN completed an unprecedented global election for five “At-Large” Directors of its governing Board. ICANN is now in the midst of a major debate over the future of broad participation in its activities. That debate will be closely watched by policy makers around the world and could have profound implications for both the legitimacy of ICANN and the future of public participation in a new breed of non-governmental, global coordination bodies.

This report seeks to address key questions: Why is there a need for a public voice within ICANN? What role does and should ICANN’s At-Large Directors and Membership play in providing that voice? What lessons can be learned from the At-Large election with regard to the At-Large Membership and the structure of the ICANN Board? And what practical steps can ICANN take to establish an appropriate and effective public voice within its structure, and hence improve its legitimacy?

This report presents the findings of the NGO and Academic ICANN Study (NAIS)<sup>1</sup>, a collaboration of ten research teams from around the world. The findings reported here began with an elaborate series of studies conducted within each of ICANN’s five designated geographical regions. The methodology of these regional assessments varied based on local conditions, but included personal interviews with experts and leaders, intensive review of supporting documents and media coverage, surveys of key stakeholders, and the analysis of experienced researchers. Cross-regional comparisons were made, coupled with a conceptual investigation of ICANN’s governance structure. Our final analysis and recommendations are the product of intense consultation, deliberation and collaboration since the formation of NAIS in early 2001.

The NAIS Interim Report (June 2001) presented initial observations and explored the need for a public voice in ICANN’s activities. This Report refines those findings, and proposes a structure for ICANN that we believe will provide a longer-term answer to the question of ICANN’s legitimacy. Our approach is rooted in the creation of an inclusive Membership, with a structure to facilitate informed *participation* in ICANN’s activities, and with elections to allow for *representation* of broader interests on ICANN’s Board. In addition, we present suggestions for structural reform, constitutional constraints, and increased accountability.

## 1. The Public Voice, Legitimacy, and ICANN

### 1.1 The mission, character, and history of ICANN requires global public participation and representation for its long-term legitimacy and stability.

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<sup>1</sup> More information about NAIS and the complete Interim Report is available at <http://www.naisproject.org> or by emailing [info@naisproject.org](mailto:info@naisproject.org). A list of NAIS team members is included below.

This fundamental finding is based on the following key observations:

- *ICANN's current and potential range of purposes are not only "technical" but also have broad policy implications.*

Efforts have been made to confine the scope of ICANN's activity to technical coordination of certain naming and numbering and protocol functions. But many of ICANN's "technical" decisions—such as the creation of new top-level domains—are inextricably linked to "policy" decisions—such as intellectual property protection, competition policy, or the allocation of Internet resources. ICANN faces great pressure to address these policy issues and, by necessity, to make decisions on grounds other than technical merit.

Much here involves the future of ICANN. Its *potential* authority is largely unbounded. Policy authority over the root server system and other central Internet functions make it possible for ICANN to exert much broader control over Internet activity. To date, many of the ICANN Directors and staff have expressed little interest in doing so and have publicly disavowed such a broad scope of power. But ICANN is likely to face increasing pressure from those seeking ways to control a range of behavior online. The broader this pressure, the more sweeping the potential impact, and the greater the need for public participation and representation.

- *ICANN is a new type of organization designed to provide coordination on a global scale.* The global nature of the Internet demands new, non-national forms of organization. For many a primary purpose of ICANN is to globalize Internet coordination in a new way. Public participation is seen as a key element and a safeguard against domination by governmental or commercial interests on a national level, and as a source of input as for global interests as ICANN's functions transition away from US control.
- *While ICANN is formally organized as a private, not-for-profit corporation, its functions are largely public and global.* In its recent Internet Coordination Policy (ICP-3), ICANN itself emphasized its "public trust" functions: "It is essential that the centrally coordinated functions be performed in the public interest, not out of proprietary or otherwise self-interested motives. For this reason, ICANN was founded as a not-for-profit public benefit organization, accountable to the Internet community." ICANN is thus best viewed as a hybrid organization, having important elements in its character and mission of both a private and a public entity.
- *Global public participation has historically played a role in ICANN.* The notion that the broad community of Internet users should be represented in ICANN's own governance has been a founding—though often poorly defined—principle of ICANN. ICANN was created, in part, to provide representation to the global Internet community in Internet coordination activities and to reflect an Internet tradition of bottom-up coordination. This broad view of public participation in ICANN is part of the basic bargain of institutional legitimacy that many relied on when supporting ICANN's development.
- *Globally broad stakeholder participation and representation will be an increasingly important element of ICANN's legitimacy.* Participation and representation are widely accepted good governance values. They are based upon the idea that those who are affected by policies should participate or be represented in the policy-making process. In the context of the Internet, this requires a truly global implementation.

**1.2 To the extent possible, the entire affected Internet community—from companies in the business of providing DNS services, to domain name holders impacted by ICANN’s rules, to individual Internet users and consumers whose activities online could be shaped by ICANN’s rules—should be considered stakeholders in ICANN’s activities.**

*The notion of an impacted “public” in ICANN is broad.* Definitions of the “public” affected by ICANN vary widely, in part due to regional differences in conceptualizing the idea of “public” independent of other civil institutions. At the very least there is a continuum of interests in ICANN’s activities that, at its broadest, include all users and potential users of the Internet.

**1.3 ICANN’s existing supporting organization structures, or representation by governments, do not alone provide appropriate public participation.**

*ICANN’s internal structures are not likely to provide adequate public participation.* The three existing supporting organizations—the Address Supporting Organization (ASO), the Protocol Supporting Organization (PSO) and the Domain Names Supporting Organization (DNSO)—were originally conceived as the locus of expert technical and business input, and they vary in the degree to which the public can participate. Many feel that despite efforts to make ICANN a “bottom-up, consensus organization” with decentralized policy development, the Board and staff wield the most important influence and make decisions in a largely “top-down” fashion.

*Government is not the appropriate avenue for public participation.* While governments play a role in ICANN through the Government Advisory Committee, there are many reasons that their role is best a limited one. ICANN was conceived as a non-governmental body. Governments are viewed with skepticism as insufficient or a poor fit for Internet management where rapid change, technical expertise, and responsiveness to new social developments are needed. Traditional multilateral governmental organizations have been found lacking in this regard. ICANN in many ways represents an attempt to find alternative methods for non-government coordination.

**1.4 “At-Large” participatory structures and representation on the Board are therefore essential channels for broader stakeholder involvement and ICANN’s legitimacy.**

Based on this conceptual model, ensuring inclusive public participation and substantial Board representation should be overriding priorities for ICANN. The At-Large Membership (ALM) remains the great—and as yet unrealized—opportunity for such needed public involvement. Broadly conceived, the At-Large membership could serve a diverse set of goals including—

- global participation—a means for communication and outreach to the public;
- representation—a voice for members directly within the decision-making Board; and
- accountability and transparency—a watchdog over ICANN activities.

Developing an ALM is a necessary precondition to successful At-Large Director selection. Institutionalizing the other roles of the ALM in providing participation and accountability will have additional important benefits for establishing the global public legitimacy of ICANN.

**2. The At-Large Election: Lessons from the Regional Reports**

From its inception, ICANN recognized that some form of representation for broad public interests was needed. The creation of nine At-Large Directors—nearly half the 19-member Board—to be selected “At-Large” was a placeholder for that broader representation. But it was only a placeholder, as the exact method for selecting directors was not established at ICANN’s founding and has been a subject of great debate.

The October 2000 ICANN election for five At-Large Directors, one from each region, was unprecedented. Potential voters in the election broadly included anyone in the world with an e-mail address and postal address who completed the web registration. Over 153,000 people worldwide registered, and over 30,000 ultimately voted. Up to seven candidates were on the ballot in each region, selected by nomination or a petition-like member nomination process. Voting occurred online, through preferential balloting, and five new directors were elected to the Board.

The election has become a point of contention among those who question the need for public participation in ICANN at all and those for whom the At-Large participation was a basic premise of ICANN's existence. In many ways the 2000 election was perceived to be successful in selecting directors by a broad membership. However, the election also presents challenges for the future.

## 2.1 Common Elements

The 2000 election, though experienced regionally, was developed and implemented globally. All regional elections had core issues in common:

- *A rapidly implemented election based on multiple goals*—In early 2000 ICANN faced the need to design an election that was broadly inclusive, inexpensive to conduct, enhanced participation and legitimacy, minimized capture and fraud, and would be completed in less than a year. These goals were in tension with each other. It is certainly a major achievement that the election was designed and conducted within the timeframe allotted.
- *Technical and administrative problems*—Members and potential members experienced numerous problems with the online registration and voting system. Registration servers were unable to handle demand and some potential members could not register. Some failed to receive a PIN number after registering. Others had trouble actually voting. These problems damaged the election's credibility but many of them—such as building scalable systems to handle higher peak loads—appear possible to remedy in a future election with more time, resources, and experience.
- *Inherent limitations of online voting*—Online voting is probably the only practical way to conduct a low cost, globally inclusive election. Yet at this time there appear to be inherent problems with such voting. Voters worldwide have little experience with such systems. Experts report a tradeoff between cost and security. Without a well-developed global authentication system, there is little chance of technically preventing people from registering more than once. The combination of online registration and postal mail confirmation, while inconvenient, seemed a reasonable tradeoff for additional security.

## 2.2 Regional Distinctions and Cross-Regional Comparisons

Region-by-region analyses are provided in the NAIS Final Report and summarized separately. They provide a rich picture of both the benefits and challenges—particular to each region—of a new global election for ICANN. Major cross-regional observations of note include:

- *Outreach gap*—Communication and education are key enablers of fair elections. In most countries, and particularly in Africa and Latin America, there was little public education about the At-Large elections. In a few countries, such as Japan and Germany, intensive outreach took place. This wide differential raises concerns about the possibility of national capture of a regional election (exacerbated by potential national voting tendencies), or regional domination of elections held on a global basis. Increased and improved voter education by ICANN, taking the complexity of language into account, may mitigate this problem.
- *Voter education*—Across regions, complaints were heard about the almost complete absence of systematic outreach or voter education. Voter turnout remained extremely low relative to eligible voters, and it is unclear how informed most voters were about the issues.
- *Diversity*—In nearly every region, concern was raised about diversity in dimensions besides geography. While many acknowledge the importance of regional representation, there was also a

felt need for a new global coordination body such as ICANN to foster representation along lines other than geography.

- *Participation role*—Across regions, At-Large members sought a role beyond merely voting for Directors. Participation can involve more than casting a ballot; it can include deliberation and open exchange of ideas, allowing the public to inform and to be informed. So far, ICANN has provided no platform for integration and deliberation by the ALM.
- *General 'satisfaction and skepticism'*—Across the regions numerous election problems and challenges were encountered. But, given the rules and circumstances, the At-Large Elections were widely seen as legitimate and a successful step towards public participation within ICANN.

### 3. Conclusions and Recommendations

ICANN serves a vital global public trust. It must therefore achieve a level of legitimacy appropriate to that trust, by structuring itself to take account of the public's interest in its activities. As described above, its existing structures have not done so to date.

Our observations and analysis of the 2000 elections indicate that the At-Large Directors and the At-Large Membership (ALM), mandated at the founding of ICANN, have so far been inadequately defined and institutionalized in ICANN's framework of operations. The 2000 elections highlight many of the challenges with global membership and elections. We believe that they also indicate possibilities for meaningful involvement and representation.

We believe that incorporation of the public interest into ICANN can be achieved through the creation of an inclusive membership, resting on two overarching principles: *The public membership should be given structure*, and *the public membership should be given representation*.

- ICANN should create and support a *broad, open At-Large Membership* with low barriers to entry and a tendency towards inclusiveness.
- That Membership should be provided with a *functional, robust structure* capable of facilitating self-organization, coordination, aggregation, and articulation of the Membership's diverse views. A Secretariat and a Membership Council for the At-Large Membership could serve this purpose.
- The Membership should be *represented in ICANN's central decision-making structure*, the Board of Directors. Balance and of appropriate representation require that the Membership *directly elect at least the same number of seats* on the ICANN Board as the various Supporting Organizations in total (nine currently).

We also put forward additional proposals for structural reforms and accountability mechanisms that should be enacted in parallel with ICANN's membership structures.

#### 3.1 ICANN should constitute a broad membership open to all who complete a relatively simple registration process.

ICANN will gain requisite legitimacy from the creation of a membership that allows for substantial participation and representation by interested members of the public. Since ICANN's activities have the potential to impact all Internet users and in fact the public in general, we favor an inclusive approach to membership. We believe that membership should be open to all who express interest by completing a relatively simple registration process online combined with postal return confirmation.

Online registration and postal return appears to strike a reasonable balance between practicality, security appropriate for a narrow membership organization, and inclusiveness on a global basis. Postal return, while imperfect, provides a measure of authentication and security. While the costs of postal return are non-trivial, these are likely one-time costs for many members. Many of the problems encountered in the postal return in the 2000 election could also be avoided with greater time for registration and better planning.

**Problems with alternatives:** NAIS considered many other criteria for membership. We found major alternatives far less attractive in achieving inclusiveness and participation in a practical fashion.

For example, limiting membership to holders of domain names was one alternative considered but which ultimately fails basic tests of fairness and practicality. Interested ICANN stakeholders include many Internet users who are not necessarily domain name holders, and holders are a highly imperfect match for those directly interested in ICANN. Domain name holders as a group are dominated by parties already well-represented in the SO structure. VeriSign has estimated that over 80% of current gTLD registrants are commercially-oriented organizations—creating a membership pool that under-includes individuals and is heavily skewed towards commercial groups and organizations. Substantial practical questions remain in determining whether those who own more than one domain name get more than one vote. And capture is still possible through the registration of many names.

Similarly, NAIS rejected the use of a fee for membership. Imposing a fee raises serious equity issues, even with substantial sliding scales for poorer regions. While likely to weed out less committed members, a fee still allows the possibility for over-representation of wealthy interests or countries. NAIS is cognizant of the need to pay for membership activities, but we believe that such costs can be borne by ICANN for at least the next several years, and question the extent to which an equitable fee would raise sufficient funds without jeopardizing inclusiveness and legitimacy at this time.

### **3.2 In order to facilitate participation in ICANN's activities, the At-Large Membership should have internal structures that promote policy deliberation, coalition building and information sharing among Members.**

Legitimacy for ICANN depends on both the opportunity for and reality of meaningful participation. An At-Large Membership that lacks enabling structures is likely to lie dormant, gradually losing its coherence—described by many as a major disappointment following the 2000 elections. We therefore propose a four-part At-Large Membership (ALM) structure to facilitate participation and representation of a productive and informed membership.

- **Secretariat**, a non-partisan, staff-level position, to facilitate the flow of information and engagement of an informed Membership.
- **Membership Council**, selected by the Membership, to oversee the ALM, guide the Secretariat, and generally empower At-Large Members
- **ALM Working Committees and Groups**, formed on an *ad hoc* basis, to discover and deliberate policy positions through an extensive outreach/consultation process.
- **Local and Regional Associations**, encouraged to self-organize (or catalyzed by the Council) in order to provide global forums for discussion catering to particular language, culture, or ideological groups.

This structure is designed with the goal of limiting, to the extent possible, the negative effect that excessive intermediary structures can have on Members' ability to directly interact with ICANN's policy development structures. For that reason, the NAIS team does not propose any kind of "Policy Council" (like the Names Council for the DNSO) purporting to represent all Member interests. While there may be a need for such a structure in the future, it should be implemented only after consideration by the Membership.

### **3.3 The public voice in ICANN should be represented at the Board level through a number of At-Large Directors equal to the number of Directors chosen by the Supporting Organization.**

In order to provide the public voice with meaningful representation, At-Large Directors should balance the policy authority of the Directors chosen by Supporting Organizations. Therefore, the number of At-Large Directors should equal the number of SO Directors, even if the size of the Board should change from its current nineteen members. This balance has also been part of the Board structure since ICANN's formation and many participants have cited it as part of ICANN's basic structural balance.

Because changes to the by-laws require a two-thirds majority, this balance on the board would permit only those changes that command at least some support from both the At Large and SO Directors. In our



view, this would provide an appropriate level of “checks and balances” on the board, and would provide the At-Large with enough authority to block changes to the bylaws that might negatively impact the public voice. (While we recognize that Directors to date have seldom acted in monolithic voting blocks, we anticipate that future boards may find At-Large Directors sharing certain common perspectives inherent to their positions.) *We believe that reducing the At-Large Directors to less than one-third of the Board would seriously undermine the legitimacy of ICANN.*

### **3.4 At-Large Directors should be chosen through direct election by the At-Large Membership. Direct elections, while imperfect, are more likely to provide ICANN with global legitimacy than other proposed options.**

Properly managed, direct elections can provide high levels of representation, diversity, and accountability. Because they eliminate an intermediate layer between members and the Board, they encourage a higher level of participation than other selection mechanisms. They also help to lessen the risk of capture when compared to indirect elections, since the electorate with real decision-making power is significantly larger in size.

The creation of an At-Large Membership structure and the direct election of At-Large Directors is a model with both benefits and problems. As was discussed in the context of the 2000 election, direct elections present challenges in voter registration and education, funding, security, and capture. These shortcomings, however, are outweighed by the system's benefits—and by the problems with alternative models—especially when based on a conception of ICANN that recognizes the organization's unique mission and character.

*ICANN's legitimacy is of a fundamentally different character, and should be measured with different standards, than that of traditional governments.* ICANN makes important policy decisions, but it is not a government. It does not raise armies or jail people, though it does have the potential to make far-reaching policies about the Internet. The point of ICANN elections is to choose directors who are representative of the public's perspective to act within the important, but presumably narrow, confines of ICANN's mandate.

- *ICANN elections are legitimized by the process used.* We propose an inclusive membership for ICANN. Such openness provides the *opportunity* for participation to those who want it, and in so doing validates the public legitimacy of the process. It is this diminished barrier to public input and access that legitimizes the election as a selection process, not its ability to represent each and every stakeholder or interest group.
- *Vulnerability to fraud or capture, while real, should not be overstated.* The danger of election fraud—such as multiple registrations—is real, but not so great that it invalidates direct elections. The system of authentication by postal mail used last year provides a meaningful level of protection (additional protections are discussed below) appropriate for an organization of ICANN's character and responsibilities.

The danger of capture—through overrepresentation of particular interests or domination by nations—is real but somewhat overstated. The 2000 elections provided little evidence of corporate domination of the elections, and improved elections rules and monitoring could mitigate this fear. Nationalism remains a concern as well, but we note that “capture” may arise as little more than a vigorously sponsored effort at voter registration and participation. The response, then, to fear of capture is not less elections, but more democracy and clearer rules. Alternatives to elections appear at least as susceptible to domination by particular interest groups or nations.

- *ICANN's importance may increase, not diminish, with time.* As to the fear that public interest in ICANN will wane, leaving elections to the control of a fringe few ICANN zealots, this is a concern that can only be tested over time. We do not think this will happen because we believe that ICANN will become more, not less, relevant and visible to the public. The creation of a stable, informed membership—one that is perhaps smaller than the 2000 electorate—appears a reasonable outcome.

*Alternative models of selection.* A number of alternatives to the direct election model have been proposed by members of the ICANN community. These proposals seek to address some of the shortcomings of the direct election model, but all sacrifice critical elements of legitimacy, accountability, or security.

- *At-Large Directors selected by a “User Supporting Organization”* appears to have many different meanings to different people. To the extent it stands for the notion of reducing the number of At-Large Directors to three, it fails to provide an adequate level of representation or check on other interests. To the extent it stands for the adoption of the indirect and questionably representative elections of the other SO's, it would be a poor fit for a body meant to represent the broad public voice.
- *At-Large Directors appointed by governments.* For many reasons, as stated above, governments are not seen as the best public voice at ICANN. Governments already have input into ICANN through the GAC, and ICANN was created in many ways as an alternative to government or multilateral treaty organizations felt inappropriate for the fast-paced and often technical coordination activities.
- *At-Large Directors selected by intermediary “public interest” organizations.* It would be extremely difficult to identify the appropriate intermediary organizations to represent the public interest in selecting At-Large Directors. No single organization or set of organization appears adequate, especially on a global basis.
- *At-Large Directors selected by the ICANN Board.* While a common model for companies, for sitting Board members to select their successors would not provide the outside input and check on vested interests already represented on the Board that the At-Large Directors are intended to provide. This proposal is very unlikely to provide the comfort or legitimacy sought from an At-Large process.
- *Indirect elections.* These dramatically dampen the sense of public participation in the selection process, and therefore fail the fundamental test of providing the Internet public with a sense of participation and empowerment. Problems of fraud, authentication, and cost are not necessarily diminished, and the risk of capture within the narrower selecting group is heightened.

### **3.5 Details of the At-Large Election: Lessons from 2000 and Recommendations For the Future Election of At-Large Directors.**

***3.5a ICANN should adopt inclusive authentication mechanisms based on postal returns, while also pursuing alternative models.*** The At-Large Election's long-term viability will depend on the system's security, accuracy, and resistance to fraud. These questions all lead eventually back to the problem of authenticating users in an election with such a broad electorate. The task before ICANN is to provide reasonable protection that each person voting is a real person, and that no person can vote more than once.

**Postal return system.** Used in 2000, the postal return system was successful in some ways but problematic in others. Despite its problems, we believe electronic registration with postal return strikes the best balance among security, inclusiveness, and cost. With more lead-time and greater experience, we expect lower failure rates and greater opportunities for errors to be remedied. Reforms such as longer registration periods, better addressing of PIN letters, and opportunities to re-send lost or misplaced PINs should be adopted. A long-term membership means that many members will use the system only initially. Clearer election rules, combined with improved auditing (perhaps on a statistical basis periodically), would provide greater levels of security. Publication of membership rolls—an option to be pursued by the ALM—could further reduce fraud and boost confidence. Finally, serious member education is needed to diminish confusion.

Authentication technology is advancing rapidly, though we believe at this time none of the major alternatives provide an acceptable tradeoff in deployment or accessibility. ICANN should experiment with these systems in the next few At-Large elections, perhaps offering them as an alternative to the postal return system.

**3.5b At-Large Directors should be elected both geographically (by region) and on a global basis.**

Measures should be taken to reduce the risk of national dominance. The election of directors on a regional basis, from among voters within the region, was cited as a critical benefit of the At-Large system that guarantees a baseline of regional balance. We recommend ICANN continue to elect one Director from each region (recognizing that the number of regions may change over time.)

Many with whom we spoke also felt strongly that geography should not be the only basis for representation. The election of some directors on a global basis could have the very desirable effect of promoting organization, debate, and communities of interest across regional lines. ICANN should therefore elect the remaining At-Large Directors on a "global" basis, through a separate ballot cast at the same time for regional and global elections. In order to diminish risks of regional domination, we also recommend that no region be allowed to secure more than 25% (one under the current board makeup) of these "global" seats.

**3.5c ICANN should refine its election policies, creating more independent Election and Nominations committees and improving educational efforts surrounding preferential voting.** As it did in 2000, we recommend that ICANN continue to delegate responsibility for the development of election rules and the identification of some candidates for election to Election and Nominating Committees.

- **Election Committee.** The notion of an expert committee tasked with proposing election rules is attractive, but ICANN must make every effort to ensure the Committee's independence from the Board, as well as its transparency. Rules should be promulgated early, with at least a basic enforcement mechanism set in place. Also, ICANN should make a strong commitment to regular review of the elections and rules, to include some kind of auditing (through sampling) of the Membership rolls.
- **Nominating Committee.** The 2000 Nominating Committee was criticized for its ties to the Board and perceived biases in its nominations. We believe a Nominations Committee provides a useful way to identify strong candidates for the Board, but it must have heightened independence and sensitivity to the interests of Members. Alternatives to nomination, through a petition process with a low threshold, should continue to exist. Further, both the Committee's membership and its nominations should reflect diversity of gender, ethnicity, experience, and ideology.
- **Preferential Voting.** Despite legitimate concerns about voter confusion, the preferential voting system seems to offer a fair way to elect Directors without relying on costly and complex runoff elections. We recommend the continued use of the preferential voting system, contingent on a commitment by ICANN (and, in the future, the ALM) to undertake a significant multi-lingual outreach effort to inform voters about the voting system's operation.

**3.5d ICANN should commit to funding the Membership from its operating budget for at least the next several years, while pursuing alternative methods.** To ensure that the Membership's development continues unimpaired, we recommend that ICANN commit itself to funding the membership's full expenses out of the ICANN operating budget for a period of at least the next several years. While we recognize that this constitutes a serious budgetary obligation for ICANN, it is also an integral component of ICANN's legitimacy.

A pillar of ICANN's funding structure has been that those groups deriving financial or other benefits from ICANN's operation should shoulder the responsibility for supporting ICANN's activities. These groups indisputably benefit from a legitimate and stable ICANN. The At-Large Membership is an essential component of that legitimacy, and should be supported. We recognize that money paid by the registries and registrars to support these expenses would ultimately be passed on to the customers of those entities—namely, the community of users who purchase and hold domain names.

At-Large Membership and elections would not be cheap, but we believe that the costs of Membership and elections should be manageable. The 2000 election cost on the order of US\$ 350,000 and the largest variable costs—from the postal return system—should decrease sharply as Membership stabilizes if ICANN can institute a reasonable system for "one-time" authentication of members. Even a Membership costing US\$ 1 million (US\$ 500,000 in fixed costs, and US\$ 500,000 in variable costs—enough to register more than three times the 2000 membership), would cost less than US\$ .04 per domain name registered in ".com" alone.

Self-sustainability is a laudable long-term goal for the Membership, and should also be explored in the future. Possible options include:

- **Membership fees.** As already discussed, mandatory membership fees run afoul of principles of equity and democracy. Also, the expenses of collection and international money transfers call into question the value of this approach. At the same time, it appears that greater experience may resolve some of these issues and the ALM should continue to monitor possibilities for equitable collection of fees.
- **Government contributions.** ICANN has to date avoided government support, but many NGOs and research organizations benefit from government subsidies worldwide. There is, of course, a risk that governments might seek to use any degree of financial dependence on the part of the At-Large Membership as leverage to pursue political ends.
- **Voluntary donations.** The Membership should pursue innovative suggestions that have been made about the collection of fees on a voluntary basis as part of the domain registration process. It may be possible for the Membership to collect some, though most likely not all, of its budget from voluntary contributions by members, especially if such a contribution were made very easy.

### **3.6 ICANN should pursue other mechanisms to ensure the public's voice in ICANN.**

The ALM and At-Large Directors are only one method—though an essential one—for enhancing ICANN's legitimacy and stability. Other reforms should be pursued in parallel to the changes outlined for the ALM.

**3.6a ICANN should develop structural constraints on Board authority.** ICANN should directly confront the reasonable fear that it will venture into an even broader policy agenda than it now does. To do so, ICANN should find a way to constrain its jurisdiction in a binding fashion. The limitations currently in ICANN's bylaws do not effectively serve this purpose, both because ICANN has shown a distressing tendency to amend its bylaws casually, and because there is little public confidence in the restraints that already exist.

ICANN should therefore take steps to limit the Board's mission and powers to provide the organization with additional legitimacy:

- **Create "constitutional" limits in charter and bylaws.** ICANN should specifically enumerate the types of activities it may engage in, the scope of topics it may act on, and the principle that powers not specifically granted to the ICANN Board should devolve to the stakeholders in ICANN and the individual users of the Internet.
- **Declaration of user rights.** ICANN should adopt a charter guaranteeing individuals and organizations protection for certain basic liberties, their property, and their expectation to be treated fairly and with due process.
- **Limits on amendment power.** ICANN has already modified its bylaws nine times. ICANN should adopt a much-heightened amendment process—requiring ratification by a supermajority of SOs and the ALM—for those charter and bylaws provisions governing the scope of its authority and the rights of users.

**3.6b ICANN should create additional accountability mechanisms.** Accountability promotes responsiveness by enabling stakeholders to hold the organization responsible for its decisions. To renew accountability we suggest:

- **Board and Staff Codes of Conduct.** At present, there is no adopted standard for measuring the performance of Board and staff, or for providing a baseline of acceptable behavior. ICANN should develop a code of conduct for both elected and other ICANN Board members, and should clarify their mandate.
- **Fair Administrative Procedure and Reporting.** ICANN should adopt procedures for guaranteeing the transparency of its policy activities. Decisions and meetings should be fairly noticed. Input should be openly taken. Documents should be made widely available. Stakeholders should be provided with detailed reasoning behind decisions of the Board and staff. We note that ICANN

has made some substantial progress in this direction and particularly in the use of online resources, but much more can and should be done to promote the openness of ICANN processes.

- **Active Independent Review Panel.** ICANN should prioritize the creation of an Independent Review Panel from globally respected figures who can serve as a true balance to the Board, and whose decisions should hold great weight within the ICANN community.

### ***3.6c ICANN should pursue Supporting Organization reform.***

While not discussed in this report in detail, the ICANN community has recently focused significant attention on the proper role of the Supporting Organizations. We note above many concerns about the effectiveness and openness of the SOs, especially the DNSO. Public participation and representation through the ALM does not end the need for sound bottom-up policy development processes in the functional areas represented by the ASO, PSO, and DNSO. We therefore support the notion of reevaluating the SO structure, processes, and board representation.

## **4. Proposed Action Plan & Timeline of Activities**

Having established a theoretical framework for ICANN's legitimacy and proposed a set of structures to make that legitimacy real, we believe ICANN still needs to institutionalize the At-Large Membership, establish its relationship with the ICANN community, and set in motion an election. Reform must happen quickly; the terms of office for the five elected At-Large Directors on the Board will expire in November 2002, while four other At-Large seats are still filled by Initial Board Members appointed in 1999. Their replacements should be chosen and ready to serve by November 2002 at the latest. Considering the complexity and length of the election implementation, the Board will need to take decisive action at its Annual Meeting in November 2001.

This necessitates major bylaw changes, as well as a commitment by ICANN to adhere to a rigorous schedule of At-Large Membership-related activities over the next year. The full NAIS report proposes a detailed plan of bylaws changes, as well as a timeline for community action. For timely implementation, we feel it is essential for the Board to make substantial progress in this direction by November.

## **5. Conclusion**

ICANN is an experimental, quasi-public, global organization with important responsibilities for a critical worldwide infrastructure that must be managed as a public trust to serve the public interest. As such, its real legitimacy will come only when ICANN establishes robust and effective structures for a public voice to participate and be represented within the institutions of ICANN's internal governance.

***Thus it is essential for ICANN to establish an inclusive, open At-Large Membership, with a clear means to participate in the decision-making process and substantial direct representation on the board.***

Such steps acknowledge the broad potential impact of ICANN's activities, and would significantly legitimize ICANN's operation. They would go a long way towards the basic tenet of good governance that those affected by policies should have a role in deciding those policies. We understand that the difficulties in establishing a functional At-Large Membership are not trivial. However, we also believe these difficulties are outweighed by the benefits to ICANN of such essential legitimacy and stability.

As long as ICANN fails to strongly establish the public voice in its activities, it will increasingly risk that the Internet community will reject the legitimacy of its decisions. The terms of office for the five current At-Large Directors will expire in November 2002; ICANN should make it a high priority to develop and implement a system for their replacement by then.

We note that ***while SO reform is important it need not and should not delay progress towards establishing an At-Large Membership and At-Large elections next year.*** To that end, we have presented recommendations and systems that can be set in motion immediately. These approaches are structured in terms that are flexible in the face of changes that seem possible, whether sooner or later, in ICANN's SO's, regions, or board structure.

The Internet is about empowerment—about giving information, and giving voice, to individuals around the globe. What more appropriate opportunity than for ICANN itself to use the power of the Internet to harness the public voice needed to make its own work legitimate. By solving the riddle of its internal

government, ICANN will take a great step toward more stable grounding to ensure the success of its own, larger experiment.

## Introduction

As the Internet becomes more widespread, pervasive and mature, policymakers worldwide are recognizing the need for new modes of governance and coordination to address the global challenges that the Internet poses. Some nation-states are deferring to nontraditional, global coordinating or policymaking organizations, either for guidance in harmonizing national lawmaking or for the actual creation of binding policy. These entities are making decisions that once would have been made by nation-states through traditional legislation and administrative rulemaking.

This shift in the locus of societal decision-making represents an important development and challenge for governance and social coordination as we know it. Such a trend may fulfill its promise to enable efficient, stable and international policymaking to support a rapidly growing industry, but will not do so legitimately without adequate mechanisms for protecting the public interest on a global level.

The Internet Corporation for Assigned Numbers and Names (ICANN) represents such an effort to create a new mode of coordination or "governance" outside the traditional framework of international organizations and national governments. Its key objectives include promoting core principles of administration for the Internet:

- Stability
- Competition
- Private, bottom-up coordination
- Representation<sup>2</sup>

As such, ICANN was designed to represent stakeholders directly, rather than through nation states. Moreover its decisions are to be guided by consensus. Yet, the legitimacy of ICANN's structure and decision-making process has been questioned by various players in the Internet community. The central plank of this criticism is that ICANN's organizational structures and activities do not comport with the ethos of good and democratic governance. This need for new global governance structures that include the public voice underpins the current debate of ICANN's At-Large Membership and forms the subject of this report. In particular, our goal is to offer some insights in how to address the current debate about democracy and legitimacy at ICANN.

The idea that Internet coordination should include some sort of membership body of Internet users has been apparent in Internet policy debates since at least 1992 (then in reference to the Internet Society<sup>3</sup>). Since ICANN's formation, the organization has been plagued by a deep confusion over who exactly should be represented on its board. Its bylaws call for an "At-Large Membership" of Internet users from which just under half of the ICANN Directors should be elected, yet this principle for direct representation of "user" interests has never been fully satisfied.<sup>4</sup>

The first At-Large Membership election, held in 2000, was widely seen as an important experiment to establish representation, accountability, and transparency in ICANN by giving interested individuals a means to be informed about and participate directly in ICANN governance.

In the aftermath of the election, the ICANN board created an independent Study Committee to undertake an "At-Large Membership Study" (<http://www.atlargestudy.org/>) in order to evaluate the 2000 election, to assess the role that a user membership body should play in ICANN, and to determine how best to structure individual user participation and representation. The board emphasized that *such a study should be structured so as to allow and encourage the participation of organizations worldwide.*

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<sup>2</sup> See U.S. Department of Commerce Statement of Policy (the White Paper), <http://www.icann.org/general/white-paper-05jun98.htm>.

<sup>3</sup> For more information about the Internet Society (ISOC), see "A Brief History of the Internet" (<http://www.isoc.org/internet/history/brief.html>) and "History of the IETF/ISOC Relationship" (<http://www.isoc.org/internet/history/ietfhis.html>).

<sup>4</sup> Article 11 of ICANN's bylaws deals with At-Large Membership and elections, and has seen multiple changes, most recently at the Board's July 2000 meetings in Yokohama, Japan.

This Report is a response to the above call for participation and study of the At-Large Membership. It is the result of research conducted by the "NGO and Academic ICANN Study" (NAIS) group. Our report addresses the need to ensure inclusion of a diverse set of regional, sectoral and disciplinary viewpoints in a study of the ICANN membership; and connects advocacy groups and experts of all regions that share certain public interest concerns and that can produce a valuable, independent and legitimate study. The main objectives of this report are:

- To review the "At-Large Membership" and ICANN's governance structure;
- To conduct regional assessments of the 2000 election;
- To conduct an inclusive, interdisciplinary and comparative analysis of key governance issues behind ICANN Governance (including accountability, transparency and legitimacy);
- To recommend participation and representation structures for individual users within ICANN; and
- To provide input into ICANN's deliberations on the future of its At-Large elections and the structure of its Board.

This report poses a variety of questions and probes answers with regard to: Why is there a need to include the public voice within ICANN? How was it reflected during and since the creation of ICANN? How is the At-Large Membership organized and structured worldwide? How did the At-Large election take place regionally? What models of representation, elections and governance exist in the region and is there a relationship? How were the election results and possible complaints communicated, perceived and evaluated by the different stakeholders? What improvements with regard to participation and representation of different interests within ICANN were suggested? And perhaps more importantly: What lessons can be learned with regard to the procedures and processes of an At-Large membership and the structure of the ICANN Board? Are there other participation and representation mechanisms for individual Internet users that should be considered that enable legitimacy, effectiveness and efficiency within ICANN?

As such, this report is structured in five parts. The first part considers the need to include the public voice within ICANN, first from a value-based approach and then by analyzing ICANN's founding documents, public statements made by its officers, and its agreements with the U.S. government which committed ICANN to meaningful representation of the Internet user community on its board of directors. The second part reviews comparatively the At-Large Election and the way the At-Large Membership is structured. The third part contains our final recommendations for how to provide structure and representation for the At-Large Membership. The fourth part discusses the specific actions and a proposed timeline for ICANN to follow in implementing our recommendations. In the fifth part, we summarize our conclusions. And finally, in an addendum, we discuss the varied options we considered when contemplating the best way to improve user participation and representation within ICANN.

This report was prepared over a period of nine months by an international team of academics and representatives of non-governmental organizations. The NAIS team includes members who have long involvement with ICANN and others with expertise in issues of Internet technology, election systems and political theory. The report is based on extensive outreach and consultation on a worldwide basis. In preparation of this report, NAIS members conducted over ninety interviews (*see* list of interviewees in Appendix III). NAIS held public outreach sessions at the ICANN meetings in Melbourne in March, 2001 and in Stockholm in June, 2001. In addition, NAIS published an interim report (available at <http://www.naisproject.org/report/interim/>) reflecting our tentative conclusions about the ICANN regional elections held in 2000, and options for moving forward. This final report is based in part on reaction and feedback to the interim report.

The NAIS team includes members from each of the five ICANN regions of the globe. Our collaborative efforts in producing this report relied extensively on online consultation and exchange through a team mailing list. We also held regular conference calls, and met face-to-face in team working sessions at ICANN meetings over the last year in Los Angeles, Melbourne and Stockholm, as well as additional meetings in New York and Washington, DC.



# 1. The Public Voice, Legitimacy and ICANN

The need for user participation and representation to legitimize Internet governance—and consequently, ICANN itself—is the proper basis of all debates with regard to the At-Large Membership. While ICANN's founding documents and other communications indicate an institutional commitment by ICANN to "At-Large" or other public representation on the Board, we begin our defense of public representation's abiding importance with a value-based analysis of ICANN's need for a strong public voice, rooted in the impact that ICANN's activities have on the Internet community and the public at large.

## 1.1 A Value-based and Conceptual Approach

Participation and representation are governance values that are now globally accepted. They are based upon the concept that those who are affected by decisions or policies initiated by the relevant bodies should participate or be represented in the policy making processes. Participation creates empowerment and empowerment yields a sense of collaboration. The more comprehensive the level of participation, or the more inclusive the level of representation, the less likely that those subject to a resulting policy will consider that policy unfair or illegitimate. This holds especially true for such a globally pervasive medium as the Internet.

The appropriate structure of internal governance for ICANN is therefore largely a question that depends in important part on two related threshold questions: what is the essential organizational *character* of ICANN? And what is the essential nature of its *mission*?

The relationship among these questions arises because, to the extent that ICANN functions as a public or quasi-public entity that engages in the formulation of public policy about the Internet, i.e., decision-making that has broad impact on the general public, then the legitimacy of ICANN depends, at least in substantial part, on having some public voice as an important part of the structure of its decision-making.

### 1.1.1 Character: Private or Public?

The threshold questions about the character and mission of ICANN are significant because they define its location on a continuum that extends from a purely private business, on the one hand, to the effective equivalent of a government agency, on the other. Where an entity is located on this continuum can, in a strong sense, inform the question of whether public participation in its internal governance is essential to the organization's legitimacy.

Thus, for instance, to the extent that ICANN is viewed as a purely private business, the case for a public role in the selection of its directors, or otherwise in its decision-making process, is weak; to the extent ICANN is viewed as the functional equivalent of a governmental or quasi-governmental agency, the case for public participation in its internal governance is strong.

A model of ICANN that describes the organization as a private company engaged in a service business would likely not include any need for a public voice in its decision-making. Private organizations or companies are governed by boards of directors. The boards of private for-profit companies are typically chosen by the company's shareholders. The boards of not-for-profit companies can have electorates that vary widely, from self-selection by sitting directors to election by the "membership" of the organization. But in almost no case would the public at large choose the directors of a private company.

On the other hand, an organization or agency exercising "public" influence is usually seen as legitimate only to the extent that it is headed or controlled by one or more decision-makers who are directly or indirectly accountable to the public.

Much of the debate (and confusion) on the issue of what, if any, the proper role should be for public participation in the election of ICANN's directors, is due to the need to answer the underlying question: how to best locate and describe ICANN on the continuum between a purely private and a purely public organization.

This indeterminacy about ICANN, in turn, arises from the fact that ICANN is best viewed as a hybrid entity, having important elements in its character and mission of *both* a private and a public entity.

ICANN is formally incorporated in the United States as a private, not-for-profit corporation (with Board members from all over the world). In a narrow legal sense, its structure is the same as other corporate entities with strictly “private” effects on society. Yet ICANN was formed through contract agreement with a U.S. government agency (an arbiter of “public” authority, at least in the U.S.), and it carries out functions that may impact millions of Internet users worldwide. Thus, its legal structure is consistent (again, at least in the U.S.) with a *private* set of activities, but those activities are in many ways *public*.

This indeterminacy is not unintended; indeed, it is the whole point of the organization. ICANN was formed for the purpose of *privatizing and internationalizing public functions*. It was formed to be the private organizational recipient of powers of public import—but for which no public institution yet existed to exercise them efficiently, fairly, and in a manner consistent with the global nature in the Internet.

But to say that ICANN was intended to privatize authority over the Internet does not resolve the underlying question about the location of ICANN on the public-private continuum, for two reasons.

First, the decision by the U.S. government to press for the “privatization” of functions now performed by ICANN<sup>5</sup> was due not simply to a judgment that those powers should be privately held, but to a belief that the Internet’s unique, global character called for a new system of administration that mirrored its transnational quality.

Following a traditional mode of thought, this goal could have been achieved by a transfer of functions to a multilateral quasi-public entity such as an international treaty organization. But ICANN was created instead, and structured to incorporate global participation in its internal governance. Thus, the creation of ICANN was as much an effort to internationalize control of central Internet functions as it was simply to privatize them.<sup>6</sup> Even so, many observers criticized the Green Paper as being too U.S.-centric. Too many details of the New Entity were seen as dictated by the U.S. Government. By contrast, the White Paper addressed these criticisms by emphasizing more of the global nature of the Internet. The White Paper called for private sectors to gather globally, to discuss and formulate the new entity under their own efforts, in order to reach the consensus of all stakeholders.

In any event, the coalescence of authority in ICANN as a private entity does not alone resolve the issue of how ICANN itself should be governed in order to legitimately exercise the power it has been given. Simply to say that ICANN is a creation of privatization does not mean that ICANN should be governed like a private corporation. If ICANN retains substantial attributes of the character and mission of a public entity, then ICANN should be grounded on a governance model that confers the legitimacy of a public or quasi-public entity.

The questions about the character and mission of ICANN are closely interrelated. In many ways ICANN retains the character of a public entity because of its mission. That character is additionally influenced by the fact that some of the most important functions ICANN carries out have been transferred to it by, and in a sense ICANN is the immediate successor to, an agency of the U.S. government for the purpose of performing those functions. Because those functions were performed by a government agency, and especially because of their broad public effect, they retain the characteristics of basically *public functions*. And ICANN, as the entity now performing those functions, thereby inevitably assumes the character of a public agency, at least to some extent.

There is an ongoing effort by some, at least rhetorically, to re-characterize ICANN. When ICANN staff members refer to it as “the company,” a reference they increasingly use, they are making a subtle linguistic attempt to stress the private, corporate nature of ICANN, as opposed to its public character. That characterization in turn reinforces the view that as a private “company” there is no basis for public participation in its governance.

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<sup>5</sup> Prior to ICANN’s creation, many of the functions now under its administration were performed on an *ad hoc* basis by a wide variety of individuals and organizations—many of whose participation was supported by research grants from the American government.

<sup>6</sup> When drafting the Green Paper and the White Paper, the U.S. Department of Commerce made an explicit effort to reach out and collect public comments on DNS management policy issues from all over the world. This included contacting and negotiating with the EU, Australia and Japan, as well as holding open public meetings with Internet community members in Asia, Europe and North America, soliciting written comments over the Internet, and posting all of these on their official web site in an unusually open and public manner.

More directly instructive, however, is the actual experience of ICANN, which has now been in operation for over 24 months. Over the course of that time, ICANN has exercised its decision-making authority in a variety of matters. And it is the analysis of that experience—a review of the kinds of decisions that ICANN actually makes—that provides the best basis for assessing the character and mission of the organization.

### 1.1.2 The Management of the Root Is a Public Trust

In the first analysis, it is important to take account of ICANN's overall mission, which is to manage the domain name system (DNS) and ultimately, the root server system. The DNS is a fundamental operational attribute of the Internet. The operation of the root server system is at the core of the Internet—in an important sense, it *is* the Internet. In this regard, the role of ICANN in managing the DNS and the root server system is central to the good functioning of the Internet.

This reality makes ICANN's success tremendously important to the worldwide public at large. As the Internet has become more pervasive, more international, more accessible and more multi-faceted, it has taken on the character of a global public resource. The "custody" and "trusteeship" of that resource—the management of the policies that determine the functionality of the resource—certainly take on the characteristic of serving a public or quasi-public role.

Indeed, it is ultimately the public at large that has the greatest stake in those policies, because it is the public that is the end user and beneficiary of the Internet. The accessibility and functionality of the Internet hold an inherent public interest because of the increasingly pervasive utilization of the Internet in a broad set of applications—commercial, governmental, educational and interpersonal—that cut across the spectrum of daily global life. Public participation within ICANN is thus a prerequisite to ensure that the "public interest" is taken into account when implementing its mission.

ICANN itself has recognized and affirmed this view. In its recent policy paper ICP-3, "A Unique Authoritative Root for the DNS" (July 9, 2001)<sup>7</sup>, ICANN commits itself to "a single, authoritative public root" for the DNS and "to the management of that unique root in the public interest..."

ICP-3 notes that the Internet requires "the existence of a globally unique public name space." It is noteworthy that ICANN refers to the DNS as "*a global public name space*," since the requirements for the legitimate governance of a "global public" good are distinctly different from those for a "national public" good, or a "global private" good.

In particular, descriptions of the DNS as "global" and "public," and references to ICANN as a "*public trust*" to manage the "*authoritative public root*," have direct implications for the way ICANN itself should be administered.

Under the current architecture of the Internet, some form of central coordination is necessary because the DNS requires a single authority to coordinate the assignment of globally unique parameter values.

This "single authority" rests in the organization that has the authority over the "Authoritative-Root Server." The question then is: what makes the root server "the" authoritative root server, and where does this authority come from? Moreover, what does it imply if this authority should be exercised by a "global public trust"?

In the early days of the Internet, no one outside the small cadre of engineers that was developing the Internet cared very much about the answers to these questions. The coordination functions were basically performed by IANA under the guidance of Jon Postel. IANA's authority and legitimacy to manage the A-Root were not frequently challenged, and this authority and legitimacy derived primarily from the Internet community's shared history and trust in Jon Postel.

With the exponential growth and globalization of the Internet that began in the early 1990s, however, the prerequisites for having the authority—and thus the legitimacy—to exercise power over the A-Root have changed drastically, because control of the root potentially confers substantial economic and political power.

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<sup>7</sup> See <http://www.icann.org/icp3>

The root determines which top-level domains (TLDs) are visible to the vast majority of Internet users. The power to add, or not to add, TLDs to the legacy root has implications for intellectual property rights, consumer choice, competition, the ease of political discourse, and e-commerce generally. It even has implications for nation-building and international law.<sup>8</sup>

It is not simply a matter of theoretical concern that ICANN be—and be perceived to be—legitimate. It is a matter of essential practical consequence as well. If ICANN lacks legitimacy, Internet users can simply choose not to use the ICANN root server. Governments, Internet service providers, or major institutional users could establish a consortium of alternative root servers outside of ICANN's control. If more and more users decided not to direct their queries in the direction of the legacy root, the contents of the ICANN-controlled root would become increasingly irrelevant.

Therefore, unlike IANA, ICANN's authority can be exercised only if it is perceived as legitimate by all stakeholders or, in other words, by the global Internet community. This fundamental fact has been recognized by ICANN, which said in its ICP-3 paper that where central coordination of the Internet is necessary, "it should be performed by an organization dedicated to serving the public interest." Thus, according to ICP-3, ICANN needs to continue the work of IANA "in a more formalized and globally representative framework, to ensure the views of all the Internet's stakeholders are taken into account in carrying out the public trust."

The question that logically follows is: What should a more "globally representative framework" for ICANN look like?

ICP-3 further states that the guiding principle for the management of the unique root by ICANN should be in "the public interest according to policies developed through community processes," which require "participation of affected stakeholders." ICP-3 cites the White Paper, which itself mandated that the management of "the Internet root server system should be vested in a single organization that is *representative of Internet users* around the globe."

Hence, ICP-3 states:

In linking the formation of ICANN to the global Internet community, the White Paper *established a public trust* that required that the DNS be administered in the public interest as the unique-rooted, authoritative database for domain names that provides a stable addressing system for use by the global Internet community. The commitment to a unique and authoritative root is *a key part of the broader public trust—to carry out the Internet's central coordination functions for the public good—that is ICANN's reason for existing*.

ICANN was founded as a not-for-profit public-benefit organization, accountable to the Internet community. Longstanding Internet principles also require that the policies guiding the coordinated functions be established openly based on community deliberation and input. For these reasons ICANN's structure is *representative of the geographic and functional diversity of the Internet*, and relies to the extent possible on private-sector, bottom-up methods. [emphasis added]

Creating a well-functioning, representative and participatory At-Large-Membership is necessary to implement the principles of ICP-3—to foster community deliberation, to be accountable to the community and to develop a structure that provides meaningful participation and representation to "millions of people collaborating worldwide."

Without a broad, participatory and representative At-Large-Membership, ICANN will not gain or hold legitimacy, and its long-term survival will be threatened.

### 1.1.3 Mission: Technical and/or Policy?

The contrary argument to this broad view of ICANN as serving the public trust does not deny the importance of the Internet, but rather minimizes the importance of the role ICANN plays in regard to the Internet. Under this argument, ICANN's role or mission is not to "manage" or "regulate" or "govern" the Internet, but rather to serve as a mere technical coordinating body.

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<sup>8</sup> See <http://personal.law.miami.edu/~froomkin/articles/icann.pdf>

Indeed, some (but not most) of ICANN's work neatly fits this more modest description. And it is assumed by those who make this argument that "technical coordination" is a function so arcane or inaccessible that it should be exercised by experts whose decisions are dictated—and thereby narrowly bounded—by the objectivity of the science or technical reasoning involved, rather than by unbounded discretionary policymaking. Within this bounded sphere of technical reasoning, it is argued, legitimacy is sufficiently conferred by expertise alone, and there is simply no need for a broader reference to public will or public accountability in order to ground the decisions made.

There are at least two major flaws with this argument.

The application of expertise to decisions that affect matters of public interest does not thereby insulate those decisions from the need for public accountability. To claim a decision is "technical" does not mean it can be made without oversight that protects the public interest in the decision being made correctly.

Much of what governments do is highly "technical"—from operating air traffic control systems to predicting the weather—and at least as arcane and complex as what ICANN does. Those functions are performed by experts, but experts who are ultimately subject to public control through elected officials. If experts running the air traffic control system repeatedly fly planes into each other, there will certainly be public pressure brought to bear on elected officials who will—undoubtedly in consultation with new experts—replace those who have not performed well. If such steps are not taken, the public will likely replace the officials who fail to act. Thus, to describe a function as "technical" does not in any important way address the question of whether it pertains to a matter of great public interest, and therefore whether there should be public accountability for, or a public voice in, the management of that function.

The second flaw in the argument based on "technical coordination" is more important. Even though much of what ICANN does can be characterized as "technical coordination," it is sometimes nonetheless inextricably intertwined with policymaking of precisely the sort that requires grounding in some form of public legitimacy. Further, much of what ICANN does is simply and forthrightly policymaking that has no particular patina of technical expertise to it. Several of the most important decisions that ICANN has made since its founding are exercises of discretion of the kind typically associated with public agencies. Three examples illustrate this point.

First, arguably the most important (and certainly the most publicly visible) decision made by ICANN to date was the award of new global Top-Level Domains (gTLDs). Both the decision on how many gTLDs to award, and then the selection of the chosen gTLDs themselves, were exercises in discretionary policy making, not technical coordination. The ICANN Board's discussion on the selection of new gTLDs had all the characteristics of a public agency exercising subjective policy judgment in the application of its values about how to best serve the public interest in expanding the DNS. In this instance, the judgments were based not simply on how best to run a "test" of the introduction of new gTLDs, but rather on which new domain names would best serve public purposes.

There is nothing improper in that basis for judgment—indeed, it is arguably the correct one—but it highlights the need for the decision-makers to have some underlying legitimacy to make inherently value-laden policy choices, particularly where they result in the granting of an economically lucrative franchise to a quasi-public resource.

A second example of policy-type decision making is the creation of the UDRP process. ICANN established this process in order to create a tribunal for resolving issues relating to the protection of intellectual property rights in the DNS. In establishing the UDRP process, the ICANN board has responded to the claims that *it* should protect, or provide a mechanism for protecting, the rights of trademark holders. Making this judgment was itself a substantive policy decision, and certainly the design of an adjudication process involved a host of policy determinations about how to balance the rights and interests of Internet users and trademark holders, how to allocate the costs of dispute resolution, and how to establish a means for fair, legitimate and supposedly neutral adjudication. None of these are "technical" questions. All involve policy judgment based on some underlying conception of whose interests should be protected, to what degree and how.

Finally, even though ICANN does not conceive of itself as a regulatory body, it has in fact engaged in a process of regulation by contract, which has resulted in a range of substantive policy making. This has not been done by the issuance of "rules," but rather through the drafting of private contracts. For instance, in recently renegotiating its contract with VeriSign, ICANN argued that modifying the contractual terms of its relationship with VeriSign would promote competition in the DNS marketplace. That may be a legitimate, even desirable, goal for ICANN to implement, but a policy of enhancing

competition—a kind of policy typically implemented by a government, not by a private company—depends on judgments about the nature of the marketplace and the degree and form of competition that will best serve the public interest.

Similarly, the contracts ICANN has negotiated with the registries that were awarded the new gTLDs contain a host of regulatory provisions about the permissible uses of the new domain names. These contractual rules, in many instances, go well beyond what is strictly required to implement a test of expanding the DNS. Such collateral policy goals of ICANN may be laudable, certainly they are controversial, but they again illustrate a kind of substantive regulatory policymaking that ICANN engages in through contract.

These three illustrations—the award of new gTLDs, the creation of the UDRP process and the imposition of regulatory-type controls through private contracts—are among the most important, visible and controversial actions that ICANN has taken. None of these actions can be accurately described as “technical” or arising from mere “technical coordination” of parameters necessary for the operation of the Internet.

Instead, each involved overt policy making—decisions about how to facilitate the development of the Internet as a public, global resource, about how to shape the marketplace for key Internet services to best create competition, and about how to balance the protection of conflicting private economic rights claims against each other, or against claims of free speech in the management of the DNS. All of these decisions must be based on some underlying substantive conception of how the DNS, and hence the Internet, will best function. And to the extent that the Internet is, or will become, a global quasi-public resource, these decisions must involve some deeper conception of the general public good. For that reason, these decisions—all of which lie within the sphere of authority that ICANN claims to have—resemble the kinds of decisions typically made by public agencies.

In this regard, we strongly agree with the statements of the At Large Study Committee (ALSC), chaired by Carl Bildt, which, in its Discussion Paper #1, dated July 12, 2001, strongly asserted the need for public participation and representation in the work of ICANN.

“It is clear to us,” the ALSC wrote, “that there *is* a ‘public interest’ responsibility vested in ICANN.”

The ALSC continued:

In essence, ICANN needs to be accountable not just to those people whose daily work concerns ICANN's activities...but also those who are affected by its actions but whose daily focus is elsewhere. Actions ICANN takes within its seemingly narrow technical and administrative mission can affect (and generate interest among) the world's individual Internet users in a myriad of ways. These users hold a variety of values and represent interests that may be personal, political or economic. They care about issues such as access to domain names in non-Latin characters, the potential use of IP addresses and domain names for identification or location of individuals and groups, the mapping of telephone numbers to Internet addresses, competition and choice (or not) in the provision of various services provided by independent parties under contract to ICANN, domain name intellectual property issues, and the like.

– <http://www.atlargestudy.org/DiscussionPaper1.shtml>

These views of the At-Large Study Committee strongly reinforce our own view that ICANN is involved in a myriad of public policy issues and decisions that affect the public at large.

Thus, the minimalist account of ICANN as a merely technical coordination body that does not engage in broad policymaking affecting matters of the public interest is, at the very least, an incomplete description of the organization. Even though ICANN exists in the form of a private company, its functions, at least in part, very much embody the consideration of public issues. Thus, even as a unique and experimental hybrid entity, its legitimacy to resolve these issues must be based on a process that reflects some reference to the public will or public accountability.

#### **1.1.4 Legitimacy as a key to stability**

There is an additional reason this is true as well. In many ways, ICANN rests on unstable ground. It is a voluntary association that has the ability to implement its decisions only to the extent that those

decisions are perceived as legitimate by the relevant community—governments, private companies and Internet users.

ICANN has little in the way of coercive authority through which to enforce its decisions. Thus, the legitimacy of its decision-making process is particularly crucial for ICANN, since it is constantly in danger of being discredited or ignored. ICANN ultimately has no ability to stop the creation of alternative root servers with alternative DNS systems. The voluntary adherence by the worldwide Internet community to its decisions will likely continue only to the extent that those decisions appear to be based on a process that is fair and legitimate.

Nor can ICANN “borrow” the legitimacy of another institution, or of any government, since ICANN is structured as a freestanding private entity. The legitimacy of its decision-making must be generated by its own internal governance procedures. And if it fails to do so, it runs the risk of being deemed irrelevant, or inviting governments to take control of it or to regulate it in the name of imposing governmental policies of consumer protection, competition or other nationalistic goals.

For these reasons, ICANN—and all those who want the ICANN experiment to succeed—share a common interest in ensuring the legitimacy of ICANN’s governance process. That legitimacy will be the best way to establish ICANN’s own authority, and the best defense against those who would undermine ICANN or seek to devolve its role back to governments acting singly or in combination.

## 1.2 ICANN's History and its Commitment to Public Representation

As a new and unique body in need of a long-term system of public representation, ICANN has a special need to review its own past and to learn what it can from the discussion of the last several years. Most of the issues that the community now faces have persisted since long before ICANN's inception; they are of obvious importance but are complicated and, frequently, divisive.

From the time it was conceived, and in its current infancy, ICANN has had a clear responsibility to establish a public role in its decision-making. Such responsibility in itself has frequently placed ICANN at the center of controversy. While the organization has several times declared its intention to build in a lasting role for the community of Internet users (sometimes in response to pressure from outside interests), consensus on the form and responsibilities of that role has been elusive, and progress has been slow.

In this section, we attempt to trace the development of ICANN's responsibility to public participation, and the obstacles it has encountered along the way.

### 1.2.1 Early Commitments to the Internet "Public"

While responsible management of the Internet's addressing, naming, and protocol resources are of clear international concern, the history of ICANN's development as an organization was largely the result of negotiation with the American government.<sup>9</sup> In 1998, partly spurred by recent international efforts to promote globally responsive naming and addressing administration,<sup>10</sup> the U.S. Department of Commerce (Commerce) released two policy documents calling for the creation of the corporate entity that eventually became ICANN. Known as the Green and White Papers, these documents provided an early conceptual sketch of the founding principles, authorities and responsibilities, and proposed organizational structure on which ICANN would be built.

"Representation" was one of the four founding principles that these documents laid out for ICANN. As the White Paper, put it:

The development of sound, fair, and widely accepted policies for the management of DNS will depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users. Mechanisms should be established to ensure international participation in decision-making.

In imagining a governance structure for ICANN that would serve this principle, the Green Paper suggested a Board of Directors that would balance—in a roughly even way—the interests of specific domain name

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<sup>9</sup> The U.S. government maintains policy authority over the A-root server that is the nexus of the DNS root system. As a result, USG has played a significant role in negotiations regarding the fate of the DNS and, by extension, other centralized Internet resources.

<sup>10</sup> The most important early effort to address these questions in a global way was the Internet International Ad Hoc Committee (IAHC), a coalition of experts appointed by well-established Internet organizations such as the Internet Society, IANA, and the Internet Architecture Board, as well as the World Intellectual Property Organization (WIPO), and the International Telecommunications Union (ITU). In 1997 the IAHC proposed that an international non-profit body be established to deal with the Internet's centralized naming, addressing, and protocol issues. This concept was embodied in a new organization, the Council of Registrars (CORE) and described in a Memorandum of Understanding on generic Top-Level Domains (gTLD-MoU). Ultimately, however, the gTLD-MoU process failed to gain vital support from some key stakeholders (including the US government) and suffered from criticisms about its legitimacy, procedures and representativeness.

<sup>11</sup> It should be noted that the Initial Board was originally known as the Interim Board, and that they were generally expected to act only as placeholders for a later, more legitimate set of Directors.



and IP number stakeholders with those of commercial, noncommercial, and individual Internet "users." But the White Paper did not provide a specific blueprint for how the Board would be constituted or created, as the prescriptive and detailed nature of the Green Paper's recommendations had been widely and heavily criticized. The White Paper suggested that "commercial, not-for-profit, and individual" users were all likely participants and the Department of Commerce invited Internet stakeholders from around the world to work together to form the new entity.

In response to the call by the White Paper, an ad hoc group of Internet business, technical interests, and representatives from the user community known as the International Forum on the White Paper (IFWP) was established to seek consensus among all the major stakeholders about the group that would eventually become ICANN.

### **1.2.2 Initial Board Authority Over the At-Large Process**

In early October 1998, ICANN submitted its proposal to become the corporation envisioned in the White Paper. The proposed bylaws submitted in this process established a governing structure for ICANN that attempted to strike the balance called for in the White Paper. ICANN proposed a 19-member board, which would include the corporation's appointed president. Nine board members would be selected three each by three Supporting Organizations created to represent specific Internet stakeholders—the IP number registries, domain name registries, domain name registrars, and the technical community. The remaining nine seats would be occupied by "At-Large Directors"—though, once again, the form and function of those Directors was left largely undefined.

To guide ICANN in its formative stages, a nine-member Initial Board of experienced people from industry, academia, and the research sector was created. ICANN's process for selecting this Initial Board was widely criticized for its lack of openness and inclusiveness, and many questioned the fundamental legitimacy of this Board (and still do, as four of its members remain on the ICANN Board today).<sup>11</sup>

One of the chief responsibilities given this Initial Board was to determine the process for selecting the At-Large Directors who would later replace the Initial Board itself. Early drafts of the bylaws suggested that this would involve the creation of an At-Large membership to elect these nine directors. However, these bylaws left the Initial Board with broad discretion to fill in the details regarding the selection of the At-Large Directors, and even to determine whether or not a membership system would be part of the process.

These initial bylaws received significant criticism from groups like the Boston Working Group (BWG)<sup>12</sup> for giving excessively broad authority to the Initial Board. There were no protections against the Initial Board, should they so desire, simply deciding not to have any kind of At-Large membership whatsoever. Some went so far as to express concerns that the Initial Board had the power to reject not only the notion of a At-Large membership, but also the more general underlying principle of having At-Large Directors who would represent "users" to begin with.

The BWG strongly lobbied Commerce for revisions that would require the Initial Board to create some kind of membership structure (the specifics of which had not yet been determined). Ultimately, Commerce agreed, and ICANN, under pressure, revised its bylaws accordingly. Shortly thereafter, a Memorandum of Understanding was signed between ICANN and Commerce, under which ICANN began assuming the responsibilities set forth in the White Paper.

### **1.2.3 The MAC Report**

Since neither the MoU between ICANN and Commerce, nor the Green Paper, nor the White Paper, included any strong definition of what the "At-Large Membership" would look like or how it would run, ICANN appointed a 13-member Membership Advisory Committee (MAC) to address these questions. As MAC Co-Chair George Conrades put in an early committee conference, the questions the MAC faced boiled down to: "Who will be the members of the corporation? And what will the members do?" After thoroughly discussing these issues, the MAC made its final recommendations to the ICANN Board at its May 1999 meeting in Berlin. Among them were the following:

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<sup>12</sup> The Boston Working Group is an ad hoc group of Internet technology and policy experts who regularly discuss matters pertaining to ICANN's structure and operation. They maintain an active mailing list and are one of ICANN's most active, though informal, constituencies.

- Only individuals (not organizations) should be eligible for At-Large membership;
- Membership registration should be open to all individuals worldwide willing to provide their name, e-mail address, and a verifiable physical address;
- A committee should be set up to identify high-quality candidates to join self-nominated ones from the membership; and
- An election should be held for the At-Large Directors with all members registered at least 30 days in advance of the election eligible to vote.

Yet the ICANN Board did not immediately implement the At-Large membership structure envisioned by the MAC. While reaffirming its intention to move forward with a system that would allow individuals to select At-Large directors, the Board resolutions passed in Berlin also recognized that developing such a system could be complex and expensive, and they directed the ICANN staff to “to analyze the MAC principles in the light of its discussion, and report back prior to the Santiago meeting.”

#### 1.2.4 Community Pressure for a Timely Election

In the period immediately following its Berlin meeting, ICANN continued to face strong outside pressure to realize the its founding principle of “representation” and replace its appointed Initial Board with an elected one. In June 1999, ICANN submitted its six-month status report to Commerce. This urgency to provide elected representation on the Board was restated in testimony that another Commerce official gave before the U.S. Congress<sup>13</sup> and in letters to ICANN from the chair of a U.S. House of Representatives subcommittee.<sup>14</sup>

Similar pressure also mounted in the online community. In responding to these concerns, ICANN reaffirmed its commitment to a representative Board of Directors. For example, in a July 1999 letter to Burr, ICANN said that putting in place an elected board “is our highest priority” and “we have been working diligently to accomplish this objective as soon as possible.”

#### 1.2.5 The At-Large Council Concept

Just before the August 1999 meeting in Santiago, Chile, ICANN staff posted its report following up on the MAC’s work. The staff report reflected the MAC’s notion of an open membership consisting of individuals. However, it also recommended that the Board create an At-Large Council largely analogous to the councils already formed to represent professional stakeholders in the Supporting Organizations (SOs). The staff report argued that this would create parity between the At-Large membership and the SOs, and that it would equip ICANN with a formal entity to help build the At-Large membership and help oversee the At-Large elections.

A legal analysis that accompanied this report also suggested that ICANN could protect itself from burdensome derivative lawsuits under California state law, if it removed the power to directly elect the At-Large Directors from the At-Large membership and placed it in the hands of this At-Large council instead.<sup>15</sup>

While the staff report did not explicitly recommend that an At-Large Council select the nine At-Large Board Directors, the Board discussed and passed resolutions to that effect at its meeting in late August 1999 in Santiago. It adopted the necessary bylaws changes that October at its meeting in Los Angeles.

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<sup>13</sup> As an agency of the American government, the Department of Commerce is directly answerable to the President (then Bill Clinton), but also to the Congress, which maintains control over the budget available to Commerce and to all federal agencies.

<sup>14</sup> Bliley, Rep. Tom, Letter to Esther Dyson (ICANN), June 22, 1999. <http://www.icann.org/correspondence/bliley-letter-22june99.htm>.

<sup>15</sup> See additional discussion of this claim, and its merits, below in Section 3.4.

Under the new bylaws, when the At-Large Membership reached a threshold population of 5,000, it would elect 18 members of an At-Large Council in two installments. The Council would then select the nine Board members.

### 1.2.6 Opposition to the Indirect Election

Some in the ICANN community liked the notion of indirect elections of the At-Large Board Members through an At-Large Council, because this would guard against the threat of derivative suits and would create a more deliberative setting for selecting directors than an direct popular election would provide. Many others attacked the plan as an effort to hijack the broad Internet user voice in ICANN, reasoning that no one would participate in a body that only provided rights to select individuals who would in turn select policy-makers. According to this critique, indirect elections also would result in no direct lines of accountability between the ICANN Board and the "public."

At its March 2000 meeting in Cairo, the ICANN Board faced intense pressure to scrap the indirect election plan proposed by staff and hold direct At-Large elections. Advocates for the direct model argued that it offered enhanced accountability and legitimacy for a Board that, it was felt by some, was lacking in both. Ultimately, the Board accepted the validity of the direct election model and passed a compromise resolution, Resolution 00.18—also termed the "Cairo Compromise."

Resolution 00.18 instructed staff to draft bylaws amendments that would:

- Establish a system for direct election of five At-Large Directors
- Adjust the terms of the Initial At-Large Directors
- Establish a committee to nominate candidates, as well as a system for member-nomination
- Initiate a study of the At-Large Membership
- Suspend any selection of At-Large Directors after the five until completion of the study

Instead of filling all nine Directors at once, the compromise stated that only five would be elected in 2000, after which the election process would be studied before future action. At the time, the compromise seemed acceptable to most parties; direct democracy advocates avoided setting a precedent of indirect elections and placed five elected Directors on the Board, while those with stability concerns were assured that, should the election go badly, the five At-Large Directors would constitute a minority of the nineteen-member Board.

At the Yokohama meeting in July 2000, however, the spirit of the "Cairo Compromise" was revisited.

### 1.2.7 The Bylaws Amendments in Yokohama

When the Board in Cairo asked staff to prepare new bylaws to flesh out the Cairo Compromise, neither those at the meeting nor the ICANN community as a whole had reviewed all the Compromise's possible implications. When the proposed bylaws were published immediately before the Yokohama meeting, the Board once again encountered strong opposition from the community, and criticism that it had both betrayed the spirit of the Cairo Compromise and failed to accurately gauge community sentiment. Members of the public interest community strongly criticized both the proposed bylaws and the process behind it.

While the proposed amendments did provide for the direct election of five At-Large Directors, followed by a period of study, they were self-extinguishing, deleting themselves from the ICANN bylaws as soon as the 2000 At-Large Election was finished. In the absence of direct action by the Board, this left ICANN with no process for *ever* selecting At-large Directors to the Board after 2000. At the same time, the amendments proposed that the "placeholder" At-Large Directors—those Directors of the Initial Board—would leave the Board at the end of 2001.

Since no process had been established to replace the departing Board members, the "At-Large" seats they occupied would vanish when their terms expired, leaving the At-Large community represented by just the five Directors elected in 2000. And even those Directors' terms were set to expire in 2002. Barring direct action by the Board, At-Large representation on the Board would dwindle from nine seats, to five, to

zero. Advocates urged the Board to rethink the proposed amendments, and to secure At-Large Directors' positions for the foreseeable future.

Once again, the Board reversed course. It amended the bylaws to secure the positions of all nine At-Large Directors until late 2002—though the bylaws setting up an At-Large Election self-extinguished after the 2000 election. Under those terms, the 2000 At-Large election took place—and ICANN was left, once again, without a clear concept of how to represent the public's interest in ICANN's activities.

### **1.2.8 Where we find ourselves**

In a certain sense, the ICANN of 2001 and the ICANN of 1998 are not as far apart as they might seem. For both organizations, persistent questions demand quick resolution—and for both, community sentiment is deeply fragmented in its ideas about ICANN's future direction. Yet where the ICANN of 1998 had little idea of what the At-Large Membership might mean, or the role it might play, the ICANN of 2001 at least has the benefit of hindsight in seeking to resolve those issues.

## 1.3 Public Participation and the At-Large Membership

For structural and historical reasons, there is a need for improved public participation in the current internal governance of ICANN, in order to establish its legitimacy as a quasi-public body that has a mission to decide policy matters of public interest and importance relating to the functionality of the Internet.

Addressing the need for public participation in turn suggests two subordinate questions: what is meant by the public? And what is understood by participation?

### 1.3.1 Definition of the “public”

There are various ways to define which “public” has an interest in ICANN. The answer is perhaps best thought of as a sliding scale, from a narrow definition focused on domain name holders—those stakeholders who are most directly affected by ICANN policies—to a much broader definition that includes all those who “use” the Internet, such as all e-mail address holders. Even beyond this, the broadest definition would essentially include the entire public—both those who currently use the Internet and those who are potential users in the future.

In our view, ICANN should recognize that its decisions have a broad impact. Because the Internet is a global resource, decisions about the functionality of the Internet have a global impact. And because the Internet is used directly by individuals on a global basis, that impact extends down to the individual level.

It is important as well to acknowledge that the class of those affected is dynamic. As the Internet expands, particularly in underdeveloped regions, the class of individuals who begin using it will grow. Yet these potential users of tomorrow will be impacted by the decisions ICANN makes today in setting domain name policy that will structure the Internet in the future.

As explained in more detail below, an open, easy-to-access web- or e-mail-based registration process could form the basis for a cost-effective and inclusive membership. Such systems approach universal availability for ICANN's potential membership and, as will be discussed below, support reasonable levels of authentication and security. Their openness, moreover, lends an important legitimizing effect to ICANN.

NAIS considered many other criteria for membership. Limiting membership to holders of domain names is one popular alternative, but was ultimately rejected by the group for several reasons:

- The interested stakeholders include Internet users who are not necessarily domain name holders. We note that ICANN is charged with coordination of functions beyond the DNS—including addressing and some aspects of protocols—and so a membership limited to DN holders would be a highly imperfect match for those interested in participation in ICANN.
- Domain name holders as a group are dominated by parties already well-represented in the SO structure. VeriSign has estimated that over 80% of current gTLD registrants are commercially-oriented organizations. In some ccTLDs, individuals cannot even own domain names. Limiting membership to domain name holders would create a membership pool that under-includes individuals and is heavily skewed towards commercial groups and organizations.
- Substantial questions abound regarding the relationship between domain name ownership and voting privileges. Will companies that own more than one domain name have more than one membership and vote? If so, large organizations and domain name warehouses will be heavily over-represented. If not, substantial problems are created in determining who casts votes and what is a duplicate organization.
- Many TLD managers, particularly in the ccTLD space, have differing requirements about how and by whom a domain name may be registered. Some domains, for example, do not permit individual registration, while others offer only registration at the third- and fourth-level. Proposals to restrict the Membership to domain name holders fail to address these and other questions about Internet citizens' access to names.

- This proposal does not solve as many problems as claimed. Capture is still possible through the registration of many names. The number of members is still potentially very high. Authentication to guarantee “one person one vote,” if desired, is still virtually impossible.

Similarly, NAIS rejected the use of a fee as a criteria for membership. As noted in more detail below, imposing a fee raises serious equity issues, even with substantial sliding scales for poorer regions. While likely to weed out less committed members, a fee still leaves the possibility for over-representation of those with financial resources and potential gaming of the membership by wealthy interests or countries. NAIS is cognizant of the need to pay for membership activities, but we note the cost of administration and international money transfers, and question the extent to which an equitable fee would raise sufficient funds without jeopardizing inclusiveness and legitimacy.

ICANN should broadly construe the “public” affected, and potentially affected, by its decisions. A broad, open concept of membership is the best way to achieve this.

### 1.3.2 Definition of “participation”

Even if the “public” is defined broadly, that does not mean there must be only a single means for individuals to “participate” or “be represented” in ICANN’s decision making. ICANN’s structure suggests, not one, but several potential avenues for the public to participate in ICANN’s work. By far the most important (and under-developed) is the At-Large Membership (ALM). Before discussing the untapped potential of the ALM, we want to take note of the other possible avenues, as they ultimately impact the role the ALM can and should play.

#### 1.3.2.1 Participation through the Supporting Organizations.

The three existing supporting organizations—the Address Supporting Organization (ASO), the Protocol Supporting Organization (PSO) and the Domain Names Supporting Organization (DNSO) —provide open routes of input into decision-making by ICANN.

The supporting organizations each directly elect three members to the ICANN board. Further, each of the SOs, at least in principle, is consulted prior to board decisions affecting their particular area of interest. The supporting organizations also are, as a formal matter, open to participation by anyone that attends their meetings or participates in their listserv discussions.<sup>16</sup> Thus, any member of the public can indirectly participate in ICANN decision-making through participation in the supporting organizations.

There are, however, several limitations on the adequacy of this avenue for public participation. First, the supporting organizations are each forums of particularized and specialized interest—they do not easily contain the interests of the general public in ICANN’s issues. The ASO and PSO in particular are viewed as bodies of technical specialists which, although formally open to any member of the public, are not natural or comfortable forums for general public participation. Past attempts to house the concerns of the general public within the DNSO have been unsuccessful. Indeed, the lengthy, and as yet unresolved, debate over whether even to create an Individual Domain Names Holder Constituency suggests that there is not any constituency group within the DNSO that provides a forum for general public concerns. Even the IDNH constituency, were ICANN to charter it, would speak only for a small class of the general public—those individuals who own domain names—but not for the public at large.

Further, the supporting organizations are largely viewed as forums for corporate and business interests within ICANN, not for individual interests. This perception weakens the ability of the SOs to serve as an effective vehicle for public participation within ICANN. It is one available route for expression of public voices, but an avenue with inherent limitations.

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<sup>16</sup> This is a matter of theory, rather than practice. In practice, none of the Supporting Organizations or their independent constituencies has achieved target levels of efficiency, activity, and openness simultaneously.

<sup>17</sup> There have been a number of attempts at such self-organization of the At-Large Membership as it was constructed for the 2000 election, but their activities have been complicated by the lack of certainty about the ALM’s future role and form.

### 1.3.2.2 Participation through governments.

Democratic governments themselves are institutions that, ideally, embody and represent the public (although governments can vary widely in the degree to which they are truly representative). But to the extent that governments have input into the decision-making process of ICANN, this is another potential avenue for public participation in ICANN's internal governance.

Again, however, this is an avenue with significant limits. Governments play a formal role in ICANN through the Government Advisory Committee (GAC), which provides institutional views to the ICANN board on matters of relevance to its members. But the role of GAC is poorly delineated. Although it is supposed to be advisory only, the GAC exercises apparently significant influence. But it does so with poor mechanisms for transparency, and for public input and participation because it operates largely in a closed and inaccessible fashion.

In its current form, the GAC's influence may be unavoidable. Though their formal authority in ICANN is minimal, the actual effect of strong government statements or policy initiatives should not be discounted. In that light, *transparency* and *openness*, not attempts at structural limitations on influence, offer the best hope for equitable participation by governments.

Public participation in ICANN through representation by governments in the GAC is an unsatisfactory solution for a deeper reason as well.

The underlying principle of ICANN is that it is a *non-governmental* institution. Indeed, the very point of ICANN is as an experiment in non-governmental self-organization. Governments are viewed with suspicion by the Internet community, mainly because of their inefficiency and lack of responsiveness to rapidly changing social and technological developments that have marked the growth of the Internet.

As is discussed above, ICANN was deliberately structured to be non-governmental. Although it is to operate on a *global* basis, it is not to be an *international* or *multilateral* organization like other inter-governmental treaty entities. In this sense it is not, like many other international entities, an organization formed by governments or consisting of governmental representatives. Instead, it is to be a global and transnational organization operating on a quasi-public basis outside of international governmental control.

Public participation on a global basis should reflect this underlying premise of ICANN's structure. Thus, although governments, through the GAC, may indirectly reflect the views of their citizens, and thus provide another vehicle for indirect public participation in ICANN, this is again a highly restricted form of participation by the public.

### 1.3.2.3 The At-Large Membership

The third potential avenue for public participation in ICANN lies in the establishment of a broadly diverse At-Large Membership (ALM).

A concept that is anticipated in the foundational documents of ICANN (such as the White Paper), the ALM has yet to be adequately defined and institutionalized in ICANN's framework of operations. The ALM remains the great—and unrealized—potential opportunity for public participation in ICANN.

The ALM has been organized to date only in the context of the election for five board seats held in October 2000. Although voting for board members may remain an important function of the ALM, its role should not be limited to serving as the electorate for At-Large director seats. Indeed, if the only role of the ALM is to participate in elections, the full potential for public participation in ICANN will remain unrealized, and even the role it plays in electing directors will be underdeveloped.

The ALM can serve diverse goals of participation, representation and accountability. In fulfilling each of these functions, a fully developed ALM will strengthen the legitimacy of ICANN to make the kinds of policy-based decisions about the functioning of the Internet in which it is now engaged.

In fostering *participation*, the ALM could become a means for communication and outreach to the broader public for ICANN. The ALM could create empowerment of the public, and empowerment yields a sense of collaboration. It could also be a channel for consultation and input into organizational decision-making. Institutionalizing this sort of participation might be done through ALM forums or meetings that can be convened in conjunction with each ICANN meeting, or through the development of online mechanisms.<sup>17</sup>

The ALM could be structured into more manageable sub-units or committees by region or by issue, or by some combination of both.

In fostering *representation*, the ALM can serve as the electorate for the At-Large board seats. Representation through election can make participation operative and give it meaning. The election could be structured in different ways, including the direct election not only of directors to the ICANN board, but also, for instance, to an At-Large Council which can serve as an intermediary entity between the general At-Large membership and the ICANN board. When the ICANN board is perceived as *representative*, then the mode and degree of participation can be balanced to adapt to the goals and mission of the ICANN, the heterogeneity and size of the community, and the need for stability and efficiency.

Finally, in fostering *accountability*, the ALM can serve as a kind of public “watchdog” on the actions of the board, and can be a means to ensure that, at minimum, the elected At-Large directors reflect the views and interests of Internet users and act in a responsible manner. Accountability devices may include, for instance, the specific creation of substantive and procedural rules designed to enable board member responsiveness and a set of *ex post* mechanisms to allow responses to decisions (including rationales and justification for those decisions).

The ALM is a key piece of the structure of ICANN that has not yet been brought to maturity. Developing the ALM is necessary to make elections work in virtually any form. But institutionalizing the other roles of the ALM in providing the means for participation and accountability, as well as representation, will have additional and equally important consequences for establishing the public legitimacy of ICANN.



## 2. Lessons and Challenges: The 2000 At-Large Election

If ICANN must incorporate public participation in order to gain its required legitimacy, how can it do so? One starting point to answer that question is an assessment of the 2000 At-Large election, which is the subject of this chapter. The first section deals with cross-regional elements of the election, while the second section comprises the regional reports, and a final section discusses comparative themes between regions.

### 2.1 Cross-Regional Elements: Board and staff election administration

As a whole, this chapter focuses on the effects of the 2000 election in each of the five geographic regions. But many decisions governing the election belong to no particular region—e.g. the decision to hold direct elections, or the technical specifications of the election system itself. The implications of these decisions were felt universally, and this section provides an overview of lessons about the common elements of last year's election.

From ICANN's incorporation in 1998 through the conclusion of the 2000 At-Large election, the organization devoted substantial time, energy, and resources to finding a process by which the community "At-Large" would select Directors to the Board. The largest part of that effort came from ICANN staff—Chief Policy Officer/Chief Financial Officer Andrew McLaughlin, Outside Counsel Joe Sims, and Vice President/General Counsel Louis Touton. Staff has historically played a major role both in developing ICANN policies and advising on Board action regarding those policies.

As under-resourced volunteers, the ICANN Directors' reliance on staff is to be expected. However, both the staff's accountability and its operational transparency have been the subject of criticism from a number of sources, and some have asked whether the staff plays too large a role and has too much autonomy in establishing ICANN policy. In that light, the Board's dependence on them raises questions about the nature of decision-making in ICANN.

ICANN's accomplishment in coordinating an election of this scope—on a short timeline and with limited funding—deserves recognition. But ICANN's decisions regarding the 2000 election reveal important lessons for future decisions affecting the entire Internet community.

There are several considerations to bear in mind while reviewing ICANN's election administration. First, both the Board and the community share a responsibility to prevent avoidable mistakes from interfering with future selection of Directors. Second, there are indications that some Board actions regarding public input were inconsistent with the ICANN process as it is generally understood; discussion of the frequency, circumstances, and implications of these instances appears below.

#### 2.1.1 Limitations Faced by the ICANN Election

The 2000 ICANN election broke new ground, not just for ICANN as an organization, but for the world as a whole. While, for ICANN, the election was an untested first attempt at representing the public interest through the election of Directors, for the world the election was an untested attempt at a fully online, truly global election of unknown size and scope. The experience of the election offered insight into the core strengths and weaknesses of such an election.

In the offline world, certain elements are considered baseline components of any legitimate election. For example, we generally assume that, in a given political election, it is possible to know with reasonable certainty who the electorate is and is not, and that each of the voters is a verifiable human being. We assume that elections take place in an environment where rules and laws will define appropriate behavior, and that those rules and laws will be enforceable by some authority (usually the state).

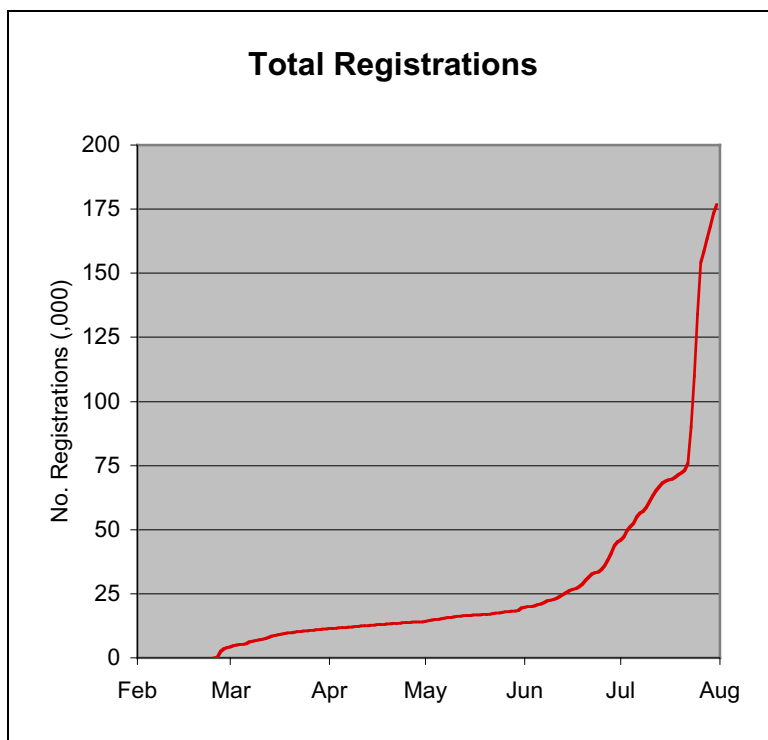
But these assumptions do not apply to the online world in which the 2000 ICANN election took place. In an environment unbounded by the rules of physical space, simple tasks like verifying that a given voter registration represents a real, unique individual become much more difficult. Similarly, there is no single authority capable of enforcing rules on a global electorate. National laws are unique and are likely to offer little help in establishing a single rule set for an online ICANN election.

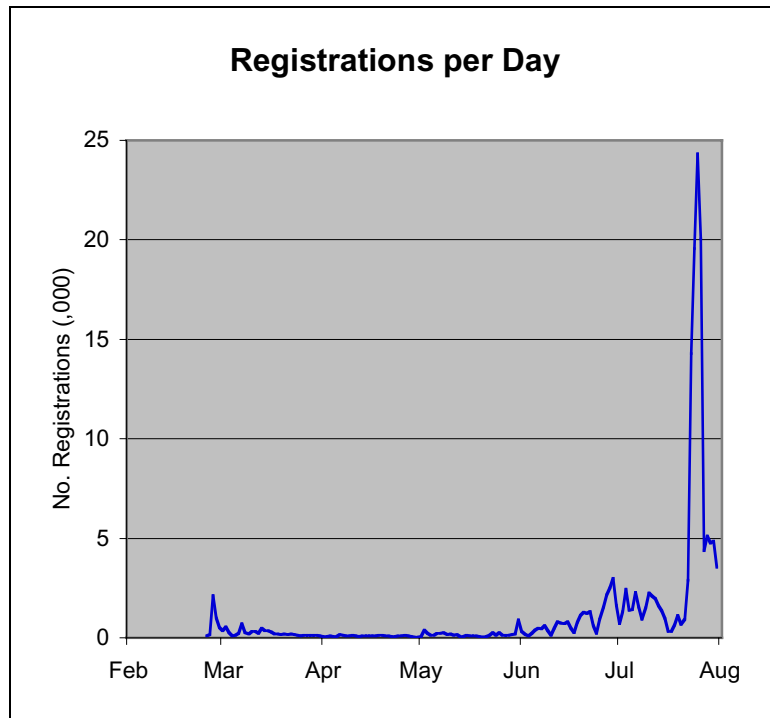
These difficulties made the 2000 ICANN election into a series of trade-offs. Robust authentication of voters—and therefore protection from “ballot-stuffing” and other fraudulent activities—was, to a degree, sacrificed to keep election expenses manageable and registration globally accessible. Rules were limited and, of necessity, self-enforcing.

These and other limitations of online, global elections make the questions that ICANN faces all the more difficult to answer, and should be kept in mind as we look towards future participation in ICANN.

### 2.1.2 Description of the 2000 Election

ICANN began to accept registrations for its new “At-Large Membership” on February 25, 2000—about eight months before the actual election and five months before the direct election system were approved in Yokohama. Registration was handled in-house by ICANN, and extended from February through July 31, 2000.





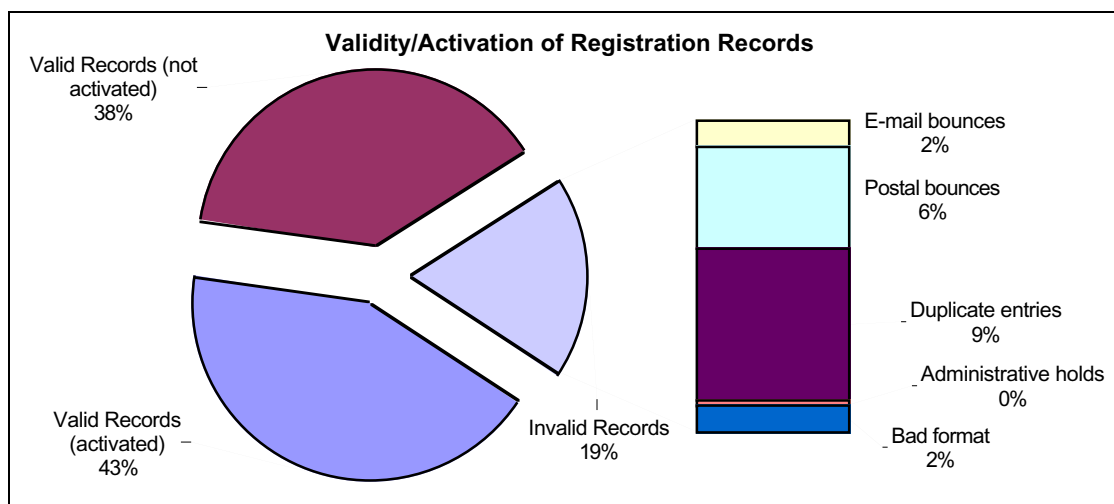
Demand for registration services proved to be extremely high, particularly near the end of the registration period. Registrations peaked on June 25, with 24,310 registrations in twenty-four hours. In total, ICANN received 176,837 registrations—far more than had been expected.

As is discussed below, ICANN encountered significant technical problems during the registration phase, stemming back to early expectations about the Internet community's interest in an ICANN election. For that reason, the 176,837 registrations successfully processed are only a subset of the registration attempts of Internet users. While anecdotal accounts of denied registration are many, quantitative evidence on the subject is scarce, and it is not possible to say just how many Internet users may have been denied the opportunity to register due to server failure.

Registration was the first step towards voting. Through a second step, Activation, ICANN attempted to authenticate voters by mailing (by surface mail) each registered member a password and PIN number, which the voter would then use to "activate" his or her membership on the ICANN Web site, *members.icann.org*.

The activation process encountered difficulties as well. As is discussed below, many voters found the postal return system unintuitive and unreliable. Some were unaware of the need to activate one's membership at all, or of the existence of an activation deadline. These and other circumstances contributed to a low rate of membership activation.

Postal return difficulties and other problems eliminated 33,043 records from the ICANN database.



The chart above shows some of the shortcomings of the activation system. Besides the registrations for which the letters containing activation information were returned to ICANN (10,334, or about 6% of the total registrations), many more letters may have gone undelivered, particularly in countries using non-Roman alphabets. Counting, or even estimating, the number of such letters lost in the postal system is impossible.

The activation phase began while the registration phase was still underway; voters began activating their memberships as early as May 22. Activation ended on September 8, about three weeks before the start of voting.

September 8 was also the date on which the ballot for the October election was finalized. The ICANN ballot had two types of candidates, Board-nominated candidates, selected by a Nominating Committee established by the Board, and member-nominated candidates, chosen by voters themselves. Any member of the At-Large Membership could post his or her name on *members.icann.org* and solicit endorsements from voters. Election rules stated that would-be candidates had to collect endorsements from at least two percent of their regional electorate in order to be added to the ballot<sup>18</sup>; beyond that, top vote-getters would be added, to a maximum ballot size of seven candidates (both Board- and member-nominated) per region. Results of the member-nomination process are discussed below, but every region had at least one member-nominated candidate on its ballot.

After the ballot was finalized, a three-week campaign period began. ICANN supported the campaign by providing each candidate with Web space at *members.icann.org*, as well as a "Question and Answer" forum where members could submit questions for public response by candidates. These forums were fairly well populated; indeed, many of the candidates interviewed complained only about the volume of questions that they produced.

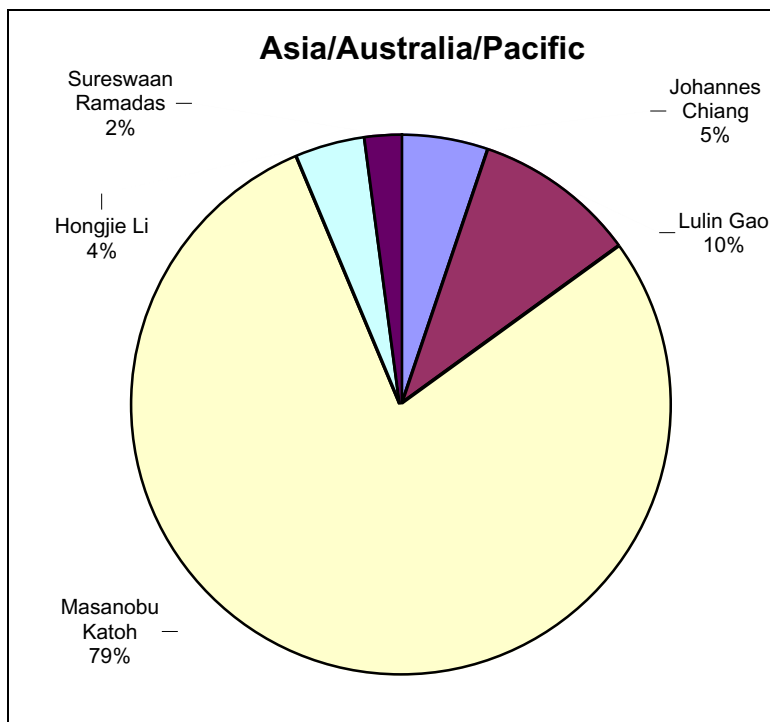
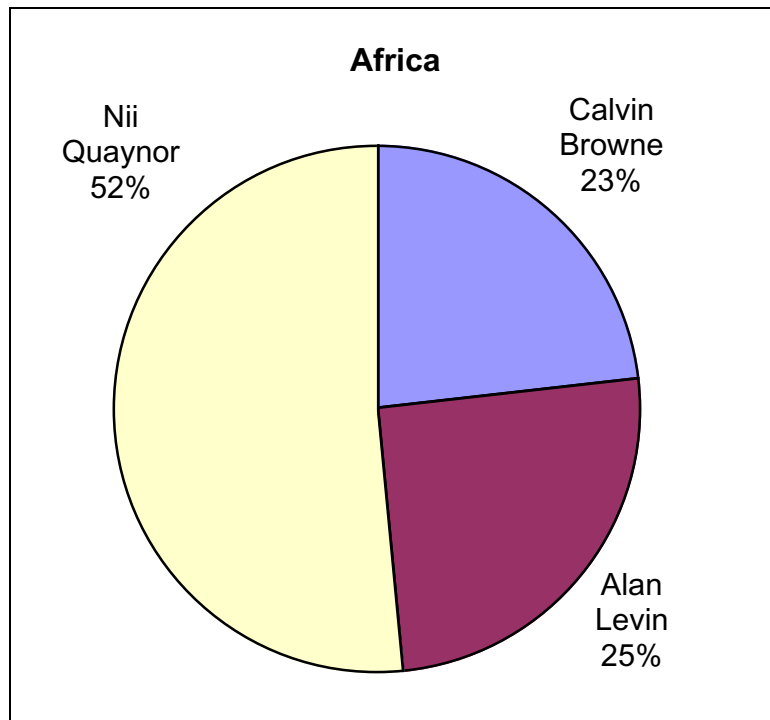
Some candidates did engage in campaigning beyond *members.icann.org*. Their activities are described in the regional studies below.

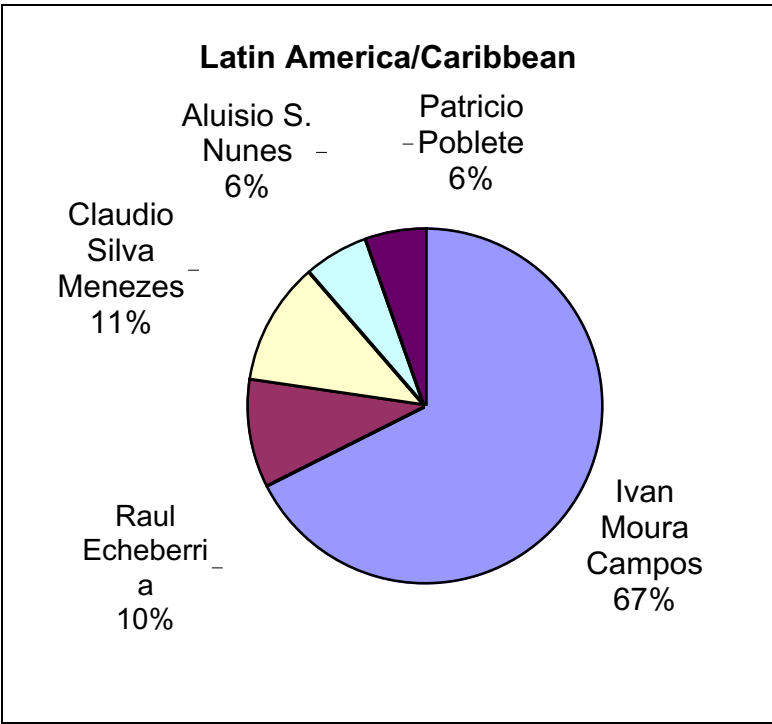
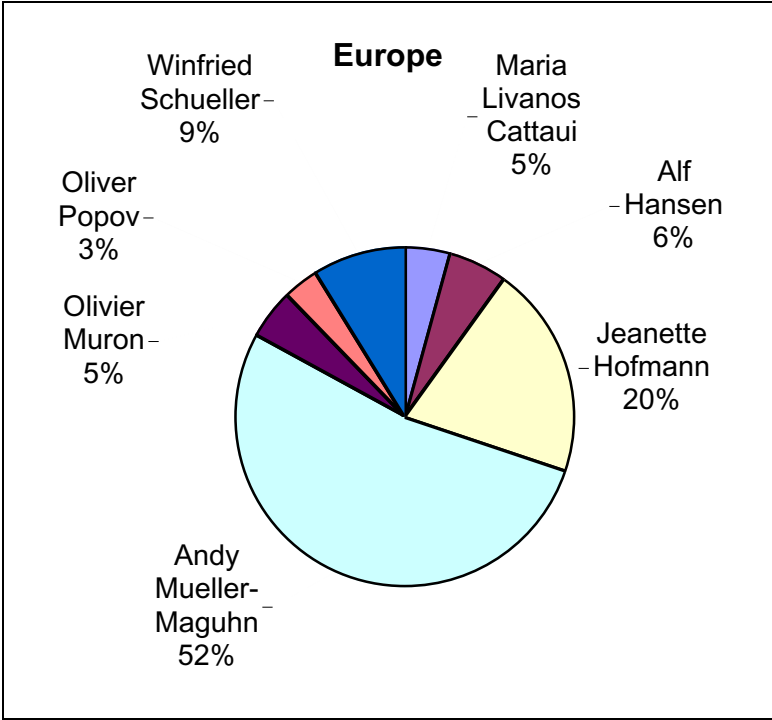
Actual voting began on October 1 and lasted for ten days. Unlike earlier phases of the election, ICANN contracted out the voting phase of the election to election.com, an online voting vendor located in the U.S. Voters entered their ID numbers, passwords, and PINs, then ranked the candidates in their region in order of preference. As in earlier phases of the election, some technical problems were seen: in ten days of voting, the servers were completely offline twice. The first instance was relatively early in the election period, lasting about an hour, and the second was at the very end of voting, lasting approximately forty minutes. ICANN and election.com extended voting for about thirty minutes beyond the stated deadline then closed the polls.

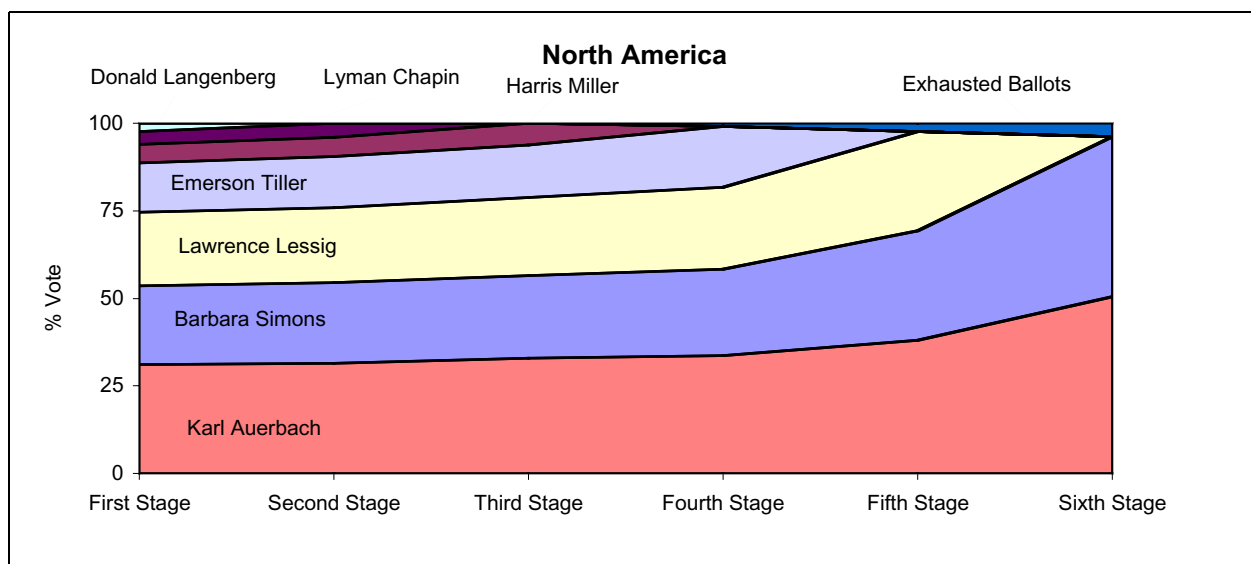
<sup>18</sup> In regions with extremely small electorates, such as Africa, candidates were required to show support from at least twenty At-Large Members in order to be nominated to the ballot.

Election.com tallied the votes, and results were announced the next day. In four of the five regions, one candidate had a clear majority of votes; in North America, several automatic runoffs were held to determine the victor.

## Election Results







### 2.1.3 Decisions Regarding Election Rules

#### 2.1.3.1 Absence of Community-Wide Election Goals

One of the signal difficulties for the 2000 At-Large election seems to have been the lack of a well-defined, widely supported list of the community's goals for the election—a consensus on what the election was really supposed to accomplish and in what cases it could be considered a success. Not only did this make objective post-election analysis difficult, it significantly complicated the development of the election system itself. Choices about election systems, voting models, technical provisions, membership requirements, and even nominations were all made without reference to shared priorities, and as a result they were seen by some as inconsistent, even at times suspicious.

Ultimately, this problem stems from a series of quick and unexpected shifts in the way the Board presented the election. From the MAC report to Cairo to Yokohama, ideas about what the 2000 election would look like and how it would work bounced around the spectrum of possibility, before finally coming to rest on the direct election model in July 2000—just three months before voting began, and over four months after registration for the election had opened.

This uncertainty as to the form and function of the election system had complicated roots in ICANN's history and political landscape. As is discussed above, strong direction on the subject of public participation could be found neither in ICANN's founding documents nor in the opinions of the men and women who had a hand in creating the new organization. Not surprisingly, quick resolution of the election question eluded ICANN throughout its early history. Still, the Board, under strong pressure to move quickly, pressed forward in circumstances where delay, had it been possible, might have been preferable.

Some have also voiced concern about the privileged position occupied by staff not only to prepare proposals on important policy matters like the development of an election system, but also to advise the Board on approving those proposals. It seems clear that some staff proposals, such as those in Cairo and Yokohama, were made in the absence of even the roughest community consensus. Fortunately, the Board detected community dissatisfaction in those cases. In the future, though, one hopes that the Board and staff would attempt to move forward only in cases of demonstrated consensus, not merely an absence of popular outcry.

#### 2.1.3.2 The Regional Election System

The importance of geographic diversity to ICANN, especially at the Board level, can be traced back to the organization's early history. But while most of the ICANN community has agreed on the importance of such diversity, debates about how best to achieve it were extremely contentious. The election bylaws



passed by unanimous consent in October 1999 called for an At-Large Council divided into five now-familiar geographic regions.<sup>19</sup> In defining those regions, the risk of privileging (accidentally or otherwise) certain nations, language groups, or vested interests over others was substantial, and could have had lasting effects on ICANN. In recognition of this problem, the short time available and ICANN's limited funds, the Board defined its geographic regions based on standards previously established by the United Nations.<sup>20</sup>

The five-region model was low-resolution but high-efficiency. Its adoption cleared the way for a speedy and manageable election, but did so at the cost of representative legitimacy. Some members of the ICANN community have pointed out that At-Large members in, say, Israel, India, and Indonesia (all members of the "Asia/Australia/Pacific" region) will have extremely different points of view on many ICANN-related issues, and that a single Directorship fails to represent all the interests involved. The point is well taken.

On the other hand, ICANN's relationship with the Internet community is built less on political theories of representative legitimacy than on the idea that ICANN's activities will be defined by community consensus.<sup>21</sup> A certain geographic diversity greatly assists ICANN in identifying that consensus. But an over-broad system of political representation in the traditional sense could interfere with ICANN's consensus-based processes, even pushing ICANN into areas of policymaking it ought not to enter. Balance is necessary, and in that light the five-region model seems reasonable. It brings diversity to the Board, without implying unrealistic notions of authority.

At the same time, the regional model offers structural protection against the problem of capture—the risk that a populous country or well-organized interest group could seize control of the Board and interfere with the Internet's basic mode of administration. Even a large and well-organized group would find it difficult to coordinate the capture of Board seats across all five regions (provided that certain controls are built into the system).

### 2.1.3.3 The Election Committee

As was seen in the election as a whole, the Election Committee also seems to have suffered from definitional problems. The Board created the Election Committee in May 2000 to make recommendations on "procedures regarding the At-Large elections,"<sup>22</sup> but that mission seems to have been overbroad given the shortage of available time and the lack of clear community consensus on precisely what the elections were supposed to accomplish. Subtle differences in election systems, fraud protections, and even candidate campaigning weigh heavily on the election's ultimate character and results. Uncertainty about what that character and those results ultimately should look like seems to have hindered the Election Committee's ability to proceed surely in its work.

This was perhaps most evident in the technical support for the election provided by election.com. While the specifics of the technical problems encountered are discussed below, ICANN's request for bids from election contractors could have benefited substantially from the Election Committee's collective expertise. Vague instructions about the election's purposes and goals may have prevented the development of thorough recommendations.

The Election Committee encountered substantial criticism and controversy as a result of its attempt to propose rules for member-nomination. Advocates for the public interest have repeatedly emphasized the importance of the member-nomination process as a way to provide the user community with easy access to the ballot, outside the control of ICANN-related bodies. In its initial recommendation of election rules, the Election Committee proposed that all would-be member-nominees be required to show support from at least 10% of their regional electorate—a figure widely decried as an unrealistic one, and one

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<sup>19</sup> Africa, Asia/Australia/Pacific, Europe, Latin America/Caribbean, and North America.

<sup>20</sup> United Nations Statistics Division, "Composition of macro geographical (continental) regions and component geographical regions." 16 February 2000. Available at <http://www.un.org/Depts/unsd/methods/m49regin.htm>.

<sup>21</sup> This consensus-based relationship presently exists only in the theoretical sense. As is discussed below, it has not yet matured nor been adequately codified. Strong evidence of dysfunction in ICANN suggests the need to better define this relationship, or to find a new one.

<sup>22</sup> *Resolutions Approved by the Board*, 00.32.

that would put the ballot out of reach of all potential member-nominees. Under pressure, the Election Committee revised its recommendation to the fairer (and basically successful) 2% showing.

On balance, the Election Committee's final recommendations were good ones. The low barrier to ballot access for member-nominated candidates was successful; the preferential voting system, though perhaps not perfect, struck most participants as intuitively fair,<sup>23</sup> and, as discussed above, the regional voting system made sense in its context.

#### **2.1.4 Decisions Regarding Membership Relations**

##### **2.1.4.1 Creating the Ballot**

###### **2.1.4.1.1 The Nominating Committee**

The Nominating Committee was constituted at the same time as the Election Committee, and was tasked with naming qualified candidates to the At-Large ballot on behalf of the Board. However, the Committee was basically unaccountable for its decisions and opaque in its process, raising critical questions about the Board-nomination process as a whole.

Concerns about the Committee's process evoked suspicion among many in the community, both about nominees' qualifications and about their legitimacy. This probably affected the election differently in different regions, but seems likely to have led to greater dependence on the member-nomination process in Europe and North America.

As is discussed below, the Nominating Committee's additions to the ballot ranged from only two candidates in Africa to five in Europe, though the Committee did not volunteer the reasoning behind such differences. The ultimate consequences of this, and of a ballot limited to seven participants total, varied by region, and important questions remain about the Nominating Committee's conduct in this regard. Since it added candidates to the ballots before the end of the member-nomination process, and because ballot size had already been capped (by Election Committee rules) at seven candidates, the Nominating Committee effectively controlled the number of member-nominated candidates on the ballot.

###### **2.1.4.1.2 Member-Nomination**

Although not every region was able to name the same number of candidates through member-nomination, the process worked well within its limits. As discussed above, potential candidates were required to show support from at least two percent of their regional electorate. Such a level proved reasonable, and at least one member-nominated candidate appeared on every ballot.

Member-nomination took place on *members.icann.org*, where all would-be candidates were provided Web space and the opportunity to describe their platform. Users visiting *members.icann.org* during the nomination period were also offered statistics on how many endorsements each candidate had so far received. While this may have helped voters gauge candidates' relative levels of support, it may also have unintentionally favored those candidates who made strong early showings in the member-nomination process. Voters endorsing candidates late in the process would have been more likely to support candidates already near the 2% line, leaving candidates who submitted their names for member-nomination just a few days late out of the running.

###### **2.1.4.2 Candidate Support**

ICANN did not provide candidates in the 2000 election with direct access to the rolls of the At-Large Membership. This was basically due to strong privacy statements made early in the voter registration process regarding the ways that registration data—particularly e-mail addresses—would be used by ICANN. The Board and staff generally felt that providing candidates with access to voter rolls would have violated its privacy policy, diminishing voters' trust in the election process.

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<sup>23</sup> Putative fairness notwithstanding, the preferential voting system was unfamiliar to many voters, and the documents describing it were lengthy and complicated. Many Internet users from non-English language groups, and those with limited bandwidth, have announced their frustration in downloading and deciphering the often-complicated list of Frequently Asked Questions.

As an alternative, ICANN presented a web site, *members.icann.org*, as the online home of the At-Large Membership during the 2000 election.<sup>24</sup> The site served a functional purpose as a central locus for voter registration and member-nomination, but ICANN also encouraged candidates to post their positions and answer questions posed by members. The site included election-related material in eight languages<sup>25</sup>, though candidate question-and-answer forums were mostly in English—ICANN's working language. As is discussed below, candidate use of the question-and-answer forums was uneven, and several candidates expressed dissatisfaction with their inability to contact At-Large members directly.

### 2.1.4.3 Voter Education and Outreach

#### 2.1.4.3.1 Membership Implementation Task Force

The At-Large election's expansive scope—ultimately including voters from over 190 countries—indicated a need for voter education and outreach on a global scale. The Board attempted to address this need through the Membership Implementation Task Force, but the effort's lack of success stemmed from problems in both definition and execution.

The Board called for the convention of a Membership Implementation Task Force in November 1999. The initial resolution indicated a broad set of tasks regarding election implementation, outreach, and fraud protection,<sup>26</sup> but the Board later indicated that most of the real policy discussion would occur at the Board level. This had the effect of limiting the MITF to a mission of near-pure outreach, frustrating both MITF members, who felt that their expertise in policy matters was not being appreciated, and outreach experts, who may have had more of an interest in the MITF had they known its specific purpose in advance. Further complicating the issue was the MITF's tremendous size and resultant unwieldiness.<sup>27</sup> Members' activity in the task force flagged. Consequently both discussion and action by the MITF were hamstrung, leaving ICANN in the lurch for an effective outreach program.

This lack meant that ICANN missed an opportunity to take a leadership role in positioning the 2000 election. As the regional reports below show, the election was cast in different, sometimes wildly different, ways by the media organizations, companies, and interest groups that played a part in promoting it to voters. This contributed to inconsistencies and problems later on.

#### 2.1.4.3.2 Third-party outreach and education

As is discussed in our look at the election on a region-by-region basis, substantial responsibility for outreach moved outside ICANN to (in varying degrees) media outlets, corporations, non-profit organizations, and even governments. While the tenor and effect of third-party outreach varied considerably by region and by nation, the lack of a strong, centralized outreach effort meant that third-party efforts could exert significant influence over the number and character of registrants.

ICANN did not offer overt support to these outreach efforts. A number of them complain that ICANN declined even to link to their online resources from *members.icann.org*. Given the electorate's large size and decentralized character, placement on a high-visibility page such as the official members' site could have energized some of the self-organizing efforts of groups worldwide, particularly regarding voters new to the ICANN process. Concerns about favoritism could likely have been defused by offering equal space to all outreach efforts.

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<sup>24</sup> Some ICANN participants, particularly those from developing parts of the world, have expressed displeasure with ICANN's Web-only approach, claiming that it may have disenfranchised low-bandwidth users whose Internet access is limited to e-mail and other text-based media.

<sup>25</sup> English, Chinese, French, German, Japanese, Korean, Portuguese, and Spanish.

<sup>26</sup> *Resolutions Approved by the Board*, 99.144. "[The task force will] generate and implement strategies for outreach and recruitment of a broad and numerous membership that is global representative of the Internet user community; design effective membership authentication and online election procedures; and undertake... other membership implementation responsibilities." For many, this seemed to establish the MITF as the successor to the Membership Advisory Committee (MAC), on whose suggestions for election administration ICANN had relied heavily. This the MITF proved not to be.

<sup>27</sup> The MITF had nearly eighty members, divided into eleven "task groups."

### 2.1.5 Decisions Regarding Technical Provisions

As mentioned above, technical provisions for both voter registration and the general election had significant shortcomings. During voter registration, over 170,000 registrants crowded ICANN's servers, overloading them and precluding an uncounted number of individuals from joining the At-Large Membership. The servers' inability to keep up with demand traces back to decisions made early in the planning stages of the election.

In its early thinking about the election, the Board severely underestimated the Internet community's interest in its election. In late 1999, ICANN President and CEO Mike Roberts referred to the election's "minimum goal of 5000 members,"<sup>28</sup> and ICANN staff seems to have designed the registration servers with an extremely limited electorate in mind. Servers began accepting registrations as early as February 2000, but, as is discussed above, the election plan went through significant changes between then and the end of registration on July 31. At the Yokohama meeting, Roberts stated that the servers had been designed with the February-March specifications in mind; they could handle approximately 100 registrations/day, with peaks of up to 500/day. Already by the Yokohama meeting, the servers had seen demand of about 1,000 applications/day, with peaks as high as 2,000/day. As a result, the servers were stumbling, and frequent service outages were the result. However, Roberts maintained that, while a few limited changes could be made, the system was basically resistant to upgrade, and reminded the Board that their design was consistent with original goals.

Server capacity was eventually increased, however, and ultimately permitted as many as 24,000 registrations per day. Such an increase in capacity indicates that the system was less resistant to scaling than had been thought; ICANN has not commented on the types of upgrades that were made.

The activation process, in which voters confirmed their registration by entering information mailed to them by ICANN, ran more smoothly. Problems in server capacity seemed to be resolved. But anecdotal evidence still suggests that many would-be voters had difficulty activating their membership. Lost (and ultimately irreplaceable) documentation, problems in the postal return system, and an unfamiliar activation system all contributed to creating a group of unsatisfied would-be members, able to register but not to "activate" their membership. However, since the size of this group cannot be objectively measured, it is impossible to determine whether their participation (or lack thereof) might have influenced the election's outcome.

By contracting actual election administration to the U.S.-based election.com, ICANN attempted to bring professional-grade resources and experience to bear on the task of providing robust, fraud-free election service. While generally successful, election.com's service failed at two critical moments, making voting service inaccessible for a substantial amount of time—about an hour early in the election cycle, then for approximately forty minutes at the very end. While it may be neither possible nor productive to debate the cause of these outages, they raise obvious concern about voters' access to the tools of voting, and about ICANN's responsibility to find and provide truly robust voting systems.

While the Election Committee had a lot of collective expertise and experience to offer, it is not clear that ICANN made best use of that expertise when they solicited bids for the election. Inflexible time restrictions, a lack of clarity in its specifications and, as discussed above, a certain vagueness in its intentions may have prevented ICANN from finding the provider best suited to the job. And while election.com's lack of disclosure to date about its election systems prevents an objective analysis of its service, service outages are clearly unacceptable in any serious election, online or otherwise.

### 2.1.6. Conclusions

Within the rules that the ICANN community established for the 2000 At-Large Election, it was a qualified success. The Membership selected five competent Directors to the Board, all of whom bring new perspectives and expertise that will benefit the corporation and the community over time. But in drafting future models for public participation, we must keep the shortcomings of the 2000 election in mind:

- **Inherent limitations of online voting systems**

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<sup>28</sup> Minutes from the Special Meeting of the Board, 9 December 1999.

Technologies for online voting, particularly for voting on a global scale, are still nascent. As yet, the cost of carrying out even basic tasks like voter verification—a regular practice in the offline world—is high, and the technology is problematic. While in the future the world may develop infrastructure that would help solve this problem, it does not yet exist. Therefore, for the foreseeable future, though online elections will enjoy many benefits from the Internet's unique nature, they will also suffer some substantial costs.

- **Lack of shared goals**

The absence of community consensus on precisely what the 2000 election was supposed to achieve, and how it would achieve it, complicated even basic tasks of implementation. The lack was largely the result of strong, divergent pressures on the Board that separately raised a broad range of tough questions—yet collectively emphasized the overarching importance of quick action. Yet when attempts to push consensus forward failed in Cairo and Yokohama, the Board was forced to make quick, sharp changes in the direction of the election fairly late in the game. The Election and Nominating Committees operated with vague and overbroad missions, and outreach was generally unsuccessful.

- **Unaccountability and opacity of Board Committees**

While they may have a role to play in future elections, the processes used by both the Nominating Committee and the Election Committee in 2000 raised questions about the loci of control for the election. While the Election Committee's rules were ultimately positive ones, the Nominating Committee's conduct raised questions not only about the utility of the Board-nominated ballot, but of the control wielded by the Committee over the member-nominated ballot. Again, better-defined goals and rules for both committees might have assisted in this.

- **Well-designed, but limited, election rules**

Early drafts of the Election Committee's election rules were criticized for their treatment of the member-nomination process. And while, as mentioned above, even the final rules fell short of providing the community with a unified concept of the 2000 election's priorities, they were much improved and worked well within their limitations. Every ballot included at least one member-nominated candidate, and member-nominated candidates were elected in two regions. Moreover, no candidates that demonstrated the threshold two percent regional support were denied access to the ballot. The five-region system, despite concerns about its resolution, performed well and resulted in a manageable election. And while the preferential voting system was complicated and unfamiliar to many, it maintains a capacity for basic fairness and was a generally positive part of the 2000 election.

- **Lack of an organized central outreach effort**

ICANN's main outreach effort, the MITF, was not as effective as had been anticipated, opening the door to a major role for third parties in voter outreach and education. While the effects of this varied regionally, ICANN ceded a significant amount of authority to establish the tone of the 2000 election to outside groups.

- **Inaccurate technical assumptions and inflexibility of voting/registration systems**

The ICANN Board severely underestimated community interest in the 2000 election, but more troubling was its installation of voting/registration systems that could not be easily scaled up to handle unexpected demand. Although registration servers first went online in February 2000, and were designed to handle relatively limited loads, the fact that they were not designed with flexibility for future upgrades was a major oversight, and an obvious lesson for the future.

- **Unavailability/inconclusiveness of key data**

Critical questions about the election in several key areas could not be answered, either because of the inaccessibility of key information or because that information had not been collected in the first place. For example, it has not been possible to estimate the level of fraud that might have occurred in this election, nor to determine whether voters were adequately authenticated

by ICANN's registration and election systems, nor to ascertain whether At-Large Directors might have been "captured" by determined interest groups. Other important data, such as voter turnout, was available only in aggregate form, and could not be meaningfully deconstructed along national, demographic, or ethnic lines. Whether the data scarcity can be properly attributed to reticence on ICANN's part or to technical shortcomings of the election system is unclear. But considering the experimental nature of the 2000 election, ICANN's failure to make advance provision for thorough analysis of the election data is disappointing.

## 2.2 Regional Reports

### 2.2.1 Africa<sup>29</sup>

The continent of Africa has the lowest penetration of Internet users in the world, and registered the lowest numerical number of voters for the At-Large election. However, the number of voters was of similar proportion to total users as in other regions, and so can be considered to have been a success from this perspective.

We studied the election process and its result by means of:

- An outreach exercise to facilitate public participation in the study effort;
- A series of in-depth direct interviews carried out with informed individuals active in the ICT (Information and Communication Technologies) industry;
- An e-mail survey which was sent to individuals as well as being circulated to the At-Large Membership (ALM) candidates, key influencers and the following e-mail lists: IOZ (Internet Organisations of South Africa) and Afrik-IT (African IT professionals working across the continent).

This report is further informed by the observations and experiences of its authors, who actively participated in the election through outreach, as voters, and (in one case) as a candidate<sup>30</sup>.

The e-mail survey mentioned above received a response from 99 people. 87% of these respondents were South Africans, which roughly correlates with the distribution of Internet usage on the Continent. We feel that, since there were 130 African voters in the election, of which 26 were respondents to the survey, the results of the survey are significant. All of those who responded appropriately addressed all the questions, and from this point of view, the information gathered is of high quality and has been taken to be representative of the target audience of the exercise.

It should be recognized that, due to the method of dissemination, the survey was inevitably biased towards people with some professional involvement in the information and communications technology industry. Such individuals are more likely to have an interest and knowledge of “how the Internet works” than would “everyday” users, and are more likely to be members of e-mail discussion lists and have regular access to the Internet and, by extension, such surveys.

#### 2.2.1.1 Participation and contextual variables

##### 2.2.1.1.1 Internet use

Internet access in Africa is uneven, both geographically and across socioeconomic groups. South Africa has a disproportionately high penetration of Internet connectivity in Africa, accounting for 67% of the dial-up Internet connections on the continent, 81% of bandwidth into Africa and 87% of hosts using African ccTLDs. In general, all African countries (including South Africa) have relatively low Internet penetration levels in comparison with the developed world. At the time of the ICANN At-Large election, only 0.3% of the African population had dial-up Internet access. One reason for this is the retarded development of telecommunications infrastructure in Africa. Most telecom services are delivered by state monopolies, resulting in poor service and high user costs.

##### 2.2.1.1.2 Electoral systems and traditions

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<sup>29</sup> Prepared by Professor Clement Dzidonu of the International Institute for Information Technology (INIIT) (Ghana), and Alan Levin and Mark Neville of Future Perfect Corporation (South Africa).

<sup>30</sup> Alan Levin was an ICANN nominated candidate for Africa, together with Nii Quaynor—the eventual elected AL Director.

From the perspective of the United States or Europe, the history of open and representative elections in Africa may seem recent and even shallow. However, the concepts of participation and social involvement, together with cultural conventions aimed at producing consensus at the community level, are deeply embedded in much of African society. Individuals recognized for their ability and commitment attain positions of authority through respect for their contribution to society.

Though electoral democracy based on majority voting systems has now become established throughout much of Africa, what may be deemed as a democratic process by Western standards is not something that is mature on the continent. For example, during the first democratic elections in South Africa in 1994 considerable international resources and effort needed to be expended to educate all sectors of the population on the process of transparent candidate selection, open campaigning and secret voting.

Most people involved with Internet functionality are likely to be more aware of the functioning of "western-style" elections, and this was reflected in the way that the African ALM participated in the election process. However, such cultural variables should be taken into account when next organizing similar elections, especially if broader participation is the goal; the assumption that the "western" way is the only way needs to be tempered with mechanisms that recognize the need for dialogue and consensus building if they are to be acknowledged as legitimate.

At the macro level, limited access to the Internet and the lack of familiarity with the mechanics of "western-style" elections overwhelmed the nuances of the ALM election process within the African context—though this does not diminish the importance of the involvement of Africa for the legitimacy of the At Large election.

#### **2.2.1.2 At-Large Membership and Election**

In this section we review the ALM recruitment drive and outreach program in the African region, and the subsequent election of the ALM Directors. We also examine some of the problems encountered by the African regional Group of the Membership Implementation Task Force (MITF-Africa) as well as some of the lessons learned from the process.

##### **2.2.1.2.1 The pre-election phase**

The ALM recruitment drive and outreach program was coordinated by the African Group of the MITF. The Group carried out a number of tasks, including:

- An outreach program to educate the public about the concept of ICANN, its process, functions and activities;
- An ALM recruitment drive;
- A public awareness campaign to inform and educate the public about the voting process and procedures; and
- An outreach program to encourage registered ALMs to activate their membership and cast their vote.

A number of methods were used to facilitate the recruitment drive and the outreach program, including:

- Messages to numerous lists of African interest;
- Targeted e-mails to members of the African Internet community;
- Radio interviews and talk shows devoted to promotion of ICANN and the ALM concept;
- Press releases;
- Notices at conferences, universities and other public meetings targeting the Africa Internet community; and
- Letters to noted public figures and politicians urging them to promote the ICANN concept and to encourage people to register.



A number of ISPs were also contacted (via messages posted on their web sites) and encouraged to join the recruitment drive. Some of these ISPs went so far as to directly contact their subscribers by e-mail, encouraging them to join the ALM and promote the ICANN concept.

For many members of the Internet community—especially in southern Africa—a critical point in the pre-election phase was the announcement of the ALM elections at the AfrinIC and Afnog meetings in Cape Town in mid-May 2000. As a result the elections became more widely known across the region. Similar outreach efforts took place at a number of conferences in Accra, Addis Ababa, The Gambia and other places. However, a review of the number of registrants for the election demonstrates that more could have been done in a more timely manner to obtain better representation from large Internet user populations other than Ghana and South Africa. Interview respondents cited this as an example of why the ALM is needed to increase the transparency and legitimacy of ICANN.

In South Africa media exposure in two publications (*Financial Mail* and *Weekly Mail and Guardian*), that enjoy wide distribution across southern Africa, helped somewhat to increase the number of registrants. In addition, once the registrations were closed and the nominees announced, various Internet Network providers made efforts to enable higher visibility of ICANN and its functions.

Unlike, for example, the Japanese and the Brazilian governments, neither the Ghanaian nor the South African governments openly or explicitly supported candidates from their countries. Why they chose not to do so is unclear. The South African monopoly telecom (*Telkom*) was also approached and encouraged to campaign actively, but they declined to become involved in any way.

#### **2.2.1.2.2 Problems Encountered**

The African ALM recruitment and outreach program suffered from organizational difficulties, especially in the area of establishing reliable and effective channels for information dissemination and communication. Also problematic was the lack of resources to facilitate the implementation of the recruitment drive and outreach program. The MITF was made up of volunteers using their own resources, with no funding from ICANN to support their activities. This was compounded by the time constraint. Insufficient time was given to effectively carry out the recruitment drive and outreach program as well as the voter education and dialog process across such a geographically diverse continent. Language barriers also made communication more difficult.

Fundamentally, the MITF-Africa faced a general problem of apathy and lack of interest on all matters relating to ICANN. Very few people knew of ICANN, and of those who did, not many were initially keen to get involved in its processes. This made the task of undertaking the ALM recruitment drive and outreach program all the more difficult.

#### **2.2.1.2.3 Outcome of the Recruitment Drive and Outreach Program**

The At-Large recruitment drive prior to the election managed to recruit 792 individuals. Of these, 315 activated their membership, and 120 actually voted.

Global registrations	158,593
African registrations	787
Africa % of global	0.50%

In percentage terms, these numbers correlate well with those of the other regions. However, such low absolute numbers could also be interpreted as meaning that the importance and standing of ICANN in Africa is minimal, or that it could even be considered to be irrelevant.

A possible objective measure of Internet use on the continent is to compare the number of ALM from Africa with the number of hosts carrying African ccTLDs (country-code Top-Level Domains).

Internet hosts (Global vs. Africa)		
	Jan-00	Jan-01
Global hosts	72,398,092	109,574,429
SA % of global	0.23%	0.17%
Africa % of global	0.26%	0.20%

This shows there to be a good correlation between Internet usage in Africa and the numbers of the ALM. A weakness of this approach is that there are potentially many hosts in Africa carrying gTLDs. However, by this measure, the level of registrations was acceptable.

Drilling down through the number, it is clear that the recruitment exercise was more successful in some countries than others. Of the 787 applications for membership, South Africa registered 201 applicants, followed by Ghana with 112, then Benin (48), Senegal (41), Egypt (34), Madagascar (31), Morocco (27) and Niger (27), Kenya (21), Mauritania (20).

These 10 countries accounted for close to 80% of the total number of applicants. With an additional 8 African countries recording between 10 and 20 applicants, the vast majority of countries recorded a single digit number of applicants, with some of them registering only one applicant. Finally, eight of the fifty-four countries in Africa did not have a single ALM registration.

The relatively high number of applicants from South Africa can be explained by the fact that the country has the highest number of Internet subscribers on the continent. No South Africans participated in the MITF.

The disproportionately high number of applicants from Ghana and Benin (where there were more ALM registrations than there are hosts using those ccTLDs) can be attributed to the fact that these countries have MITF-Africa members whose personal initiative to recruit locally had some impact. In the case of Ghana, a local ISP played an active role in the public education and mobilization exercise. This demonstrates how effective the outreach program was within the countries where it was able to have an impact.

The e-mail survey uncovered a high awareness of ICANN within the target group, with 40% of respondents having become aware of ICANN through the recruitment drive and outreach program that preceded the election. Further, 48% of those respondents who heard about ICANN as a result of the program registered to vote.

#### 2.2.1.2.4 The Activated Membership (The Eligible Voters)

Of the 787 applicants from the African region, only 315 (40%) activated their membership. The gender composition of the activated members was 34 female (11%), 261 male (83%) and 20 did not specify.

Global activations	76,183
African activations	315
Africa % of global	0.41%

If one compares this figure with the ratio of hosts using African ccTLDs, Africa's activation percentage was again in line with the rest of the world.

The table below, reproduced from ICANN's Election Data Site, indicates that the majority of the 315 African ALM members who activated their membership learned about the ICANN ALM and the election process by way of *electronic mail*. These could be people reached directly by the MITF-Africa and others by way of targeted e-mails, or by way of announcements on specific African-interest lists.

Media	Number
At Work	53
Banner Advertisement	1
E-mail	94
Friend/Acquaintance	65
Newspaper/Magazine	15
Other	13
Print Media	1
Search Engine	1
Website	45
No response	27

The above data also indicates that a significant number of people found out about the process from *friends and acquaintances*. In fact, combining the number for those who learned about the process *at work* (which in itself, is also another type of personal contact) with those who were informed by friends and acquaintances, it is obvious that person-to-person contacts ranks as the highest means by which people in the African region were informed about the ALM election process. It is possible that some of these contacts were made by e-mail.

It is interesting to note that the Web as a medium for the recruitment drive and outreach program ranks only third, with about 45 out of the 315 activated voters learning about the process via web sites. This means that only about 15% of the eligible voters learned about the ICANN ALM and the election process via the Web. This figure is an interesting one, considering that one needed to have an access to the Web to be able to vote in the ALM election.

Also, although MITF-Africa made an effort to use the newspapers and the print media as a means for reaching a greater portion of the African public, the evidence shows that not many of those who might have read about the process in the papers went ahead and registered. This may be because the vast

majority of people with access to print media don't also have access to the Internet. Even some of those using the Internet for e-mail may not have *Web* access, or could not afford the cost of staying on the Web to carry out the registration process.

It is clear that the Web-based online registration and voting was not the most appropriate for Africa, where lack of access and unreliable connectivity and a high 'out of pocket cost' for Web access is the norm. In Africa, the majority of people who do have access to an Internet connection (and who are not necessarily ISP subscribers, e.g. those using Internet cafes for access) use only e-mail. Most Internet users do not own a computer: they either rely on Internet cafes, their employer's system or—as in the case of college students—the computer system of their institution. Because they do not own the access equipment, they do not have the prolonged access that would enable them to browse the Web or carry out a Web-based transaction like ALM registration or voting.

Another lesson learned from the ALM recruitment drive and outreach program is the lack of knowledge within the African Internet community and the public on matters relating to the management of the Internet. Most Africans, including long-time users of the Internet, have not heard of ICANN; the few who had come across the name remain in the dark about its purpose and role and do not know how it works. ICANN should have done more to educate the Internet community about its role, structure and process long before it embarked on the ALM process. Although the ALM process itself did play some educational role, more could have been done in advance of the election.

At least within the context of Africa and other "low-Internet-usage" regions, there is a need in the future for ICANN to increase its public education and awareness initiatives. ICANN should not rely on the fact that close to 160,000 people accessed its web site to complete ALM forms as an indication of a worldwide knowledge of its existence and process.

Of the e-mail survey respondents, most (81%) would like to be involved in global Internet policy formulation in the future. 96% agreed that more should be done to promote knowledge of the work and role of ICANN in Africa, with 89% feeling that ICANN should take into account the special needs of Africa when formulating its policy and process decisions.

#### **2.2.1.2.5 The Candidate Nomination Process**

Three candidates eventually stood for election in Africa. Nii Quaynor (Ghana) and Alan Levin (South Africa) were board-nominated candidates, while Calvin Brown (South Africa) was nominated by the registered ALM.

Most of the respondents felt that the self-nomination process was fair and transparent. There was, however, some disagreement on the degree of fairness and the transparency of the procedure used by the Nominating Committee of ICANN to nominate the two candidates for the African region. Some people were not aware of the criteria and the procedure used by the Nominating Committee, and they therefore did not regard the candidate nomination process as transparent. In the words of one respondent: "...the two-way candidate nomination did not appear transparent to people, as there was suspicion as to ICANN staff's willingness to 'coach' a few candidates...."

#### **2.2.1.2.6 Technical problems**

The technical problems associated with late registrations were publicly debated, and ICANN's credibility (as well as the election's legitimacy) was tainted. Specifically in South Africa, discussions in this regard were extensive in both the national and local communities.

The late posting (and, in some cases, complete non-delivery) of PIN numbers was disastrous. This problem was especially acute in Africa; it may have been less so in regions where there was earlier and more robust ICANN participation. It was also noted by many respondents that the guidelines regarding the date for final activation of one's membership were hidden or not obvious, and that this additional voting requirement compounded the postal problems. A number of respondents commented that this step unnecessarily complicated the process.

The majority of respondents felt that the Web-based membership application procedure excluded those without Web access from the process. In the words of one respondent:

"... It certainly DID exclude those with e-mail only access to the net... additional ways have to be found in order to bring this group into the online democratic fold."

Many expressed the same opinions about the membership activation procedure. Samples of these views, which are indicative of the general consensus on this issue, follow:

- "...It definitely did... It was a long procedure that required people to be on their guards, [the combination of] snail-mail and e-mail, I think, was too much for a lot of impatient people, but also for those who showed interest at first and then got discouraged by the duration of the process."
- "... It excluded a lot of people due to its complexity, the overload on the server itself that made it impossible for people to vote, etc..."
- "... The activation procedure [added] more complexity to the process. ... Most people got lost and ended up not activating when they should have done it... and thus could not vote...."

### **2.2.1.3 The election phase and voters**

#### **2.2.1.3.1 The Election Campaign**

Overall, the campaign can be considered a success. The minimum threshold for self-nominated candidacy was appropriate, and the candidates participated in the ICANN forums.

While some respondents felt there was enough time to get acquainted with the candidates, others felt there was an element of time constraint, and that some of the candidates did not show enough commitment in responding promptly to the questions posed by the ALMs during the campaign. In the words of one of the respondents: "... the process was interesting... Not sure it was a problem of ICANN but I found that at first there was not much info about the candidates. They were a little slow at providing information, especially about why they should be elected..."

Numerically, not many people participated in the online forums with candidates. This lack of participation did not help the awareness situation, given that in general the candidates were little known outside their countries. It could be that this was part of the reason that less than 50% of the eligible voters actually cast their vote. As previously noted, this low final turnout could also have been due to the lengthy and complicated activation process, which drained the voters of energy required to complete the entire process.

When questioned as to the value of the online dialogue phase—designed to facilitate interaction with the candidates during the campaign process—some felt that it was informative, while others said that the dialogue session was short and not as useful as they would have liked. Some were of the view that ICANN should, in the future, find ways of making the dialogue phase more 'instantaneous,' through chat sessions or other ways in addition to e-mail and web-based methods.

#### **2.2.1.3.2 The Voter Education Exercise**

Respondents were asked to comment on the adequacy and informative value of the voter education exercise prior to the actual election. A number were of the view that the process had some inherent problems: for example, there was too much information to absorb and act on in a short period of time. In the view of one of these respondents: "...I struggled a bit. Too much information on things I didn't really need to know, and not nearly enough simplicity on the things I did want to know..."

Some, however, were of the opposite view. They thought that the voter education exercise was fine but limited in scope, as there were no appropriate channels for relaying the information in Africa.

A number of recommendations were made to improve the process in the future. For example, one suggestion was that local media and other channels should be used to facilitate the voter education exercise.

Respondents also cited a lack of clarity about the ultimate purpose of the ALM elections. In the view of one of these respondents: "...the purpose of the election of the Directors was not clear at the time of voting and is still not clear. ... Nor is the role of the ALM in the management of ICANN."

### 2.2.1.3.3 The Election

Of the 315 members who activated their membership, only 130 cast their vote. This figure represents less than 41% of the eligible voters and less than 16.5% of the original number of 787 applicants.

Global votes	34,035
African Votes	130
Africa % of global	0.38%

130 votes represents 0.0054% of the dial-up user population (similar to that of the North American region). We can therefore deduce that, although the number of ALM in Africa is numerically low, they are not disproportionately low in comparison with other regions.

The result of the election was that Nii Quaynor was elected after a single ballot, with 67 votes (52%). Alan Levin received 33 votes (25%) and Calvin Brown 30 votes (23%).

Of the e-mail survey sample, 70% of the registered voters actually cast their vote.

### 2.2.1.3.4 Comments on the Election process

The vast majority of the respondents felt that not many people understood the rules and the procedures governing the membership registration and election process. Some attributed this to the newness of ICANN itself, but also to the confusing nature of those rules and procedures.

Some comments:

- "... I think that the whole process was problematic. Well designed in theory, but badly implemented. I couldn't even vote because the process would give back errors. ...E-mails in this regard were never answered."
- "...The rules and the procedures are not straightforward, I even got confused sometimes... I think it should be more simplified and coordinated."
- "...While the principle was very good [but] needs to be improved, there needs to be more awareness raising about these new methods of online democracy."
- "...The rules and procedures were not that simple to understand, as it was all Web-based..."

Other respondents were more specific: in their view, people were required to learn about ICANN, its process, functions and the whole business of the concept behind the ALM and the election of the Directors in very short period of time. The language problem was also singled out as a problem area. A number of people were of the view that the rules and the procedures were not translated into other languages in a timely manner. This situation put the non-English speaking ALMs in Africa at a disadvantage. For example, in Africa there are four main language zones: English, French, Arabic and Portuguese. While the rules and the procedure were eventually translated into French and Arabic, they were never translated into Portuguese.

Overall, and with the exception of the technical problems, the election system was considered on balance to be appropriate. However, the use of Web-based voting did undoubtedly reduce or even eliminate the ability for individuals in a number of African countries to vote.

In the words of one respondent: "... the web-based voting was not at all suited for Africa. So, it is quite certain that some eligible voters have been excluded..."

It is commonly thought that an option for e-mail-based voting is needed, although there no answers have been put forward as to how this can be done with secure authentication, such as is offered through the Web.

Among respondents to the e-mail survey, awareness of the election result was good, with 57% of those knowing about ICANN aware of the result.

#### **2.2.1.4 Conclusions and Assessment**

Overall, the ICANN At-Large elections proved to be a qualified success. As a "first-time" effort, and relative to the voter experience elsewhere in the world, the election can be considered to be a legitimate expression of African involvement. Further, as a result of the interest generated by the election it is clear that African At-Large members and the African Internet community do want to participate in ICANN policy formulation, and do want to vote in direct elections for ICANN Board representatives.

However, the following problems must be addressed:

- **Lack of awareness of ICANN and the need for outreach**

Within Africa there is a general lack of awareness of ICANN, and much more is therefore needed in the areas of outreach and education if future elections are to be more inclusive and consequently legitimate. The ALM recruitment drive and outreach program did have a positive impact, but did not change the general situation appreciably. The MITF-Africa faced a general problem of apathy and lack of interest within the Africa region on all matters relating to ICANN. Very few people knew what ICANN is all about. Most people, including long-time users of the Internet had not heard of ICANN; many of the ones who had heard of it remain in the dark about its role, structure and processes.

ICANN should do more to educate the Internet community about these aspects of its mission and operation. ICANN should not use the fact that close to 160,000 people completed the ALM forms on its web site as an indication of adequate awareness on a global level. A broader global communication strategy needs to be developed. People need to know more about ICANN and the impact of its activities on the growth, usability and accessibility of the Internet. Efforts must be made to make information available in all major official languages of African countries. Relevant material with regional specificity must be developed.

There is a clear need for outreach programs in the African region to encourage and facilitate active participation in the ICANN process. People need to know more about ICANN, and efforts have to be made to make information available in all major official languages of African countries.

Specific voter education is required about the role of the ALM and the Directors elected by the ALM. Some suggested decentralization, to ensure that regional specificities are addressed before reaching any consensus on a global level.

- **Representation problems**

The perceived "under-representation" of the African region will have a negative impact on the legitimacy of the ICANN At-Large process, structure and governance in the future, unless steps are taken to get more Africans involved and interested in ICANN.

Africa does have special requirements; while behind in Internet use, the Internet and related technologies have the potential to impact Africa more than anywhere else in the world. As such, Africa needs representation in all of the various ICANN bodies.

Most people regard the self-nomination process as fair and transparent. But there was some disagreement on the degree of fairness and the transparency of the procedure used by ICANN's Nominating Committee to nominate the two candidates for the African region. An option for the future is therefore to only have self-nominations. This will also reduce the complexity of the process.

In addition to At-Large Directors, an *At-Large Advisory Committee* may be regarded as one of the most appropriate “representational models” to ensure public representation and participation within the ICANN structure.

- **Technical issues**

If the authentication process continues to utilize traditional paper-based mail, then more time must be allowed for letters to arrive at their African destinations.

The Web-based online registration and voting procedure is not appropriate for regions like Africa, with poor Internet connectivity and high “out-of-pocket cost” for the average subscriber linking to the Web.

Since few people participated in the online candidate forum for one reason or another, this apparent lack of interest does not help awareness, given that the candidates were little known outside their countries. ICANN should assist in various ways to make the online dialogue phase—which facilitates interaction with the candidates during the campaign process—more instantaneous, through chat sessions or other ways, as well as the use of e-mail and Web-based methods.

Many people did not understand the rules and procedures governing the election process, including membership application, membership activation to qualify for voting, and the voting process itself. The step for activation was particularly troubling and deemed unnecessary. Therefore, the election process must be simplified.

With specific regard to membership activation, one respondent usefully suggested that:

“... It may be a better idea to try and allow people to receive an e-mail with an activation code. Could help with the slow snail mail problem. This does not necessarily have to be a totally automated process. It could be done where the information is verified by computer and then put in a waiting queue for human verification and then the code could be allocated. The other [possibility] may be to have an e-mail ballot system as well. ...”

However, it is recognized that this proposal must be examined closely, in order to eliminate potential fraud and authentication problems.



## 2.2.2 Asia and Pacific Region<sup>31</sup>

### 2.2.2.1 Participation and contextual variables

#### 2.2.2.1.1 Internet use

While the Asia and Pacific region accounts for 60% of the world's population, it currently has only about a quarter of the world's Internet users. This relatively low degree of Internet penetration, however, is changing very rapidly as the Internet grows quickly in such large populated countries as China, India and Indonesia (see Appendix 1).

Internet penetration in the Asia and Pacific region varies widely across national boundaries. Over the last three years, South Korea, as one example, has become the world's leading nation for broadband services, with over 6 million subscribers and a penetration of DSL and cable modem service of more than 30% of households.<sup>32</sup> Australia, too, has been a leading Internet nation since the early 1990s. For its part, Japan has a well-developed wired Internet market, but is also known for mobile Internet usage, with 40.4 million mobile Internet subscribers as of June 2001.<sup>33</sup>

At the other end of the Internet development scale, Internet connectivity in countries such as Laos and Vietnam is currently very low. According to the most recent Internet Software Consortium/Network Wizards Internet Domain Survey, the Vietnamese domain was carried on just 179 hosts connected to the Internet. The Japanese domain, by comparison, had 4,640,863.<sup>34</sup>

#### 2.2.2.1.2 Electoral systems and traditions

Broadly speaking, both democracy and open, representative elections have had a relatively short history in the Asia and Pacific region. The actual implementation and interpretation of the concepts of good democracy and fair elections differ according to the historic, societal and political culture and conventions in each country in the region. In some Asian countries, political patronage and community-based political loyalties continue to play an influential role, while other countries are making a concerted effort to embrace more modern, democratic forms of governance. Some argue that, in South East and East Asia in particular, societal conventions of making decisions at community level, such as in village group or business organizations or political parties, are deeply rooted in cultural traditions.

In countries such as Australia, on the other hand, democracy is firmly established and well understood. There, suffrage is universal and compulsory for those over the age of 18 years. India, too, boasts a proud parliamentary tradition.

Yet other countries have forms of governance that diverge from democratic principles. For example, the Lao People's Democratic Republic and Democratic People's Republic of Korea (North Korea) are authoritarian states. So is China, although it has established universal suffrage in elections for the legislative arm of its government.

South Korea operates a system combining party-list proportional representation with single-member districts. After more than thirty years of military rule, South Koreans—since 1987—have begun to enjoy fully democratic political processes.

Liberalization of the military regime in Taiwan began in the 1980s and ended in 1987 when emergency decrees in place since 1948 were removed. Taiwan is now a multi-party democratic regime headed by a popularly elected President.<sup>35</sup> It has a complex electoral system that includes a majority of seats elected

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<sup>32</sup> Ministry of Information, Korea, <http://www.mix.go.kr/>

<sup>33</sup> Mobile Media Japan (MMJ), April 30, 2001, <http://www.mobilemediajapan.com/>

<sup>34</sup> Internet Domain Survey, January 2001, Internet Software Consortium (Produced by Network Wizards), <http://www.isc.org/ds/>

<sup>35</sup> The World Factbook, CIA, <http://www.cia.gov/cia/publications/factbook/index.html>

by direct popular vote, a smaller number of seats allocated to political parties on the basis of nationwide vote totals, and the remainder elected by overseas Chinese and the aboriginal population.

Other Asian governments run the gamut of openness and democracy. In Indonesia, approximately 8% of the legislative branch is appointed by the military. The legislative branch of the Philippines government is a bicameral Senate and House of Representatives that is directly elected except for approximately one fifth of the lower house which may be appointed by the president. Thailand is a constitutional monarchy with a bicameral Senate and House of Representatives. Until the 2000 elections, the King appointed all representatives to the Senate.

In Japan, democratic principles have become well rooted in the country's political representation and decision-making traditions. Universal suffrage was first introduced in Japan in 1925, but the transition to full representative democracy was marked by the adoption of a new constitution after World War II. The Japanese government operates through a combination of proportional representation and direct election.

Until very recently, in Japan it was both common and reasonably well accepted that companies and trade unions would be heavily involved at all levels of the electoral process. Until recently employers and trade unions regularly instructed their employees and members on how to vote. Such behavior was not regarded as unfair, nor as any form of electoral "capture" unless some violation of specific rules or laws has occurred.

These examples of various representative systems and different ideas about representation and democracy lead to an important conclusion: any region-wide election in the Asia/Australia/Pacific region must have explicit and common rules for how the election is to be conducted.

## **2.2.2.2 At-Large Membership and Election**

### **2.2.2.2.1 The Pre-Election Phase**

ICANN's Membership Implementation Task Force (MITF) was basically ineffective in the Asia and Pacific region. However, an independent program of outreach and education was undertaken during 1999 and 2000, through joint efforts by various stakeholders in the Asian Internet community. As part of the program, seminars were held for discussion of ICANN issues, including the At-Large, in Seoul, Bangkok, Taipei, Beijing, Kuala Lumpur, Jakarta, and other cities. Many national Network Information Centers and country code TLD registries currently operate some kind of ICANN education program, and APNIC<sup>36</sup> conducts regular training programs that include an ICANN introduction session. However, these educational activities tend to be directed at people with a strong technical and/or business interest in the Internet, rather than average Internet users in the region.

By the September 8 deadline, 38,242 Asia and Pacific users had activated their At-Large Memberships. In comparison with the other regions, the Asia and Pacific region had the highest number of activated At-Large members, as well as the highest number of actual voters (well ahead of the next-highest regional turnout, Europe's, with 23,442 members). Most At-Large members registered from Japan (38,931), followed by China (33,670), Taiwan (9,193), and Korea (6,439) (see Appendix 2).

The lack of At-Large members from poorer countries in the region and dominance of richer nations is a manifestation of the divide we see in the uptake of information and communication technology generally. However, this digital divide raises particular concerns when viewed in terms of representation in democratic processes.

### **2.2.2.2.2 The Japan ICANN Forum and chain reaction**

Japan's earliest At-Large registration campaign was initiated in February 2000 by the Internet Governance Study Group (IGSG), a group originally established to promote popular understanding of ICANN as a whole. IGSG organized meetings on a bimonthly basis, giving lectures to audiences of around 30 to 50 people, mostly in Tokyo. Later, IGSG organized a number of meetings, three in Tokyo and one in Osaka, to specifically address the At-Large Election.

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<sup>36</sup> The Asia-Pacific Network Information Center.

The second and more significant organizing activity around the At-Large election was the Japan ICANN Forum (JIF). JIF was originally proposed by JPNIC<sup>37</sup>, the Ministry of Post and Telecommunications (as the Ministry was then known) was consulted early on and provided advice and strong support during JIF's formation. This ad hoc body became the core organizer of the At-Large election campaign in Japan.

At the time of the election there was a strong fear (and confusion) in Japan that the only Board seat then held by a Japanese director—Professor Jun Murai had served on the Board since ICANN's creation—could be lost if Professor Murai resigned his seat in 2000. This was perhaps the single biggest reason why the Japanese Internet community, along with the Japanese government and industry, teamed up so vigorously to promote voter participation: the perceived need to ensure a continued Japanese presence on the Board.

Another component of the At-Large campaign in Japan was JCA-NET<sup>38</sup>, together with the Civil Society Internet Forum. JCA-NET organized their own campaign effort as a reaction to the top-down activity of industry and government and selected a candidate for member nomination, Ms. Yukika Matsumoto.

In May 2000, ICANN released the first batch of data collected from the At-Large registration process, data that included a country-by-country breakdown of recent registrations. These numbers showed Japanese registrations to be much lower than those from the US and some European countries and there were almost as many Koreans registered as Japanese. The Japanese response was quick. The JIF was officially launched on May 18, and it created a Web site to explain what the ICANN At-Large election was, how to register, and how to vote—entirely in Japanese, and with detailed instructions on the registration process. Many of the JIF's member companies, along with participating industry associations, e-mailed their employees to encourage them to register as At-Large members, and (later) instructed them how to vote and for whom.

JIF made a special effort to recruit more At-Large members in Japan. However, the most effective outreach channel came from outside the group. Though it is very difficult to analyze exactly where and how the large number of Japanese members came to register, there is sufficient evidence that a banner link on the Yahoo! Japan Web site was a major catalyst for public registration. The banner encouraged people to join the ICANN At-Large Membership, and linked to the JIF Web site. The registration campaign's language choices also proved very effective at appealing to nationalistic sentiment, claiming that, *if you do not participate, there will be no Japanese representative on the ICANN board and our national interest could be endangered* (paraphrased). The Yahoo! Japan banner was extremely successful, perhaps overly so; within a few weeks (even before the deadline for member registration), this direct link banner on Yahoo! Japan's top page was removed.

By early July 2000, it had become clear that Japan was dominating member registration by a massive number. This, in turn, encouraged renewed registration efforts in other countries within Asia, particularly in the People's Republic of China. It is believed that CNNIC<sup>39</sup> started to organize an ICANN At-Large campaign, using their own Web site and some other popular portal sites, including a "lucky draw" where registered ICANN At-Large members could enter a contest to win a free PC. It was clear that the Japanese triggered an over-reaction from China, in an attempt to counter Japan's huge lead. Similar reactions were seen in Taiwan and, to a lesser degree, in Korea.

These massive registration attempts severely overloaded the ICANN's registration servers, almost to the point of breakdown, for much of July. This meant that many people worldwide were unable to register, unfortunately leading to rumors that ICANN had deliberately throttled the servers' capacity and were refusing connections from IP addresses from the Asia and Pacific region.

Under the rules created by the Election Committee, member-nominated candidates had to be "endorsed" by at least twenty of their region's activated members, or 2% of the eligible active members in their region, whichever was higher. Because the thresholds were calculated by region, the large number of registrants from Japan effectively prevented candidates from smaller countries getting on to the ballot through petition. Only one member-nominated candidate, Hongji Li from China, obtained more than the

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<sup>37</sup> The Japan Network Information Center.

<sup>38</sup> <http://www.jca.apc.org/index-en.html>

<sup>39</sup> The Chinese Network Information Center.

2% threshold. Professor Kou-Wei Wu from Taiwan thus could not run since the 765 endorsements he received was short by just 3 votes from the target of 768 (out of 38,246 total activated members).<sup>40</sup>

### 2.2.2.2.3 Nominating members - nationalistic competition

Although China had a large number of registered At-Large members, the activation rate of Chinese registrants was very low. There are a number of possible explanations for this. Some 10,000 letters providing PIN number information were returned to ICANN by the US Postal Services as undeliverable. Unsubstantiated reports indicate that many of these returned letters were to addresses in countries where western/Roman alphabets are not used, i.e., a high proportion were likely to be from countries in the Asian and Pacific region, particularly China where the postal system can be unreliable. That the bulk of the Chinese registrations were towards the end of the registration period may have combined with a slow postal service to prevent PIN numbers from reaching people in time to activate their membership. And, more obviously, people who had little interest in ICANN and were encouraged to register for nationalistic or other reactionary reasons may not have had sufficient sustained interest in the process to later activate their membership and vote.

At the ICANN meeting in Yokohama, Japanese civil society groups officially objected to what they regarded as the nationalistic, top-down mobilization led by large corporations and by the Japanese Ministry of Post and Telecommunications. JCA-Net, a civil activist group that had been active in the Internet and telecommunications field, presented the argument that this mobilization of At-Large members was in clear violation of the principles of democracy and of Japan's civil society.

As a result of this criticism, during the meeting of the Civil Society for Internet Democracy at Yokohama, a Civil Society Internet Forum (CSIF) was established to watch over the issue of Internet governance. Since the Yokohama meeting, CSIF has provided forums for dialogue between At-Large directors and At-Large members. During a CSIF meeting in Yokohama the Korea Internet Forum, Electronic Frontier Australia and other civil society groups from the region agreed to rally support for Ms. Yukika Matsumoto, a JCA-Net board member, as the Asia and Pacific region's civil society candidate. Matsumoto's candidacy was offered as a counterbalance to that of Masanobu Katoh, the candidate supported by the Japanese government and by several large corporations.

However, despite grass-roots activism in the region to support Matsumoto's candidacy, she failed to pass the 2% threshold of active members and did not get on the ballot.

In China and Taiwan, Johannes Chiang, nominated by the ICANN Nomination Committee, and Lulin Gao, the only member-nominated candidate to surpass the 2% threshold in the region, competed for votes. Both earned significant support and obtained second (Gao) and third (Chiang) place in the final election, but both fell significantly short of the level of support displayed for Masanobu Katoh.

As nationalistic competition became more acute in the Asia-Pacific region, the global Internet community expressed many concerns, but did not know how to respond. Although several grass-roots movement groups from the Asia and Pacific region attempted to present the concept of the pan-Asian civil society, and criticized the nationalistic sentiment of the election generally in the region, their efforts proved insufficient to counter the nationalistic trend.

Many people from the region commented that the nationalist trends seen in the 2000 election would continue in any future elections unless careful measures to manage the rules of campaigns were introduced, and efforts to provide information about candidates, the election and ICANN in general were improved. In particular, people expressed concern that if China were better prepared for a future election, nationalistic competition in the region could get even more intense, and a situation could evolve in which a few countries would make deals and "cluster" together in their support of a particular chosen candidate.

The need for clear rules regarding election and campaign conduct cannot be over-emphasized. Members of the Japan Internet Forum (JIF) commented after the election that they did not feel they did anything wrong. They checked the election rules and guidelines before beginning their campaign and found nothing to prohibit them from acting as they did.

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<sup>40</sup> The simple 2% of 38,246 is 764.92, thus making 765 endorsements seemed to be passing this mark. It is not clear why the minimum was set at 768, not 765, and thus Prof. Kuo-Wei Wu was not accepted as a member-nominated candidate.

#### **2.2.2.2.4 Despite Low Awareness of ICANN**

Awareness of ICANN among the Internet population in the region in general appears to be relatively low. During 2000, major Japanese newspapers ran fewer than 90 stories about ICANN. However, as is to be expected in a technically sophisticated country, the Japanese computer press has covered ICANN quite extensively. It can be noted that a certain "sense of remoteness" may also contribute to the low level of awareness on issues regarding the Internet (and other techno-business domains) because of a perception by many Asian consumers that such discussions are "done in the West."

The Asia and Pacific region community is lightly represented on ICANN's managing structures; this, too, may contribute to a lower awareness of the organization. 3 of 19 ICANN Directors are from the Asia and Pacific region.

The predominant characteristic of the Asia and Pacific At-Large activated members was that they were between 20-39 years of age. The proportion of domain owners to the total membership in the Asia and Pacific region is the lowest among the five regions. The Asia and Pacific At-Large activated members were professionally active in the computer software, the Internet business, and other general business.

## Sources Where Asia/Australia/Pacific Region At-Large Members Learned About the Election

Table 1.

Source	Number	Percentage of total
At Work	5,526	14.4%
Banner Advertisement	114	0.3%
E-mail	4,105	10.7%
Friend/Acquaintance	2,761	7.2%
Newspaper/Magazine	1,348	3.5%
Other	887	2.3%
Print Media	162	0.4%
Search Engine	291	0.8%
Website	4,682	12.2%
No Response	18,370	48.0%
<b>Total</b>	<b>38,246</b>	

The Asia and Pacific was the only region where “at work” was the most commonly cited place where members had heard of ICANN’s At-Large membership. The second most common answer from the region was from “a Web site,” which was the most popular answer in only one other region (North America).

### 2.2.2.2.5 The Election Phase and Voters

Masanobu Katoh was elected by an overwhelming majority of 78.4%. Lulin Gao of China earned 9.9% of the vote, and Johannes Chiang 5.3%. Compared to the North American region, where the election moved through five automatic runoffs because of intense competition, the election in the Asia and Pacific region was a landslide. Katoh’s winning percentage was higher than that achieved by the winner in any of the other regions.

The three tables below, 2, 3, and 4, show that at all stages of the At Large election process the proportion of individuals participating from the Asia and Pacific was the highest of all regions. Table 5 shows the history of verified members from the selected countries in the region and Canada, Germany, United Kingdom and United States. These four countries had the highest number of members when the first registration figures were released and so are a useful data point against which to view membership growth in the selected Asia and Pacific countries.

**Table 2. Total Unverified Applications**

Total Applications (Unverified)	158,593
Asia and Pacific	93,782
AP Percentage of Total	59%

**Table 3. Total Activated Members**

Total Activated At Large Members	76,183
Asia and Pacific	38,246
AP Percentage of Total	50%

**Table 4. Total Votes Cast**

Total Valid Votes	34,035
Asia and Pacific	17,745
AP Percentage of Total	52%

**Table 5. Total Verified At-Large Membership, Asia and Pacific Region**

	22-May-00	19-Jul-00	26-Jul-00	31-Jul-00
<b>Australia</b>	310	519	1,096	1,161
<b>China</b>	41	71	28,732	33,670
<b>Hong Kong</b>	38	56	112	122
<b>India</b>	200	328	1,709	2,025
<b>Japan</b>	338	20,261	33,227	38,931
<b>Korea, South</b>	331	1,146	6,247	6,439
<b>New Zealand</b>	101	154	222	229
<b>Singapore</b>	37	99	212	226
<b>Taiwan</b>	18	71	10,780	9,193
<b>Thailand</b>	69	423	736	819
<i>Canada</i>	<i>715</i>	<i>1,348</i>	<i>1,975</i>	<i>2,094</i>
<i>Germany</i>	<i>4,107</i>	<i>8,674</i>	<i>17,409</i>	<i>20,475</i>
<i>United Kingdom</i>	<i>669</i>	<i>1,633</i>	<i>2,080</i>	<i>2,150</i>
<i>United States</i>	<i>6,915</i>	<i>12,115</i>	<i>18,012</i>	<i>19,501</i>

**Table 6: Votes Cast in the Asia and Pacific Region**

<b>Candidate (Country)</b>	<b>Votes</b>
Masanobu Kato (Japan)	13,913
Lulin Gao (China)	1,750
Johannes Chiang (Taiwan)	935
Hongji Li (China)	749
Sureswaran Ramadas (Malaysia)	398
<b>Total</b>	<b>17,745</b>

### 2.2.2.3 Conclusions and Suggestions

Many interviewees agreed that the At-Large Election had significant benefits. Clearly, they provided ICANN with an opportunity to recognize the importance and interests of general Internet users, while facilitating awareness of ICANN among those users. However, these benefits would only continue to be realized if future elections were conducted more efficiently, with better planning and information than was the case in 2000.



- **Regional Representation**

Some respondents expressed concerns with regard to regional representation. The Asian and Pacific region is composed of numerous countries with very heterogeneous linguistic and cultural backgrounds. It may be desirable to modify the division of regions to try and create a more equitable balance among countries. A new regional arrangement might be based on forward-looking perspectives that take into account the growth rate of Internet users and the potential size of user populations (see Appendix 1.) Or new regions might be created to place countries into smaller, more traditional geo-political alignments.

- **The election process and problems encountered**

Respondents also cited problems with the registration process. The At-Large election procedure was poorly explained and the complicated ballots, pre-registration systems, and the need for membership activation, compounded by technical problems, all resulted in relatively low participation. Respondents commented that ICANN's mission and the purpose of the election, the function of the At Large Directors and their relationship with the membership were not clear. Had the election been better explained, the quality of participation might have been significantly higher.

The Preferential Voting System used for the At Large election is virtually unknown in the Asia and Pacific region and was not well understood. To be effective, preferential voting systems require that voters first understand the system and the value of their votes, and have a good understanding of the issues and candidate's positions. Unfortunately, in 2000 the system was not well explained. This is particularly unfortunate, as well-run preferential voting would encourage voters to study the candidates and issues more carefully, thus reducing the tendency toward nationalism.

The combination of member-nominated candidates and those chosen by the Nominating Committee was also regarded as being confusing. The Nominating Committee process was criticized as non-transparent. In such a heterogeneous region, the nomination process and creation of a representative slate of candidates is a very important element of the election.

It is clear that the threshold level of support required for member-nominated candidates to gain access to the ballot should be reduced to something below the current 2% threshold. Some suggested that all ICANN Directors should be elected directly by the membership, and that election schedules should be transparent and regular.

- **Linguistic Barriers**

Internet users in Asia and Pacific region are constantly confronted with documents that are written only in English. This is one of the two primary barriers hindering users' full participation; the other is confusion with the mechanisms and processes of the election system. English documents can be intimidating to those not yet familiar with the relevant issues, and are doubly so to non-native English speakers irrespective of their baseline understanding. Even if some users do speak some English, the time required to go through the necessary material is so great that, by the time a user might feel ready to post something in the candidate forum, the opportunity has passed.

Local At-Large Member forums should be established to help organize the election and At-Large membership. In non-English speaking regions one of the functions of these local member forums would be to ensure that key documents about ICANN, the election process and candidates are translated into the relevant local language. In the Asia and Pacific region, where language difficulties often prevent citizens of different countries from interacting with each other, local At-Large Member forums could also act as a way to enable discussion between countries. In non-English speaking regions, Question & Answer forums should be established in each of the primary local languages. ICANN should assume responsibility for translating the web sites of At-Large candidates into appropriate major languages.

The underdevelopment of the public sphere in the Asia and Pacific region is one reason why nationalistic voting became such a powerful force in the At-Large election. In general, civil

society, particularly in the sense of voluntary service and grass roots activism is not an active component of society in many countries in the region. As such the means and perhaps the will to create bottom-up processes are not prevalent. In this respect, local forums to establish and foster the At-Large membership will be particularly important in the region.

Many respondents agreed that outreach programs, offered in "mother tongue" languages, were important and suggested the following as some ways to effect such outreach:

- Utilizing DNSO constituencies and commercial ISPs in outreach and awareness programs;
- Translating ICANN announcements into major regional languages;
- Assigning responsibility for translation to a ccTLD-related organization;
- Linking the At-Large Membership programs to ccTLD organizations such as KRNIC<sup>41</sup> and JPNIC.

- **At-Large Membership and Outreach**

ICANN is a difficult subject to understand for most Asian Internet users (a fact not restricted to Asians). For example, there are at least 50 abbreviations—including ccTLD, UDRP, GAC and so on—that are frequently used by members of the ICANN community. In some countries, members of the local Internet community produced summary information about ICANN. In Korea, KRNIC and the Korea Internet Forum published "ICANN primer" booklets, but these one- or two-page descriptions of ICANN's issues and process often seemed to cause more confusion not less for the general public. The At-Large elections were presented as being important, yet ICANN's purpose and the actual purpose of the elections themselves were inadequately explained. Many members in the Asia and Pacific region were faced with the prospect of feeling obligated to participate in a process they did not fully understand.

There are a variety of ways that this situation could be improved. First of all, it is necessary to establish a means for disseminating information about ICANN in a variety of forms, and to establish a Web site that outlines important issues for discussion on various mailing lists. It may also be necessary to establish a special fund for outreach and education.

In addition to electing Directors to the board, the At-Large Membership should also play a "watchdog" role, ensuring the public interest is protected and ICANN is not captured by special interest groups. The At-Large membership is a potentially vibrant source of ideas and brings diversity to ICANN through a broad representation of interests beyond those of the supporting organizations.

There is a strong current of feeling in the Asia and Pacific region behind providing the At-Large members with a more significant and persistent role in ICANN. But an equally powerful request was for improved outreach and education about ICANN, and particularly for better information about the election in terms of both the election processes and the issues.

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<sup>41</sup> The Korean Network Information Center.

### 2.2.3 Europe<sup>42</sup>

This part reviews the European regional election for an At-Large Directorship on the ICANN Board. What follows is an analysis of the process and procedures that led up to that election and defined the election itself.

Under the rules drafted by the Election Committee, all regional ballots were limited to seven candidates; in Europe's case, five of those seats were directly nominated by ICANN. On the final ballot (member-nominated candidates included), three nominees (two of them member-nominated), were from Germany; the remaining four were from (respectively) France, Macedonia, Norway and Switzerland. Andy Müller-Maguhn, spokesperson for a German civil libertarian group, the Chaos Computer Club, won the election with almost 6,000 votes.

From data made available so far by ICANN, it is not possible to draw conclusions about the national distribution of European At-Large Members, nor is it possible to reliably describe the ways in which national preferences influenced the overall voting behavior. Instead, our analysis of the At-Large Membership and the characteristics of the At-Large Election in Europe is based on the following research:

- *Personal interviews.* A wide cross-section of European participants in the ICANN process was interviewed via e-mail. These ranged from candidates in the election, to governmental representatives, to industry leaders, representatives of NGOs, journalists and ICANN-activists. A list of interviewees appears as Appendix 3.
- *Media coverage.* A group of students at the University of Hamburg collected television, radio, print, and online coverage that appeared in Europe before, during, and after the 2000 election. Stories were reviewed, summarized, and categorized to create a picture of the overall media presentation of ICANN.
- *Personal experience.* The contributors to this report have been critical observers of the ICANN process and contributed to academic research in the area of Internet governance.

#### 2.2.3.1 Participation and contextual variables

The At-Large elections were an experiment. Both their cross-border character and the fact that they were held online were new to Europe. Therefore it is difficult to identify the parameters and variables that can clarify its particularities. Yet with regard to Europe, the following contextual observations can be made:

##### 2.2.3.1.1 Internet use

An analysis of the use of the Internet across Europe indicates substantial differences between Central European, Eastern European, Western European, and Mediterranean countries, with the West leading the way.<sup>43</sup> Obviously, this divide played an important role in the creation of an At-Large Membership within Europe.

For example, as of January 2001, only a quarter of Russians had ever used a computer and only a small percentage of those had ever used the Internet.<sup>44</sup> The size of the Russian At-Large membership (2,111), then, is more strongly tied to the extent of technological development and the proliferation of Internet usage than to the size of the country or its population (in Russia, 146,394,000 people).

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<sup>42</sup> Prepared by Jeanette Hofmann of Wissenschaftszentrum Berlin/NEXUS (Germany), Christian Ahlert of Universität Giessen (Germany), and Stefaan Verhulst of Oxford University (UK) and the Markle Foundation (USA).

<sup>43</sup> For a full and detailed overview see for instance the results of the European Survey of the Information Society available at <http://europa.eu.int/ISPO/esis/default.htm>

<sup>44</sup> [http://www.nua.ie/surveys/index.cgi?f=FS&cat\\_id=18](http://www.nua.ie/surveys/index.cgi?f=FS&cat_id=18)

However, the “digital divide” only partly explains variations in the distribution of European At-Large Members. Germany’s lead in At-Large registrations, for instance, may also be an effect of Germany’s role as a leading economic power in the region. Nevertheless, comparison of registrations in the UK, France, Austria, Switzerland and Germany indicate a clear over-representation of German-speaking people. In European countries such as Denmark, Sweden and the Netherlands, where the rate of households using the Internet has reached 50 percent<sup>45</sup>, the incidence of At-Large registration was significantly lower than in both Germany and France. For these countries, it seems that not only Internet usage rates but also public awareness of ICANN itself can affect the size of the At-Large Membership.

The European Commission’s latest survey of Internet use showed a 55% growth in Internet penetration in EU households, which rose from 18% in March 2000 to 28% in October 2000<sup>46</sup>, at the time of the At-Large Election. As Internet penetration continues to grow, participation in ICANN At-Large Membership is likely to increase.

### 2.2.3.1.2 Electoral systems and traditions

In general, political traditions are important causal variables that help explain electoral behavior. In most countries across Europe, voter turnout—the percentage of eligible voters who actually vote—is rather high (above fifty percent) during general elections.<sup>47</sup> Still, the sheer number of actions necessary for one to become an At-Large Member was expected by some to thin out less-interested participants, even to the extent of bringing about a high correlation between registration and actual voting. This does not seem to have been the case.

A number of factors may have contributed to the low turnout. Procedures used in the At-Large Elections, such as ballots, pre-registrations, member-nominations, are not widely used across Europe, where traditions of voter registration and of primary elections, used elsewhere, are unfamiliar. However, whether this had a major impact on electoral behavior within Europe remains unclear.

The single most important factor in decreasing participation might have been the unfamiliarity of the PINs distributed via surface mail. It is likely that many who did not activate their PIN either were simply unaware of the need to do so, didn’t receive their PIN, or missed the activation deadline. Other participants have cited confusion between the membership number, the password (which was received via e-mail), and the PIN.

Finally, the unavailability of registration servers during daytime, when many potential voters accessed the site from their workplace, may have further depressed registration and activation rates.

A credible argument can be made that the combination of technical errors, delays, human errors, complexity and confusion reduced the number of registered, activated and eventually voting members. Still, such technical difficulties are ultimately a minor problem that can be overcome. They do not pose the same kind of problem as the more insidious causes of low registration discussed above.

Even though online elections are still in the experimental stage in Europe, they are becoming more common. For example, the “Forschungsgruppe Internetwahlen” based at the University of Osnabrück conducted the 1999 “Sozialwahlen”. In this election, all German citizens were eligible to participate, though only 2% of Germans did so. Other European countries developing online voting systems have encountered similar obstacles. Nevertheless, future online elections for the European Parliament are being planned, and several research projects are under way.

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<sup>45</sup> See <http://www.independent.co.uk/news/Digital/Update/2000-11/internet291100.shtml>

<sup>46</sup> See <http://www.adie-culture.com/en/news/1204.htm>

<sup>47</sup> The term “voter turnout” may not be entirely appropriate for the At-Large election—variant election models, such as that of shareholder votes in publicly-traded companies, may provide a more productive analogue.

## 2.2.3.2 At-Large Membership and Election

### 2.2.3.2.1 The pre-election phase

#### 2.2.3.2.1.1 Mobilization through Internet user communities

Issue-based user communities played a major role in mobilizing At-Large members in some European countries. The uneven presence of these groups across Europe partly explains the distribution of members in the region. Most of those we contacted were unsurprised that the victorious candidate in 2000 was the spokesperson of an established hacker community, the Chaos Computer Club. The German Internet community is generally regarded as the largest and the most active one in Europe (measured in terms of online communities, FTP sites, open source developers and the like). Some members of the German community even attempted to extend their local election campaigns to other European countries. Most of these efforts met with failure, either because of a general lack of interest or because of assumed German predominance over them. The only successful effort at a Europe-wide forum integrating both At-Large members and candidates was the English-language mailing list *icann-europe*, founded by two members of FITUG,<sup>48</sup> a German online community. The role of German-language user communities in the election may provide a potential model for the kind of education and constituency-building campaigns that could enhance future elections.

In general, outreach efforts depended heavily on the efforts of local user communities. In some countries, such as Austria and Russia, such local-user networks proved to be quite effective. In Russia, for example, the community undertook to provide translation of information about the election to potential voters and to the general public. In France, AFNIC, the French registry for “.fr,” initiated a web-based forum to encourage participation in the election process (<http://www.gouvernance-internet.com.fr>).

#### 2.2.3.1.2 Media coverage

The level of media attention contributed significantly to awareness about the At-Large election and consequently influenced the At-Large behavior strongly. Yet the coverage was mainly domestic, featuring chiefly local candidates.

The report of Alexander Svensson et al. (University of Hamburg) on “ICANN Coverage in European Print Media” studied European media coverage of ICANN in the year 2000. A total of 310 articles appeared in high-circulation newspapers in the UK, Ireland, France, Belgium, the Netherlands, Germany, Austria, Switzerland, Denmark Norway, Sweden, Spain and Portugal. According to the report, in some countries (such as France, Germany and Italy) newspapers encouraged netizens to vote. Several newspapers in Switzerland, Italy and Germany covered local candidates.

According to observers in France, *Liberation* and *Le Monde* did cover the election but failed to create the chain reaction among national media that took place in Germany. By way of contrast, the media in the United Kingdom showed little interest in the elections. Another ICANN-related topic, the UDRP, did catch the interest of the British press. Also, in Scandinavia the elections attracted almost no attention although there was a Norwegian nominee.

Press coverage was significantly more robust elsewhere. Media attention in Germany was particularly high. According to the respondents from Austria and Switzerland, the German media hype had a measurable impact on all German speaking countries. One campaign in particular, initiated by the German *Spiegel-Online*, and mirrored by other papers and news agencies, featured the elections, and paid particular attention to certain candidates. Despite attempts by *Spiegel-Online* to encourage similar efforts by other online media in the region, only the online edition of *Le Monde* and *Der Standard* (Austria) participated. As a result most At-Large members and most member-nominated candidates were German.

Nonetheless, the campaign's direct effects on membership registration might be exaggerated. The ICANN articles run by *Spiegel-Online* didn't attract as many readers as other articles. Moreover the number of articles was reduced towards the end of the registration period when most of the

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<sup>48</sup> Förderverein Informationstechnik und Gesellschaft. Information about the *icann-europe* list is available at <http://www.fitug.de/icann-europe/index.html>

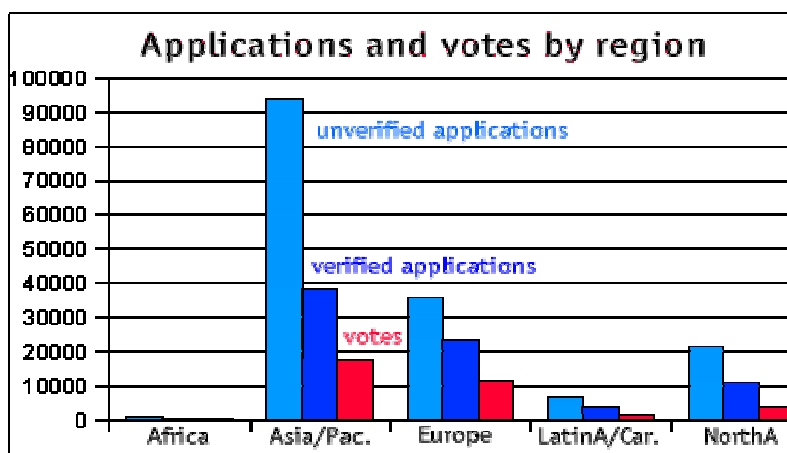
registrations took place. However, the *Spiegel-Online* campaign helped to raise awareness in Germany about ICANN and the elections.

In sum, the analysis of the European media coverage indicates that almost all media coverage of candidates was organized along national lines. Overall, candidates enjoyed little recognition in the voting public, and what recognition they did have was mostly confined to their own country. One very notable exception was Andy Müller-Maguhn, who, not least because of his image as a “hacker,” attracted considerable international attention. Such inherently nationalistic focus illustrates the difficulties of creating constituencies that lack well-set roots in local political traditions and language communities.

The At-Large Elections contributed strongly to the general awareness within Europe of Internet governance in general and of ICANN in particular. Prior to March-April 2000, Internet governance and ICANN were an unknown issue in Europe. As a result of the elections, this has changed, though it has done so in an uneven fashion across national lines. As one respondent put it: “The elections had a tremendous impact on ICANN awareness. ICANN is much better known than its predecessor IANA ever was.” This is especially true in Germany, where ICANN is now a well-known organization. “The elections have launched ICANN’s decisions into the news and feature sections of newspapers and radio shows. The editors are now willing to provide more space for reports on ICANN. Also, it is not necessary anymore to explain over and over again what the ICANN process is about.” As many of the respondents expect, future elections of board members would thus attract rather more attention by the domestic press.

#### 2.2.3.2.2 The election phase and voters

By the September 8 activation deadline, 23,442 Europeans had successfully activated their At-Large Memberships. Of these members, almost half actually voted (11,309)<sup>49</sup> (see graphic below)<sup>50</sup>. In comparison with the other regions, Europe had the highest overall turnout of registered voters (48.08%), albeit still low.

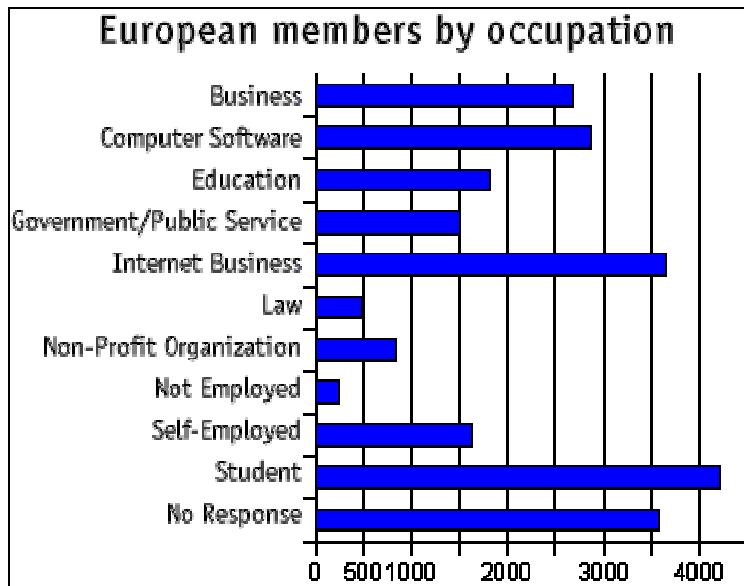


The average European At-Large Activated Member<sup>51</sup> was between 20 and 39 years old, either a student or professionally active in the Internet or Computer Software industry and male (statistics comparable to those seen in other regions). They heard about the elections mainly through e-mail, friends or magazines (with the exception of Germany, where most were mobilized by the media) and almost half of them (43.7 %) were domain-name holders.

<sup>49</sup> See <http://members.icann.org/news.htm#results>

<sup>50</sup> See <http://icannchannel.de>

<sup>51</sup> See <http://members.icann.org/activestats.html>



Further analysis of ICANN's European At-Large Membership (see Appendix 2) indicates widespread participation across national boundaries, with members representing 44 countries. The distribution of members, however, varied considerably: 28 countries have fewer than 100 At-Large Members. These figures reflect a digital divide, with, for example, a very low number of At-Large members in the Eastern European countries of Romania (39), Hungary (32), Czech Republic (28) and Slovakia (fourteen). As candidates could only encourage turnout and support efficiently within their national constituency, not across borders, local networks played a crucial role in mobilizing Internet users, which were hence mirrored by the number of self-nominations and registrations. Correspondingly those networks proved to be crucial for raising attention of the traditional press (newspapers) and the building of an Internet-related campaign.

#### 2.2.3.2.3 Process

The overwhelming majority of respondents expressed concern with the way that ICANN handled technical problems during the election, outreach, and the selection of candidates. A specific point of criticism was "the handling of the deadlines and the changing of rules on the fly" as ICANN moved towards the election. Nearly all of those contacted disapproved of the nominating committees' decision "to stuff the ballot with corporate candidates." Perhaps ironically, however, such sentiment may have resulted in an advantage for member-nominated candidates, who were seen as the more "democratic candidates."

##### 2.2.3.2.3.1 Nominations

While some respondents regarded the nomination process as basically fair, others portrayed the Nominating Committee's selection of five nominees for the European ballot as a violation of democratic principles. For only two seats to be open to member-nomination in a region the size and diversity of Europe was seen as an unacceptable limitation of both regional and political diversity on the ballot. In the same vein, the Nominating Committee's selections were condemned as biased towards industry representatives. Many respondents felt that the candidates nominated by ICANN should have been subject to the same endorsement procedure as member-nominated candidates.

##### 2.2.3.2.3.2 The lack of outreach campaigning

Many respondents expressed the need for better communication channels between candidates and voters on the one hand, and among At-Large Members on the other. The lack of a Europe-wide outreach campaign and the absence of local public forums, some say, contributed considerably to the interest deficit in most European countries.

The Question & Answer forum provided by ICANN on *members.icann.org* as a means of communication for voters and candidates received mixed assessments. Some regarded it as a useful means for voter education. Others criticized the lack of opportunities for "horizontal" communication within the At-

Large Membership. In fact, unless voters created discussion forums themselves, there were no opportunities for internal debate.

#### 2.2.3.2.3.3 Problems in voter verification

As is discussed above, many respondents mentioned problems with PIN codes. In some countries, PINs arrived too late to be useful. In almost all countries, at least some PINs were lost entirely. Additionally, ICANN's expectation that users would keep PIN codes for up to 6 months caused problems. Some respondents suggested the use of digital signatures as a possible solution to this problem. Other concerns with regard to the technical problems towards the end of the member registration period were also raised. Surprisingly though, many of the respondents cast such problems as relatively minor, capable of being solved easily. Some respondents also claimed that the very fact that the election was held entirely online may have limited the participation of some (low-bandwidth) users. In addition, some respondents found the election procedure too complicated. Many "potential" voters lost interest during the several stages of membership registration, membership activation, endorsement period and the actual voting. Finally, the fact that the election took place during the summer vacation period compounded this problem.

#### 2.2.3.3 Conclusions and Suggestions

- **Satisfaction and Criticism**

Most Europeans seem generally satisfied with the At-Large Election, not least because it was the first election ever on a global scale, and because of its apparent success in electing competent Directors accepted by the majority of the community.

Those who do consider the elections a failure refer to the low degree of participation: "The fact that the mandate was manifestly insufficient for representative legitimacy has reinforced the prejudices of skeptical commentators who doubt that democratic Internet governance is possible." Low participation is a matter of concern for many in Europe who observed or participated in the election. However, as some suggest national elections might be the wrong benchmark to assess the success of global elections on the Net for ICANN.

Yet, as seen above, there was significant criticism about ICANN's handling of various components of the election. The elections are generally seen as an experiment that, in a sense, fell victim to its own success as the At-Large elections attracted much more participants than originally expected. In particular, interviewees felt that ICANN's insufficient handling of both technical problems and outreach campaigning constituted solvable start-up problems, and expressed a strong hope that they could be avoided in the future.

- **Outreach Deficit**

The significant role of German voters throughout the At-Large Election was a result of the convergence of significant media coverage with the activism of a well-established user communities. Germany's success provides strong evidence for the importance of public outreach and debate.

Some of those interviewed blamed ICANN for the fact that its communication with the electorate was organized in an *ad hoc* manner. In addition, the use of English as ICANN's working language, combined with the lack of adequate translation, was considered as a major barrier to enabling the kind of activated membership that many had hoped to see. Nevertheless, the At-Large Election clearly contributed to the general awareness of Internet Governance in general and ICANN in particular throughout Europe.

- **Digital Divide**

In addition, the telecommunications divide between Eastern and Western Europe and the Mediterranean nations was reflected in membership patterns across Europe. High Internet use and awareness frequently correlated with a higher rate of At-Large membership,



suggesting that a renewed effort is needed to make some of Europe's less technology advanced countries active members of the ICANN community.

- **Cultural and Social Differences**

Europe has a strong tradition of diversity among its regions and cultures. ICANN's request that the region select a single voice for its collective interest was perceived by some as regressive and generally undesirable. Consequently, calls were made for a greater level of regional participation within the At-Large membership. There was a sense that if ICANN is ever to achieve global legitimacy, it must do better at taking the different interests and needs of Europe into account.

- **Future elections**

Some respondents strongly emphasized the need for a new election to fill the four vacant board seats: "The feeling of most At-Large members is that if this [the election of the missing four At-Large directors] is not going to happen, this would be a theft." Others, however, suggest that if an election is not held in the near future, the Board's vacant seats should be filled by representatives of the Government Advisory Committee (GAC), as ultimately accountable representatives of national interest.

Overall there seems to be some uncertainty in the European community surrounding the possibility of alternative methods of selecting At-Large Directors. Some observers have claimed that a single Director cannot reasonably or equitably represent a region of the size of Europe. Critics with this perspective are uncomfortable with the five-region geographic model, calling instead for some intermediate structure that would better reflect the specific interests of each country. Others suggested that At-Large directors could be elected by national representatives, through a model including some form of At-Large council, either on a regional or a global level. For example, a global council could fill the remaining At-Large Directorships from a list of nominations put forth by its members. Other suggestions included some kind of regional thresholds for elections, so that results coming from countries with many At-Large-Members would be balanced somehow with the votes of smaller Internet communities.

- **Review of ICANN Structures**

Many interviewees agree that a comprehensive review of ICANN's overall representation structure is sorely needed. The occasional forums for debate seen so far seem to be only an insufficient means of participation, since there does not yet appear to be any strong connection between such forums and the board's decision process. Respondents felt that, in light of the significant impact that ICANN's decisions have on areas of direct concern to all users, individual users should have the opportunity to participate in ICANN's decision-making processes. Arguments were presented for strengthening the At-Large membership and/or the GAC, relative to the Supporting Organizations. There was also a strong feeling that the ICANN Board and the Supporting Organizations would benefit from a reassertion of their commitment to transparent and accountable bottom-up processes. The working structure of the DNSO and the composition of the Names Council are of specific concern. Moreover, a stronger international composition of the staff and a greater respect and support for languages other than English were high priorities.

## 2.2.4 Latin America<sup>52</sup>

The objectives of this regional report are to:

- Analyze the last election of At-Large Directors in the context of the Latin American region.
- Promote discussion about the continuing role of the At-Large membership.
- Extract suggestions and proposals for future elections, taking the analysis of the previous experience as a baseline.

The research team's methodology had five components:

1. Distribution and analysis of an initial questionnaire, sent by e-mail to prominent Internet experts in the Latin American/Caribbean region.
2. Face-to-face and telephone interviews with Latin American participants in the 2000 election. These interviews lasted between 45 minutes and 1 hour.
3. Participation in and analysis of the traffic from an e-mail list created to discuss issues of the At-Large Members in Latin America, *discussion@icann-lac.org*.
4. Distribution of a second questionnaire to a small group, for discussion of some of the more controversial aspects of the 2000 election.
5. Presentation of interim conclusions at a workshop with participation from more than 20 people, mainly from NGOs and the academic sector.

### 2.2.4.1 Participation and contextual variables

#### 2.2.4.1.1 Internet use

In November 2000, there were 16.45 million Internet users in Latin America, corresponding to 4.04% of the worldwide total. (Source: Nua Internet Surveys).

About 3.9% of the people in Latin America and the Caribbean have regular access to the Internet. That situation varies, however, from country to country, from about 0.09% penetration in Haiti to 9.4 % in Uruguay. (Source: Nua Internet Surveys—see Appendix I).

#### 2.2.4.1.2 Awareness of Internet-related issues

The number of people in Latin America concerned with ICANN-related issues is quite small. Those few who are involved come mainly from several well-defined groups:

- Managers of country-code top-level domains (ccTLDs).
- NGO and academic networks, which have been involved with the emergence of the Internet in the region, as well as with its subsequent promotion and development.
- Governments. Not many governments have actively participated in ICANN's activities to date: Mexico, Brazil, Argentina, Chile, Peru, and Panama are the exceptions. Of these, just two—Brazil and Argentina—have had constant representation in the GAC. The representatives of other countries have changed regularly and in some cases participation has stopped altogether.

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<sup>52</sup> Prepared by Raúl Echeberria of the Latin American Network Forum (Uruguay) and Carlos Afonso of Rede de Informações para o Terceiro Setor (Brazil).

- ISPs, representative organizations, and telecommunications firms.

At present, Latin America is moving forward with the creation of a Regional Internet Registry (RIR). When finished, we expect the RIR to be a new locus for discussion of and work on ICANN-related matters.

#### **2.2.4.1.3 Electoral systems and traditions**

Many countries from Latin America have experienced totalitarian governments during their history, but democracy has consolidated in the region. Still, there are important differences among the region's electoral systems. Some are based on geographical models of representation, while others have direct nationwide elections to elect the President. In the last few years some countries have experimented with the inclusion of a second, "runoff" round in Presidential elections.

In many countries voting is compulsory, and as a result the percentage of citizens who vote is very high. The Preferential Voting System used by ICANN in the 2000 election is absolutely unknown in Latin America, and is not used in any public election, most of which are carried out through direct votes. In some cases, as mentioned above, there is a second round between the two candidates with the highest number of votes. This occurs only if no one obtains more than 50% of the votes in the first round.

#### **2.2.4.2 At-Large Membership and Election**

##### **2.2.4.2.1 Pre-election phase**

Many of those contacted felt that it would have been extremely useful to have had more detailed information on the process being used in the 2000 election, and more time to consider the options before them. For example, details of activated membership on a country-by-country basis were not published.

##### **2.2.4.2.1.1 Voter registration**

As of July 31, 2000, 6,486 people from the Latin American region registered as At-Large members, representing 4.09% of the global total.

The table below compares the number of Internet users with the number of hosts in some of the more Internet-adapted countries, and with the number of At-Large members. Only three countries (Brazil, Chile and Ecuador) had a greater share of regional At-Large Members than their share of regional Internet users would indicate. In the case of Ecuador this can probably be justified by the role played by some NGOs in promoting membership.

For their parts, Chile and Brazil were two of three countries represented on the 2000 At-Large ballot, which may have boosted registration numbers there. In Uruguay, the third, the share of At-Large Members basically matched the share of regional Internet users.

Brazil had by far the highest number of At-Large Members, with 80.13% of the At-Large members in the entire region. In Brazil, there was a large campaign promoting membership to vote for Ivan Moura Campos, in the last few days before the July 31 deadline. This campaign was clearly successful. Representatives from several different sectors and interests groups of the Brazilian's Internet community involved in this campaign, including people from the government and the ccTLD's administrator.

Country	No. Internet Users	% LAC Internet Users	Internet Penetration Rate	No. At-Large Members	% LAC At-Large Members	No. Internet Hosts	No. At-Large Members /No. Users
Brazil	9,840,000	59.82%	5.70%	5,197	80.13%	662,910	0.0528%
Mexico	2,500,000	15.20%	2.49%	270	4.16%	495,747	0.0108%
Argentina	900,000	5.47%	2.44%	295	4.55%	177,216	0.0328%
Chile	625,000	3.80%	4.12%	258	3.98%	64,081	0.0413%
Colombia	600,000	3.65%	1.51%	60	0.93%	53,683	0.0100%
Peru	400,000	2.43%	1.50%	63	0.97%	11,724	0.0158%
Venezuela	400,000	2.43%	1.70%	32	0.49%	16,694	0.0080%
Uruguay	300,000	1.82%	9.40%	111	1.71%	42,927	0.0370%
Costa Rica	150,000	0.91%	4.04%	26	0.40%	10,963	0.0173%
Guatemala	65,000	0.40%	0.51%	5	0.08%		0.0077%
Cuba	60,000	0.36%	0.54%	4	0.06%		0.0067%
Jamaica	60,000	0.36%	2.26%	3	0.05%		0.0050%
Panama	45,000	0.27%	1.60%	21	0.32%		0.0467%
El Salvador	40,000	0.24%	0.65%	4	0.06%		0.0100%
Bolivia	35,000	0.21%	0.43%	6	0.09%		0.0171%
Trinidad & Tobago	30,000	0.18%	2.55%	6	0.09%		0.0200%
Dominican Rep.	25,000	0.15%	----	15	0.23%	8,882	0.0600%
Ecuador	20,000	0.12%	0.15%	30	0.46%		0.1500%
Honduras	20,000	0.12%	0.33%	10	0.15%		0.0500%
Nicaragua	20,000	0.12%	0.42%	8	0.12%		0.0400%
Paraguay	20,000	0.12%	0.36%	5	0.08%		0.0250%
Bahamas	15,000	0.09%	5.09%	4	0.06%		0.0267%
Belize	12,000	0.07%	4.82%	1	0.02%		0.0083%
Antigua	8,000	0.05%	5.50%	4	0.06%		0.0500%
Barbados	6,000	0.04%	2.19%	4	0.06%		0.2000%
Haiti	6,000	0.04%	0.09%	5	0.08%		0.0833%
Other	71,500	0.43%	2.08%	39	0.60%		0.0545%

Sources: Number of users and penetration—Nua Internet Surveys; Number of hosts in Latin American countries—NIC México (www.nic.mx) August 2000.

It is worth noting the gender disparity in Latin American registration.

**Gender of members.**

Female	294
Male	3,158
No response	96

**Age**

16-19	154
20-29	1,211
30-39	1,069
40-49	653
50-59	253
+60	45
No response	163

### Role/Occupation

Business	473
Computer Software	601
Education	329
Government / Public Service	273
Internet Business	1,065
Law	139
Non-Profit Organization	86
Not Employed	9
Self-Employed	222
Student	203
No response	148

### Source Learned About the Election

At Work	370
Banner Advertisement	6
E-mail	2,129
Friend/Acquaintance	421
Newspaper/Magazine	118
Other	126
Print Media	21
Search Engine	11
Website	183
No response	163

#### 2.2.4.2.1.2 The registration phase

The majority of those interviewed agreed that the technical problems of the 2000 election constituted a major shortcoming that may have distorted the election process. All agreed that the process was badly conceived, but that the procedures, once established, were generally well supervised. The majority of those interviewed mentioned that the main reason that Latin American users registered was in order to vote for a specific candidate already on the ballot.

#### 2.2.4.2.1.3 The activation phase

The number of activated members in Latin America was 3,548, representing 54.7% of the total number of registered members (6,486). Low activation membership percentages were similar to those seen in the rest of the world.

	LAC	TOTAL	LAC %
<b>Registration</b>	6,486	158,593	4.09%
<b>Activation</b>	3,548	76,183	4.66%
<b>Votes</b>	1,402	34,035	4.12%

Some of the reasons why the number of activations was significantly lower than the number of registrations included:

- A low level of commitment on the part of those registering. The majority of people who registered did so more from the recommendation of others, than from any particular personal motivation or commitment to ICANN. Additionally, the process of registration was complex—would-be voters were required to wait to receive an e-mail, then a PIN by postal mail, then had to go to the ICANN's web site to activate their membership. This proved excessively complex for people who did not have a major commitment to the process.
- Some of those interviewed emphasized problems with the postal mail service and referred to letters that never arrived.
- Interviewees also mentioned the technical problems in the activation phase as one of the reasons for this low number.

#### 2.2.4.2.1.4 Nominations and self-nominations

The people interviewed agreed that the persons who were nominated by the nomination committee turned out to be generally the right ones. Some would have preferred to have had more candidates from the region, and/or female candidates. There was some confusion regarding the self-nomination process, however. Many people interpreted that phase of the election as 'voting,' not just a show of support for a potential candidate.

In several Latin American e-mail lists there were requests for clarifications, and some of the candidates nominated by the official committee were asked why they had not appeared on the member-nomination ballot.

#### 2.2.4.2.1.5 The election campaign

For the majority of interviewees, the election campaign had little effect because so many voters had made their decision in advance. Many also criticized the lack of information in different languages, the lack of debates organized by ICANN (either through in-person meetings or through electronic means such as public chats). People believed that there were not adequate opportunities for exchanging ideas and positions between candidates and the At-Large Members. There were no public debates, and the electronic Q&A forum organized at *members.icann.org* saw very little activity.

#### 2.2.4.2.2 The Election Phase and Voters

The Nomination Committee named three candidates to the Latin American Ballot: (Patricio Poblete from Chile, Raúl Echeberría from Uruguay and Ivan Moura Campos from Brazil). Both Patricio and Raúl had served previously as Names Council Members, and both are well known in the Latin American ICANN community. Ivan Moura Campos is the Coordinator of the Brazilian Internet Steering Committee, which has been very involved in all ICANN matters; he, as well, is well known in Latin America as an expert in Internet-related topics.

In the self-nomination process, two additional candidates joined the ballot: Claudio Silva Menezes and Aluisio S. Nunes. Both are from Brazil, and neither is well known within the Internet Latin American Community as regards domain names, Internet addresses or public policies. Claudio got a significant level of support.

The result of the election was:

Ivan Moura Campos	946
Claudio Silva Menezes	157
Raúl Echeberría	141
Aluisio S. Nunes	79
Patricio Poblete	79

Due to the high number of registered Brazilians, the result of the election seems to have been rather predictable.

Most of those interviewed felt that the problems encountered in the registration and activation phases were enough to distort the final result of the election. However, most of them also believed that the election of Ivan Moura Campos was a positive outcome, and that he is doing a good job as an ICANN Director so far. Many interviewees also commented on the nationalist influence on the campaign and on the election itself, although most believed that such influence was generally unavoidable.

#### 2.2.4.3 Conclusions and suggestions

The electoral process in Latin America had many problems and obstacles.

- **Technical Problems**

ICANN could not guarantee equal opportunities to all its potential voters. The sending of PINs by surface mail was a problem, and could become an even bigger problem in future elections. In Latin America, few would have faith in any election system where the right to vote depends on postal services or the capabilities of failure-prone servers.

For many people, such obstacles were clues to a larger, more difficult problem: can we find meaningfully representative systems when we are working with electoral universes of undefined character and scope?

However, none of those interviewed felt that the technical problems were due to any bad intentions or any conspiracy. The electoral process, in the view of all those interviewed, was well conducted, given the procedures that were established.

- **Motivations of At-Large Members**

Most of those interviewed agreed that the main reason behind people becoming At-Large Members was their desire to vote for a specific candidate. This also was the main reason mentioned by several interviewees who are important stakeholders in the region.

- **Low Rates of Activation and Voting**

Those interviewed were asked about possible explanations for the low rates of activation and votes. In Latin America, only 54.7% of people activated their membership, and only 21.6% of those registered actually voted.

The main reasons proposed to explain this discrepancy were:

- A low level of commitment by those who registered. Most people registered at the urging of others, and through any motivation of their own.
- The processes for registration and membership activation were excessively complex.



- Many people did not receive their PINs through regular post.
- Technical problems.

- **At-Large Membership**

Most of those interviewed agreed that an At-Large Membership is necessary and important for ICANN's future. Their opinions divided, however, when they were asked about the role of such a membership. Everyone agreed that At-Large Membership would be an important way to keep the community informed, and to educate people about ICANN's structure. Some felt that the membership could enable members to propose and discuss their interests, and to vote to express their positions.

Others felt that At-Large Members should have the right to participate and vote about some things, but only those matters under consideration by the Board.

- **Election process**

About half of the people interviewed proposed to continue having direct elections, as they believed that this is the most democratic way to ensure a strong public voice in ICANN. But the other half proposed some kind of indirect election mechanisms.

Those who proposed indirect elections argued that:

- It is impossible to guarantee that all potential members will be of the same basic situation.
- It is too difficult to ensure that Directors will be truly representative when the potential universe of voters is unknown.
- Indirect elections are not necessarily any less democratic than direct ones.
- Democracy requires good information systems. ICANN, on the other hand, remains an unknown organization for a lot of people.
- Indirect mechanisms would provide better communication between the At-Large community and At-Large Directors. These Directors could and should be made accountable through certain councils.

- **Geographic diversity**

Nearly all of the people interviewed agreed that any future elections should include some kind of sub-regional component.

Several proposals were suggested:

- Elect two Directors for each geographic region. Ten At-Large Directors in total.
- Elect two Directors for each region, with the region receiving the least amount of total votes electing only one. Nine At-Large Directors in total.
- The same number of At-Large seats on the board, but with better-defined geographic regions.
- Only five At-Large Directors, with more seats given to representatives from the Supporting Organizations. The reason for this proposal was a feeling that the S.O. representatives would have a stronger commitment to the Domain Name System than At-Large representatives would.

- Complete elimination of At-Large Directors, as the only way to have At-Large directors at this moment is through indirect and regional elections.

Those who proposed indirect elections offered different implementation suggestions, but all of them agreed that some kind of At-Large Council should elect the At-Large Directors.

Some felt that it would be a more effective way to represent not only the current regions, but also certain sub-regions with similar cultural, geographic and political situations. Every sub-region would have representatives in one of those councils, and they would participate formally in ICANN's structure. As compared to other regions, Latin America is probably one of the more homogeneous regions, but still there are important differences among its countries. The fact that most regional discourse can occur in one of two languages (Spanish and Portuguese) facilitates intra- and inter-regional contact for Latin America, but in the Caribbean there are many small countries in which the main language is English, French or others. More (or better) integration with those countries is clearly needed.

## 2.2.5 North America<sup>53</sup>

This report reviews the North American regional election for one of five contested At-Large seats on the ICANN Board of Directors. What follows is an analysis of the campaign leading up to that election, the election itself and its aftermath, and the implications for the broader prospect of public representation within the structure of ICANN.

Common Cause and the Center for Democracy and Technology (CDT) collaborated in an extensive process that sought perspectives on the election from a broad range of sources. Among them:

- *Personal interviews.* Staff interviewed, either in person or by telephone, a cross-section of North American participants in the ICANN process. These ranged from candidates in the election to members of ICANN's initial Board of Directors, to academic experts and systems engineers. A list of interviews appears as Appendix 3.
- *Media coverage.* Staff collected television, radio, print, and online coverage that appeared in North America before, during and after the 2000 election. Stories were reviewed, summarized, and categorized to create a picture of the overall media presentation of ICANN.
- *Primary sources.* Staff reviewed many of ICANN's "official" documents, especially regarding the election. These included the ICANN Bylaws (in their previous and current forms), Articles of Incorporation, committee reports, budgets, resolutions, minutes, and public correspondence. It also included "unofficial" records of ICANN meetings, such as the real-time scribe notes.
- *Survey data.* To assist in establishing context for the 2000 election, staff reviewed recent public opinion data exploring notions of the Internet and theories of Internet governance.
- *U.S. government documents.* ICANN's genesis is laid out in U.S. Commerce Department documents like the Green and White Papers and the MOU. Since then, ICANN has had regular interaction with the American government. Staff reviewed correspondence with government officials and congressional testimony, as well as the contractual negotiations.
- *Election-related data.* To date, ICANN has made certain data regarding the election available to the At-Large Study Committee. The A.L.S.C., in turn, has made a significant amount of data public. Staff reviewed and reproduced, where appropriate, that data in this report.
- *Public discussion forums.* Much of the online discussion that has surrounded ICANN since its incorporation has been made electronically available on public web sites. Public comment forums and mailing lists, both official and unofficial, have provided significant input for this report.
- *Personal and institutional experience.* CDT and Common Cause, like their colleagues in the NAIS team, have been active participants in the ICANN process for some time; this analysis is inevitably colored by our experiences.

### 2.2.5.1 Participation and Contextual Variables

#### 2.2.5.1.1 Internet use

Of the ICANN-defined geographic regions, North America has the largest number of Internet users. North America's user population dates back to the early days of the Internet's development and it has

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<sup>53</sup> Prepared by Alan Davidson and Rob Courtney of the Center for Democracy & Technology (USA) and Don Simon, Andy Draheim, and Scott Albert Johnson of Common Cause (USA).

grown over time. Of an estimated 407.1 million Internet users worldwide in November 2000, 167.12 million of them (41.1%) were in the United States and Canada (see Appendix 1).<sup>54</sup>

Per-capita Internet penetration is high throughout North America. By January 2001, over 60 percent of the United States population had access to the Internet from either home or work, according to Nielsen/Netratings. Canada, while having far fewer total users than the U.S. (along with a much smaller population), still maintains a high penetration rate at approximately 42 percent (as of 1999; source: Statistics Canada).

Although Internet users' awareness of Internet issues (such as Internet governance, domain name dispute resolution, etc.) in both the United States and Canada continues to increase, it has not necessarily kept pace with the rapid explosion in Internet usage. While the North American community of Internet users has grown at a near-exponential rate over the past several years, many new users are still becoming attuned to issues of Internet administration such as those before ICANN.

Even so, North America has a significant population of technically savvy Internet users with experience and interest in ICANN's activities. This population has its roots in the programming and engineering communities, as well as an emerging broader community of interested companies, policymakers, and consumers.

For those outside this intrinsically interested community, there have been only limited efforts to foster an interest in ICANN.

#### **2.2.5.1.2 Electoral systems and traditions**

Both the United States and Canada enjoy well-established democratic traditions. The United States follows a federal form of government, with three branches (executive, legislative, and judicial) that are designed to check and balance each other. The legislative branch has a bicameral structure, with one branch (the House of Representatives) representing the general population on a proportional basis, and the other branch (the Senate) representing the several States on a two-vote-per-state basis.

Canada's system of government combines elements of the American federal structure with the British unitary "Westminster" model. Like the U.S., the Canadian system has an executive, legislative, and judiciary branch; however, some elements of the executive and legislative are combined, in that the majority party in the legislature also controls the executive.

Both the U.S. and Canadian systems rely heavily on direct election to fill most public offices.<sup>55</sup> Also, the United States electorate is characterized by a fundamental distrust of government, especially as they become removed from the people from whom they ultimately derive their authority. This may be relevant to an understanding of why many in this region pushed for a direct election of At-Large board members; direct elections are generally thought to provide a more tangible and direct form of accountability from the elected to the electorate.

With specific reference to domain name governance, Canada has accumulated recent experience through its redelegation of the Canadian ccTLD, ".ca." Until recently, ".ca" was administered on a voluntary basis by John Demco of the University of British Columbia. On December 1, 2000, the domain was redelegated to a non-profit organization established specifically for the purpose, the Canadian Internet Registration Authority (CIRA). The tenor of CIRA's policymaking is set by a ten-member Board of Directors. Seven seats on the Board will be assumed by the winners of a recent

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<sup>54</sup> Source: Nua Internet Surveys, [http://www.nua.ie/surveys/how\\_many\\_online/index.html](http://www.nua.ie/surveys/how_many_online/index.html).

<sup>55</sup> While the U.S. presidential election utilizes the Electoral College as a nominal form of indirect voting, the College in reality plays a mostly vestigial role in American democracy. In most American states, members of the Electoral College are no longer allowed to apply their own judgment in casting their votes in a presidential election. Their votes are instead dictated by state law and, in those states where no law exists, by a long-standing tradition of casting electoral votes only for the candidate victorious in a state's public election. As a result, the Electoral College has not diluted Americans' reverence for direct democracy.

election; the other three are allocated to organizations representing Internet users, registrars, and the commercial Internet industry.<sup>56</sup>

While it is not yet possible to objectively evaluate how CIRA will fare in the long term, the organization seems to have gained acceptance by much of the Canadian Internet community, as well as the ICANN community.

The United States is currently wrestling with similar questions to those confronted by the Canadians in CIRA's creation. At the time of this report's writing, the American Department of Commerce had recently closed a Request For Quotations (RFQ) soliciting bids for a new administrator of the ".us" ccTLD. The RFQ seems to diverge from the Canadian model in that ".us" will likely be delegated to a for-profit operator, but key questions about ".us" administration are as-yet unanswered.

#### 2.2.5.1.3 Perception of ICANN's Mission and the Need for Public Representation

Public attitudes towards ICANN diverge significantly in North America, though apparently not along national lines. Responses from both American and Canadian interviewees about ICANN and about Internet governance in general were markedly similar, and suggest that nationally-oriented differences of opinion in North America were less influential to the election than in other regions.

To the (limited) extent that North Americans are cognizant of ICANN's existence and activities, they seem receptive to the notion that a non-governmental body would have responsibility for technical coordination online.<sup>57</sup> And yet, in the significantly smaller population of those familiar with ICANN's activities, responses to ICANN are extremely mixed, and Internet "experts" have expressed serious reservations about the organization's activities so far.<sup>58</sup>

The problem may lie in differing perceptions about just what "technical coordination" truly entails and implies. These perceptions lie on a continuum; at one end, ICANN is seen as engaging in a truly narrow set of activities, with such narrowness diminishing the need for public representation within the organization. In this light, ICANN is seen as a body that is best administered by technical experts, with little or no broad public input.

At the other end, even ICANN's technical decisions are considered to have obvious policy implications. According to this argument, many of ICANN's most conspicuous decisions to date have been nominally technical in nature, but have had enormous policy implications. Recent examples include the decisions to approve new generic top-level domains (gTLDs), as well as the amended agreements between VeriSign, ICANN, and the U.S. Department of Commerce. Both of these decisions, according to this view, had impacts that went beyond the scope of ICANN's mission, as established by its founding documents and bylaws.

Because there is no consensus about the true and proper nature of ICANN's mission—and, in fact, there are further variations of opinion that fall between these diametrically opposed views—questions have emerged about ICANN's legitimacy that are difficult to answer. Indeed, even among those who share similar views of ICANN's mission, there are differences of opinion about the role of public representation within that framework. Some people interviewed believed that, by opening up ICANN to the sort of public voice that is typical of government organizations, there is a danger of ICANN "mission creep"—that ICANN's actions would begin to spread beyond its original mandate. Others argue that public representation would actually help constrain ICANN from usurping authority in an inappropriate manner.

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<sup>56</sup> Additional details on ".ca" and on CIRA are available at <http://www.cira.ca/>.

<sup>57</sup> In a recent survey of American Internet experts, nearly half (49 percent) were unable even to identify ICANN. However, as a private, non-profit entity, ICANN seems consistent in its structure with North Americans' ideas about appropriate Internet administration. For example, when asked about the kinds of organizations that should have a role in making rules about the Internet, American focus groups ranked non-profit groups and technology experts significantly higher than governments or business groups. (See *Toward a Framework for Internet Accountability*, Markle Foundation, 2001).

<sup>58</sup> Asked to rank their warmth of feeling towards ICANN on a scale of zero to 100 (with zero being the most cold feeling, 100 being the warmest), American Internet experts gave ICANN a relatively cool 64, citing significant accountability concerns. Those surveyed responded with comments such as, "On my list [of groups not trusted to play a role in Internet rule-making] is ICANN... Basically [they have] no accountability." and "I don't trust ICANN. I don't trust W3C (World Wide Web Consortium)." (See *Ibid.*)

So, there is far from a broad consensus about ICANN's proper role, and there is even greater variation of opinion about the best way that public representation can keep ICANN on the right course (or whether there is any role for public representation at all). In fact, many respondents said it is this very lack of clarity that has plagued ICANN and its processes from the start.

## **2.2.5.2 At-Large Membership and Election**

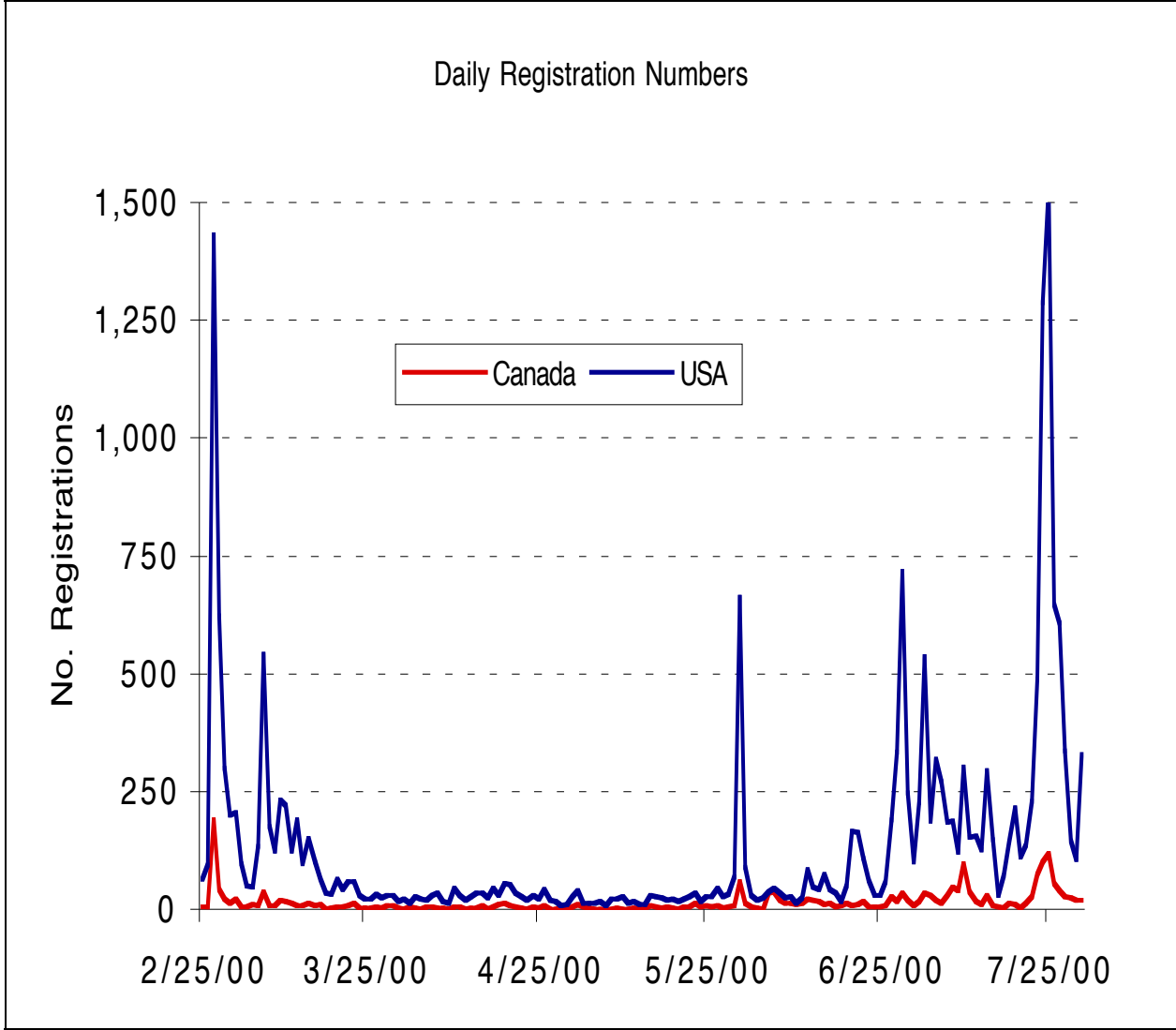
### **2.2.5.2.1 Pre-election phase**

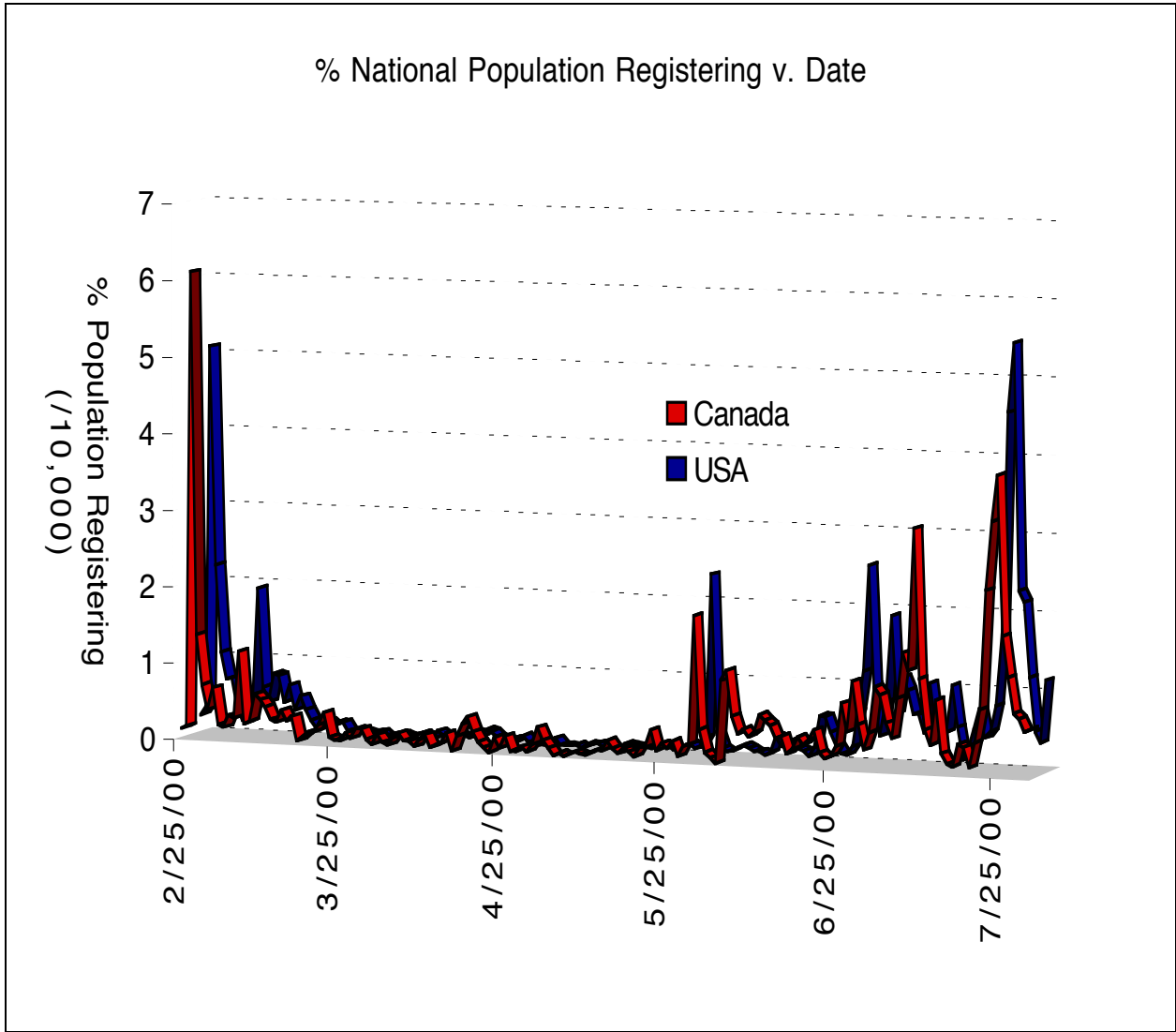
#### **2.2.5.2.1.1 Voter registration**

A total of 21,596 individuals registered as At-Large Members in North America by the July 31 deadline. Of these, 2,094 were living in Canada and 19,051 in the United States—giving Canada a slightly higher per-capita voter registration rate relative to both population and Internet user base. About half of those who registered ultimately “activated” their membership, shrinking the electorate to about 10,000 voters.

Throughout the registration and activation phases of the election, North Americans encountered many of the same obstacles as their counterparts in other regions. These included persistent technical problems, confusion over the unfamiliar preferential voting system, and the unreliability of the postal return system. All contributed to an overall low turnout for the election, and to the significant drop-off in numbers moving from the registration to activation to voting phases.

Within the region, the United States registered significantly more voters than Canada, though voting trends corrected for population remained remarkably consistent between the two nations. Such close correlation in the peaks and valleys of registration patterns suggests that Americans and Canadians experienced similar influences in their decisions to register.







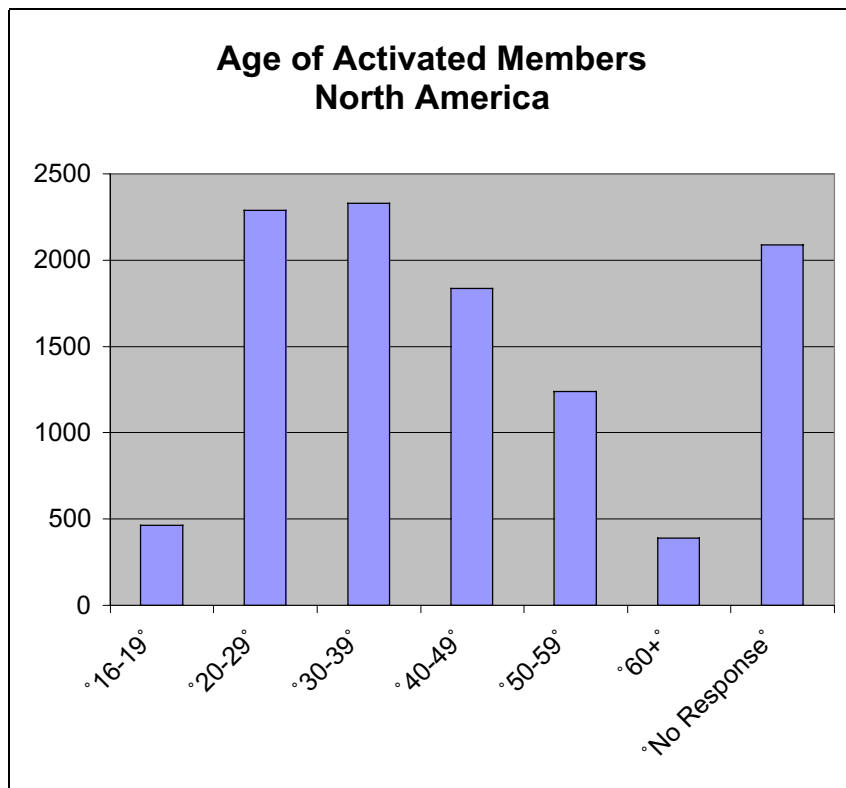
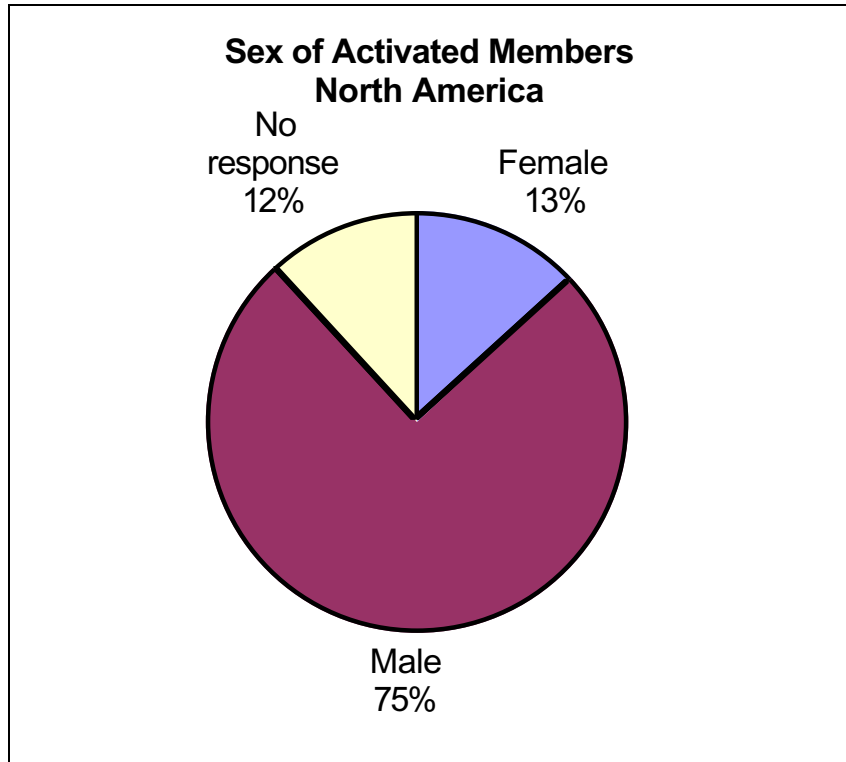
The sources of these influences were varied. For its part, ICANN's Membership Implementation Task Force seems to have had a limited role in encouraging North American Internet users to register as At-Large members. Instead, the largest efforts to register users appear to be those of non-profit and academic organizations with roots in North America that ran voter registration campaigns. These were aimed at making users aware of ICANN's important role on the Internet and of the public's role in the 2000 election. These efforts offered voters background information on the DNS, on ICANN, and on the Internet policy world in general, as well as links to ICANN's member registration pages. Still, the 21,596 individuals registered for the election in North America constitute a tiny fraction of the region's pool of eligible voters. Many of those interviewed noted this low turnout and expressed skepticism about whether it could be substantially increased without a far more concerted and widespread public education campaign.

Data collected by ICANN indicates that the largest fraction of the 10,000 actively registered voters in the electorate—almost half—heard about the election either through online media (web sites) or communications (e-mail), pointing to the effectiveness of third-party organizing efforts. This compares to less than 15% who claimed print media such as newspapers and magazines as their drivers to register.

Also, about a third of eligible voters came from technical fields, while students (9.0%) and government employees (4.1%) made up smaller percentages of the electorate than in other regions. Finally, though the proportion of women registered to vote in North America was the highest of any geographic region, about 13%, it was troublingly low.

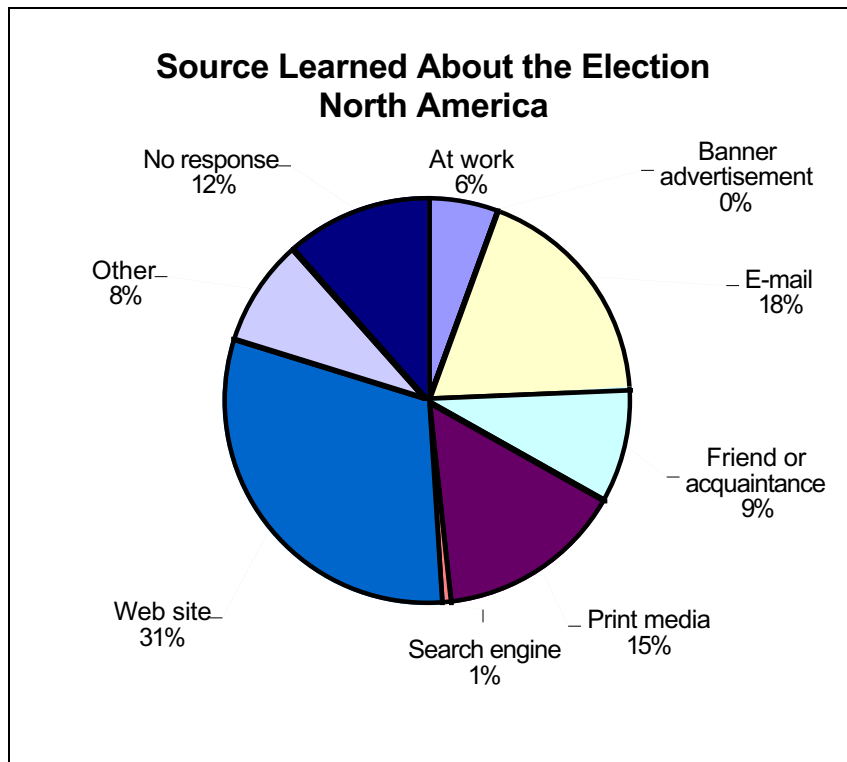
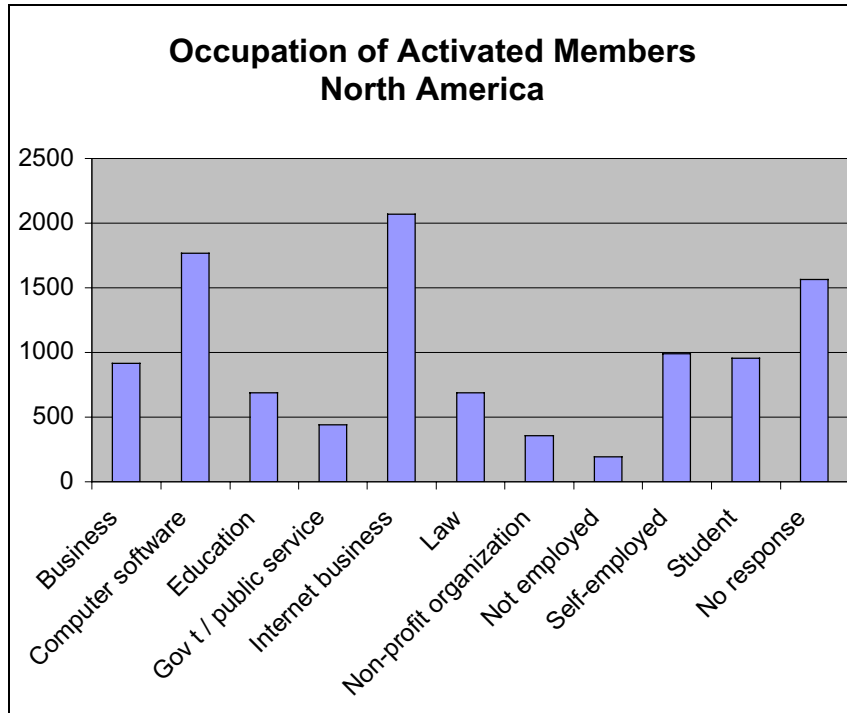
### ICANN Activated Member Registrations

Source: <http://members.icann.org/activestats.html>



### ICANN Activated Member Registrations

Source: <http://members.icann.org/activestats.html>



#### 2.2.5.2.1.2 The North American ballot

Nominations from the membership were based on a 2% threshold of active members; that is, each candidate had to be "approved" by at least 2% of the people within each region who had registered and had activated their membership. For the North American region, that translated to 214 approvals (2% of the 10,632 active members).

Many of those interviewed suggested that the presence of these "member-nominated" candidates was evidence of the validity the election rules and tap a voter demand for alternatives to the candidates chosen by the Nominating Committee. Others viewed the victory of a member-nominated candidate as evidence of the importance of alternate paths to the ballot.

#### 2.2.5.2.1.3 Election campaign

After conclusion of the member-nomination process, some non-governmental organizations and academic institutions with roots in North America began to transition their voter registration programs into more ambitious education efforts. These efforts were largely Internet-based. (One notable exception was the Berkman Center for Internet and Society's "Meet the Candidates" night; see below) As a whole, voter education in North America was at the very least available to those voters who actively sought it out.

ICANN itself prepared a number of online resources for voters to learn about the candidates, including biographical web pages, documentation of the process by which the election rules were devised, and a question and answer forum. This Q&A forum allowed members to ask the candidates specific questions. Candidate response varied between candidates and also waxed and waned as time went by.<sup>59</sup>

ICANN made little attempt, however, at proactive outreach in North America. ICANN declined to make the registration "rolls" (i.e. e-mail lists) available to the candidates, citing privacy concerns. Many of those interviewed, while not necessarily wholly critical of the logic behind ICANN's reticence, expressed frustration at their inability to directly contact the voters, a notable difference between the ICANN election and most public elections.

#### 2.2.5.2.1.4 Online resources

Several online organizations undertook to solicit and compare candidates' platforms, which included significant North American representation. A number of the voter education groups assembled resources that were highly accessible to, and reasonably well publicized among North American voters.<sup>60</sup>

Other organizations, although not purely oriented towards broad voter education, included the well-known news and discussion site Slashdot, ICANNWatch (where commentary and discussions on ICANN policies are hosted on a continuing basis), ICANNVote (a site managed by member-nominated candidate Emerson Tiller with general election discussion and content), or ICANNNot (a site protesting ICANN's election outreach) provided discussion space where those with strong opinions were encouraged to share their feelings on candidates' statements positions, and viability.

It is difficult to draw conclusions about the impact that these resources (individually or cumulatively) might have had on the election, except to say that those North American voters inclined to seek candidate information on the Internet had numerous options. In all, North American voters can be considered roughly as well informed as their counterparts in other regions.<sup>61</sup>

#### 2.2.5.2.1.5 Voter Organization

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<sup>59</sup> Most of these materials are still online as of May 2001, at <http://members.icann.org/>.

<sup>60</sup> These groups included: The Center for Democracy & Technology and Common Cause (members of the NAIS project) along with the Bertelsmann Foundation, the American Library Association, the Internet Democracy Project, the Civil Society Internet Forum, and the Association for Progressive Communications.

<sup>61</sup> Some of those interviewed expressed skepticism about whether it was possible for the entire eligible electorate to be truly well-informed.

Several organizations attempted to promote self-organization of North American At-Large members along ideological lines, although without much success. A lack of resources and an inability to reach the entire At-Large membership may have contributed to these efforts' difficulties.

Several e-mail lists were set up to serve the North American At-Large community, often in the model of other successful lists such as "ICANN-Europe" (see above) or the Boston Working Group. Populations remained low, however, and what discussion did occur on these lists cannot be reliably correlated with activism in the final election.

#### 2.2.5.2.1.6 In-Person Debate

Discussion of and among the North American candidates was aided by an in-person meeting in October 2000 of six of the seven candidates<sup>62</sup> at a forum hosted in Cambridge, Massachusetts and simulcast over the Internet. The meeting's host, Harvard University's Berkman Center for Internet & Society,<sup>63</sup> also set up an archive page<sup>64</sup> where voters and other interested individuals could review the meeting's proceedings days or weeks afterwards. Besides providing candidates with an opportunity to engage each other in face-to-face discussion, the event also lent the ICANN election a touch of the gloss traditionally reserved (in North America, at least) for public elections.

Again, firm conclusions about the impact that the Berkman forum might have had on the electorate are difficult. The in-person meeting certainly would have helped voters elucidate the differences and similarities in the candidates before them. At the same time, it may have impressed upon voters a new sense of the *importance* that those policy distinctions could have on the future of the Internet. In that sense, the in-person meeting may have ultimately assisted those candidates (Auerbach, Simons, Lessig) who voiced their positions forcefully.

#### 2.2.5.2.1.7 Press coverage

Mainstream media have not established a sustained role in promoting public consciousness. Most of the press coverage of the ICANN election was intermittent, or appeared in niche publications geared towards the technical community and not towards generating awareness of the importance of public representation within ICANN.

Major newspapers and television networks did not give large play to the story of the ICANN election, although many did run some stories about it (commonly in the business or lifestyle section). Where major media did cover the election, they generally focused on criticism of ICANN in general, and on ICANN's difficulties in bringing off the election. Very little of the coverage actually focused on the candidates and their platforms; the "hook" for most stories was how election difficulties were a reflection of general problems that ICANN faces on an ongoing basis.

Thoughtful, comprehensive coverage was generally limited to technical and computer-oriented print and web publications; even there, criticism of ICANN's technical management of the election process (and of other ICANN actions) dominated over substantive coverage of candidate positions.

#### 2.2.5.2.2 The Election phase

The North American portion of the ICANN At-Large board election was contested between seven candidates and was decided by means of a preferential balloting process. It took six ballots to make Karl Auerbach, an engineer at Cisco Systems who was widely perceived as a "reformer" candidate, the winner over Barbara Simons (also viewed as a "reformer"). Auerbach had been one of the ICANN board's harshest critics and, as part of his platform, actively called for the resignation of ICANN president Mike Roberts and general counsel Louis Touton.

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<sup>62</sup> Auerbach, Chapin, Lessig, Miller, Simons, and Tiller.

<sup>63</sup> The Berkman Center has played a major role in ICANN's development and modern history. Berkman staff typically provides the lion's share of ICANN's substantial technical requirements at its in-person meetings, as well as organizational assistance between meetings.

<sup>64</sup> Available at <http://cyber.law.harvard.edu/icann/candidateforum/>.

Auerbach and Simons were the last candidates standing from an original field of seven. Of these candidates, four—Lyman Chapin, Donald Langenberg, Lawrence Lessig, and Harris Miller—were nominated by the Board’s Nominating Committee. The other three—Auerbach, Simons, and Emerson Tiller—were nominated by the North American At-Large Membership itself.

The North American race proved to be the At-Large election’s most hotly contested race. Karl Auerbach emerged as the victor after five automatic runoffs. The election’s most popular candidates—Auerbach, Lessig, Tiller, and Simons—were all self-described user advocates.

Turnout, however, was extremely low, even when compared to the already-reduced pool of eligible registered voters. North America’s board representative was ultimately chosen by just 3,449 voters. North America is the most “wired” of any of the five regions represented in the ICANN election, yet the pool of actual voters in North America was far lower than either the European (11,309) or Asia-Australia-Pacific regions (17,745).

### 2.2.5.3 Conclusions and Observations

In North America, as in the other four regions that held elections for At-Large board seats, obstacles to a smooth election process arose. Some of these were common to each region (due to the centralized nature of the election process) and are dealt with above.

- **The North American board election seems to have been free from inappropriate interference.**

Prior to the vote for ICANN’s At-Large board members, there was widespread concern that vested corporate interests would attempt to use their substantial influence and large employee bases to seize control of one or more At-Large Directors. However, the feared “corporate capture” of the North American board seat does not appear to have occurred. Karl Auerbach assumed his seat on the ICANN Board in November without any public suggestions that his victory was somehow illegitimate.

Indeed, despite early fears by many that the At-Large election would be vulnerable to manipulation, in North America there was no evidence of any concerted attempt on the part of any corporate or governmental interests, entrenched or otherwise, to mobilize voters in ways inconsistent with the election’s basic aims. Three of the top four candidates emerged from the membership-nomination process, and their success seems to have been the product of well-organized campaigns in the democratic tradition, rather than of any inappropriately organized attempt to manipulate the election.

- **Low voter turnout was a defining characteristic of the North American election.**

While many election observers were dismayed to see such low voter turnout—just over three thousand voting in a potential electorate numbering well over a hundred million—some of those interviewed expressed little hope that future elections could bring turnouts high enough to confer traditional political legitimacy on the ICANN process. The technical (and to a certain extent, arcane) nature of ICANN’s mission, combined with a relatively low level of sophistication among North American Internet users regarding ICANN’s policy issues, seem to make substantially larger electorates unlikely without dramatically greater public education, and perhaps an altered vision of ICANN itself.

Although ICANN offered some outreach, non-profit organizations and academic institutions played significant roles throughout the election process. ICANN engaged in only very limited proactive outreach, mostly because of its concerns about privacy and a lack of resources. Third-party organizations like NGOs and academic institutions played a significant role in the registration, education, and voting phases of the election. North America’s well-established NGO community led to a proliferation of voter education and advocacy resources online, highly accessible to interested members of the North American electorate.

- **Opinions about the election tended to divide along ideological lines.**

We found two main points of view regarding the merits of the fall election in particular (and, by extension, the current representation scheme in general). One view claimed that there were structural flaws in the election process. The system may be vulnerable to capture by special interests; a public election could result in unqualified board members; a worldwide online election is prohibitively impractical; what need is there for directly elected board members of a technical management body, anyway? These were the most common objections from those that generally opposed the concept of the At-Large election from the beginning or did not support the eventual winner.

Another view held that the ICANN election was a qualified success, as (they argued) it resulted in real public representation on a board that had previously been lacking in legitimacy. The technical and procedural objections about the election were seen as overblown and, for the most part, easily remedied. For the most part, those who held these views were supportive of one of the "reform" candidates and, more significantly, their user-advocate agenda.

This dichotomy is troubling because it points to the **lack of consensus about the *purpose of the At-Large Membership***—an important observation about this election as a whole, and a common refrain heard from participants on every side of this debate.

Still, for the most part, even those with different opinions about the election process *in general* seemed to accept its legitimacy *in this instance*. While many disagreed about the ultimate merits of the philosophical and practical grounding of the current At-Large structure, most parties seemed surprisingly accepting of the results of this specific election, given the rules of the game as they currently exist. Even critics of the At-Large concept (and of the winning candidate) accepted the result and felt that ICANN was still functioning well despite their misgivings.

Similarly, many of the groups most vocally concerned about the election process (and other aspects of ICANN's operation) took comfort in the ultimate election of an outsider, reformer candidate. This diplomatic tone may have been in part a result of efforts by interviewees to couch comments in objective terms for our benefit, and there may have also been political reasons for not raising major public objections to the election process. Still, taking the general tone of comments at face value, we find room for optimism about the future evolution of the processes that make ICANN run, and for a robust public voice within those processes.

## 2.3 Concluding Comparative Themes

The At-Large Election was an unprecedented experiment conducted via the Internet at a global level. The reports above describe several (cross-) regional concerns but they also indicate a “skeptical satisfaction” with the At-Large Election across all five regions. The 2000 Election was generally seen as a first positive step towards public participation within ICANN. The distinct regional experiences described in the reports offer important clues about the nature of the 2000 election, and provide insights for future efforts at public representation. Among the main cross-regional themes:

- ***Legitimate outcome despite challenging electoral process.*** Concerns about and challenges with the electoral process (whether the electorate had the capacity and interest in ICANN; about the election's vulnerability to capture, or the possibility of widespread fraud) do not seem to have affected views on the election's final outcome. While concerns have been raised about future elections, there has been no visible challenge to the seating of these five election winners. The electorate generally considers the five elected directors to be legitimate representatives on the ICANN Board.
- ***Diverse electoral traditions and cultural values determined electoral behavior.*** Sharp distinctions in Internet users' past experiences with local election systems and cultural values led to important differences in the way the election proceeded in different regions. In the Asia/Australia/Pacific region, for example, a different election tradition led to voter registration campaigns that struck some (particularly Western) observers as inappropriate. In the Latin America/Caribbean region as well, one nation dominated the election to a significant extent; this fact, combined with observed difficulties associated with the complex preferential voting system, led some to call for a new concept beside the preferential voting system.
- ***Limited voter resources created electoral deficit.*** While ICANN's centralized voter support through *members.icann.org* was fairly useful to voters in certain regions, voters elsewhere, particularly in developing parts of the world or from language areas using non-Roman alphabets, were frustrated by bandwidth, connectivity, and assumptions by ICANN about the speed and ease of access that were not applicable to their circumstances. At the same time, elements of the election like the postal return system seem to have disproportionately affected users in developing parts of the world. And the “Web-only” character of the election also proved a significant obstacle to participation by would-be voters in developing parts of the world.
- ***Outreach deficit led to over- or under-representation of nations.*** Across and within regions, outreach and voter education were spread disproportionately, which led to subsequent over- or under- representation of countries in the final election results. The media and user-group campaign in Germany is credited with generating the extraordinarily high number of registrations that enabled Germany to exceed the total registrations of all the other countries in the European region combined. Active recruitment and outreach by JIF in Japan was similarly successful on a national level. Both examples raised concerns within their respective regions. In contrast, areas with little outreach or no voter education had significantly lower registration and were consequently under-represented in the election. A broader and more inclusive communication strategy is needed to help equalize participation.
- ***Concern about election organization at the regional level.*** While some geographic boundaries for the 2000 election were basically homogenous and, as a result, uncontroversial, users in more heterogeneous regions sometimes felt underrepresented by the five-region model. Some propose increasing the number of regions used by ICANN; others advocate a two-layer election system to resolve the problem. In addition, the appropriateness of locality as the primary segmentation criterion for representation—as opposed to interest- or issue-based criteria—has been questioned.
- ***Persistence of nationalistic and geopolitical tendencies.*** Even given ICANN's global mission, voting in many regions seems to have divided along nationalistic lines. And while this may be an unavoidable result of the democratic process, several aspects of the 2000 election—most particularly the regional voting system and ICANN's decentralized outreach



strategy—depended heavily on the emergence of transnational voting patterns. While such patterns may emerge in time, they may not do so unaided.

Similarly, global elections such as the 2000 At-Large elections unavoidably reflect global geopolitical and societal factors, including:

- The digital and economic divide between developing and developed regions;
- Nationalistic competition among states in Asia, Latin America and elsewhere;
- The absence of Africa from international governance debate;
- The complexity of ethnic, political and ideological diversity between states in one region; and
- The unequal transition to a rule of law and democratic regime worldwide; growing political apathy among the electorate.

All were contextual variables that influenced the 2000 At-Large election process and outcome substantially. An increased sensitivity and awareness of global geopolitical impediments—including regional competition, gaps in language, and technological development—will be necessary to improve the process.

## 3. Conclusions and Recommendations

### 3.1 Conceptual Recapitulation

Since its inception, ICANN has had to grapple with the most fundamental issue it confronts—that of its own legitimacy.

For ICANN to attain the requisite legitimacy, it must, at a minimum:

- Be perceived to have a fair, open, participatory and inclusive process of decision-making that takes account of the public interest in how the Internet functions;
- Have a means for robust representation of broad views and interests in the internal governance of ICANN, including the interests of the public;
- Have internal mechanisms for organizational accountability so that the authority of interests within ICANN are checked and balanced

It is increasingly clear that ICANN serves a vital global public trust. And for that reason, it is undeniable that there is a strong and direct public interest in ICANN.

ICANN must be structured to take account of that public interest in the processes of its own internal governance. ICANN must establish its own legitimacy to make decisions that profoundly affect the public interest. That legitimacy depends substantially on having a public voice that is structured to participate in the policy development of ICANN, that is represented in the decision-making of ICANN and that has a role in ensuring that ICANN is accountable and held faithful to its mission.

With astonishing rapidity, the Internet has become an essential multi-dimensional global communications resource. Yet the Internet in many senses is still only in its infancy, with a tremendous potential yet to be realized. That potential will come to fruition as the Internet becomes accessible to even more of the world's population, and as the diversity and functionality of the Internet's uses continues to multiply.

These developments will only heighten the crucial public role played by ICANN in the management and coordination of this resource.

ICANN has been created to manage the technical coordination of the Internet in order to safeguard its stability, growth and operation. Yet, as ICANN matures, and as its actual work comes into sharper focus, it becomes increasingly apparent that ICANN's functions inherently range well beyond the strictly "technical."

One of ICANN's ancestor organizations, the Internet Assigned Numbers Authority (IANA), under Jon Postel's supervision, portrayed itself as nothing more than a body engaged in technical coordination based on principles so scientifically objective in nature that its decision-making could be grounded on nothing more than the recognition and proclamation of "bottom-up" community "consensus." ICANN has generally sought to maintain this image of IANA, and has presented itself as a forum only for the resolution of technical issues, not for the deliberation of public policy.

But the veil of this image has now been dropped.

ICANN deals in principle with the coordination of Internet technical resources, but its decisions have much larger societal, economic and cultural implications. Although some decisions made by ICANN are purely technical in nature, many others just as clearly are not. Indeed, even its seemingly technical decisions are oftentimes inextricably intertwined with policy considerations. Other decisions are little more than public policy alone, whose outcome is not fundamentally determined by an underpinning of technical or engineering considerations, and whose resolution cannot realistically be thought to rest on "consensus."

These decisions in the nature of policy-making run across a range of issues that ICANN has confronted or surely will confront:

- **New gTLD creation:** Decisions on the award of new gTLDs, choosing among a range of plausible and technically feasible possibilities.
- **UDRP:** Decisions on how to create a system for the adjudication of intellectual property rights in domain names.
- **Introduction of competition:** Decisions on how best to introduce and promote competition in the market for domain name services, including how to end the NSI monopoly and how best to regulate service providers with which ICANN enters into contractual relationships.
- **Internationalized Domain Names:** Decisions on whether and how to develop domain names in non-Latin characters.
- **Privacy protection:** Decisions on whether and how to protect personal privacy in management of the Internet and how to balance a public interest in disclosure with a competing public interest in privacy.
- **Addressing:** Decisions about the mapping of IP addresses and domain names to particular individuals, with corresponding issues about privacy and freedom.
- **ccTLD redelegation:** Decisions about the delegation, and redelegation of country-code domain names, which touch inevitably on matters of national sovereignty, the geopolitical order and national interests in cyberspace.

It is not necessarily wrong for ICANN to make such decisions. Indeed, many of these decisions have been thrust upon it, either as a matter of ICANN's basic charter, or because of a vacuum due to the lack of any alternative global decision-maker equally well situated to make such judgments.

But it *is* wrong for ICANN to make such decisions without the inherent institutional *legitimacy* to do so.

That legitimacy depends on a decision-making process for ICANN that is structured to incorporate a strong, diverse and global public voice, both in the analysis of policy questions faced by ICANN and in the ultimate decisions it makes.

The incorporation of this public voice into ICANN requires, as explained below, an integrated and multi-dimensional structural approach. ICANN must create and nurture a real at-large membership—an open and accessible worldwide public constituency that is invited and encouraged to participate in ICANN.

*But this public membership must be given structure in order to be given a voice.* It must be given the means for self-organization, for coordination, for aggregation and ultimately, for articulation of its diverse views. A secretariat and a guiding council for the At-Large Membership could assist in facilitating the participation of At-Large Members in the ICANN process.

*Equally important, the membership must be given representation.* The board of ICANN is at the center of ICANN's decision-making structure. No public voice will be adequately expressed without a strong and balanced presence on the ICANN board.

ICANN ignores or minimizes the public voice at its own peril.

It is widely recognized that ICANN is an experiment. It is a body almost without precedent—a global, self-organizing, non-governmental decision-maker entrusted with the management of a vital public resource.

There is much to be gained in the success of this experiment, but its fragility should not be underestimated.

There is much at stake—not just for the public at large in whether, and how, the Internet will evolve to its full potential as a global public resource, not just for national governments in reconciling a multiplicity of diverse and conflicting national public policy interests in a decision-making process

that by its nature will have strong cross-border impacts, but also for powerful commercial interests who have much to gain or lose in financial terms from the decisions to be made by ICANN.

ICANN has been, and will continue to be, sharply criticized by those who disagree with its decisions. And ICANN needs to be robust in order to withstand its critics. Those critics—whether they are individuals, companies, NGOs, or governments—will attack ICANN's decisions—and ICANN itself—by claiming not just that ICANN is wrong in a given case, but more fundamentally, that it is illegitimate.

On the merits of a specific decision, ICANN can defend itself based on the persuasiveness of its reasoning. But on the deeper question of whether ICANN has the legitimacy even to make a decision of public policy, ICANN must ensure that it rests on solid ground. For if it does not, ICANN will continue to be vulnerable to challenge, both by private interests that may threaten to ignore or contravene its policy decisions, and by governmental interests that may threaten to retrocede the power to make such decisions of public policy back to traditional national or multi-national governmental bodies.

That is why the issue of ICANN's public voice is so important. And that is why the creation of a robust At-Large membership, structured to facilitate meaningful participation in policy-making, and given balanced representation on the board, is vital to the success of ICANN.

## 3.2 The Failure of the Public Voice in the Current Conception of ICANN

The existing structure of the supporting organizations is an inadequate environment for the voice of the public interest in ICANN.

### 3.2.1 ASO/PSO

The ASO and PSO, although formally open to any interested individual, are highly specialized forums that express the perspectives of an expert class. These perspectives are without question vitally necessary within ICANN, but these supporting organizations should not be seen as providing an adequate basis for participation by the public at large.

### 3.2.2 DNSO

Nor has the DNSO succeeded in fulfilling this function, if it ever was intended to do so. Much has been written about the problems of the DNSO, and we do not seek to repeat that analysis here.<sup>65</sup> But in many ways, the DNSO has become a forum for the corporate interests within ICANN—the register and registrar community, the business community, the intellectual property community—and there is no sure place within it for a broader public interest to organize or find the means for expression. Even such a relatively modest step as creating a constituency for individual domain name holders within the DNSO has generated years of dispute and made little progress.

### 3.2.3 The Government Advisory Committee

Nor can the Government Advisory Committee (GAC) provide an adequate forum for a public voice. The GAC speaks on behalf of governments as institutions, not on behalf of the public users of the Internet as individuals. Although governments in principle “represent” their citizens, this principle is little more than an aspiration in some parts of the world.

Moreover, it is also clearly true that even the most democratically organized governments frequently have interests—on matters such as regulation of speech, protection of intellectual property, or competition policies—that are sometimes perceived as antithetical to those of the global community of individuals users of the Internet.

And finally, the GAC has conducted its business at ICANN in an unusually secretive fashion. For the GAC to make its most important decisions, as it does, behind closed doors simply reinforces the fact that it is an inappropriate channel for the public voice within ICANN.

### 3.2.4 At-Large Membership

What is left as a vehicle for the public voice within the current conception and structure of ICANN is the existing At-Large Membership. The problem, however, is that the At-Large Membership barely exists.

The election in October 2000 for five At-Large directors was a qualified success, as discussed earlier in this report. But the creation of the At-Large Membership was an almost complete failure. As soon as ICANN established a membership, it destroyed it as well.

Indeed, in an important sense, ICANN did not establish an At-Large Membership at all. It established an electorate for the election it held. But it also hobbled that electorate in its ability to participate in the election, to interact with the candidates, or to self-organize into electoral interests.

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<sup>65</sup> We do, however, believe that if the DNSO is to continue, it should be reformed. Such SO restructuring should not delay the election of the At-Large Directors, who are to be seated no later than November 2002. We address this timing issue further in Section 4, below.

There is undoubtedly a balance to be struck between the privacy interests of a member of ICANN and the unfettered access to membership lists that would facilitate the free flowing exchange of ideas among members of ICANN. Wherever the perfect balance point might be, ICANN was too strict in limiting the flow of information among members of the electorate and between the electorate and its candidates.

ICANN also made a far more serious mistake. Having invested several hundred thousand dollars in the recruitment, cultivation and development of an At-Large Membership that in the end grew—beyond all expectations—to as many as 75,000 people (and perhaps it would have been even more, if technical problems had not interfered with registration), ICANN then let that asset go to waste.

ICANN did little to promote the membership or to ensure that it would continue as a viable, interactive and participatory group of individuals interested in ICANN. ICANN did not officially recognize or provide space on its web site to the organizing efforts of the At-Large Membership, nor did ICANN staff attempt to provide a coordination interface for the ALM.

As a result, the collective energy of 75,000 At-Large Members has grown stale from neglect and has begun to dissipate entirely. Rather than building on a solid base of 75,000 members recruited for the election, and nurturing that membership by providing them a means for discourse and participation, the membership has instead been allowed functionally to “disband.”

### **3.2.5 Conclusion**

The existing structures of ICANN have not provided, and do not provide, for a public voice. And ICANN's attempt at constructing a membership—although reasonably successful for purposes of the election—also did not provide an ongoing means to satisfy this goal.

The compelling need for meaningful and sustainable public participation in ICANN remains unmet. And structure is a necessary (though perhaps not sufficient) condition to achieve both meaning and sustainability.

Thus, the approach ICANN must take now is one that is diametrically opposite from its initial, aborted construction of an At-Large Membership in 2000. Rather than creating simply an electorate, it must create a real membership. It must provide structure and support for that membership. And it must allow that membership full rights of participation and self organization that include, but encompass much more than, just the right to vote for at large directors.

### 3.3 Options for A Public Voice

Our recommendation is for ICANN to create and structure a robust At-Large Membership, which would be empowered to participate in the policy decision-making process of ICANN. We also recommend that the At-Large Membership hold direct elections to elect the number of Board members of ICANN at least equal to the total number of those selected by the various supporting organizations. Given the current configuration of the Board and the need for appropriate balance of interests, that would mean the ALM would select nine seats by election.

Sections 3.4 and 3.5 below explain in detail these conclusions, how they should be implemented, and why we recommend them. This section briefly outlines the rationale behind our recommendations. It also addresses some of the perceived weaknesses of direct elections, and analyzes the model we recommend in light of other proposed options for representation and participation of the public voice.

The creation of an At-Large Membership structure with the right to vote in a direct election for At Large directors is a process with both benefits and problems, some serious. *But we believe that this is, on balance and considering the alternatives, the approach most likely to support the long-term legitimacy and stability for ICANN.*

#### 3.3.1 The reason for an At-Large Membership that enables participation and provides for public representation by electing the At Large Directors

The argument in favor of having an At-Large Membership of ICANN that participates in the policy process and that elects the At Large board directors is one that proceeds in steps:

- ICANN is far more than a mere technical coordination body; it makes decisions that have far-reaching *public policy implications*.
- For this reason and others, ICANN must possess institutional legitimacy, which requires the incorporation of the *public voice* in its processes. The interest of the public in the work of ICANN touches on issues of public policy that arise in matters that range across the spectrum of issues addressed by ICANN. Thus, the "public voice" is not just another Supporting Organization, but a separate perspective that needs to inform the policy work of the organization in all of its manifestations.
- This public voice will best be incorporated by the existence of an *At-Large Membership*, constituted of *interested individual members from around the world* and open to all. Creating too high a barrier to entry risks excluding those with legitimate interests in ICANN. On the other hand, a membership open to a broad community provides added legitimacy to ICANN's decisions.
- ICANN should provide this At-Large Membership with effective structures for *participation* and *representation*. Participatory processes capable of coordinating and articulating the public's diverse views inform Internet users and aggregate their energies into productive efforts, while meaningful *representation* in ICANN's central decision-making processes will assure that the public voice is given appropriate weight.
- Appropriate structures for participation should include the functions of a *Membership Council* and *Secretariat* responsible for facilitating interactions of At-Large Members in ICANN's activities.
- Meaningful representation is best accomplished by the *direct election of At-Large Members to the ICANN Board of Directors*. No other method of selection so fully and effectively links the directors to the broad membership, providing a level of input and legitimacy not attained through other forms of appointment or selection.

The importance of public participation should be recognized by ensuring the Membership a number of Board seats *at least equal in number* to the representation accorded other stakeholders in aggregate (currently the Supporting Organizations). Providing at least the same aggregate number of At-Large Directors as SO Directors is an appropriate balance of interests within ICANN. Because a two-thirds

supermajority is required for the board to amend the by-laws, the At Large directors and the SO directors can serve as a check and balance on each other. Neither group alone would be able to amend the bylaws, so any fundamental change in governance would require some coalition of support from both groups, a protection that will ensure that the interests of the public cannot be compromised by the supporting organizations alone, or vice versa.

*In the final analysis, the rationale for direct elections of At-Large directors by the members of ICANN is that it will provide the clearest channel for a public voice in the decision-making process of ICANN, a voice which is required in order to give ICANN the legitimacy it needs to resolve the multiplicity of policy questions within its jurisdiction.*

### 3.3.2 Benefits and challenges of direct elections

We have come to these recommendations following long deliberation and consideration of the strengths and weaknesses of our proposal for direct elections, and the review of other possible options.

A system of direct elections is of course not without its problems. The main criticisms made of direct elections as a means for choosing ICANN board members tend to fall into four categories:

- **Such elections provide only the illusion of representation.** Some argue that it is wrongheaded to think that the relatively few individuals who would participate in an ICANN election can be thought to “represent” the public in any meaningful sense. Given a potential electorate of hundreds of millions of people who have an e-mail address, the approximately 40,000 voters who actually voted in the ICANN election last year are a trivial number. Such low participation does not result in a process that can be viewed as a valid representation of the public, in the way that elections are typically thought to provide democratic legitimacy in a traditional political context. To put the sharpest point on this view, for instance, critics argue that an at-large director elected with 67 votes out of 130 total votes cast in Africa cannot in any meaningful sense be said to “represent” all of Africa.<sup>66</sup>
- **Such elections are inherently subject to fraud and manipulation.** Related to the criticism about illusory representation are concerns about fraud and manipulation. Critics argue that there is no practical and fail-safe way to guard against multiple registrations from one individual, against “manufactured” registrations generated by a central source (whether it is a corporation or a government) or indeed, against registrations that are entirely fictitious. They also argue that the low participation heightens concerns about “capture,” whereby a company or government generates votes to “win a seat.” Evidence from last year’s elections heightens this concern because of nationalistic behavior by voters worldwide and by some governments. This manipulation, critics contend, is only likely to grow worse in the future.
- **Such elections are expensive.** These critics point to the costs of success as much as the problems of failure. If ICANN does attract public attention and support, they claim, the mechanism of elections is not readily scalable because of the sheer cost of maintaining a membership and authenticating participation through the mail. The financial burden of running elections, they contend, will overwhelm the ICANN budget.
- **Such elections cannot be sustained over time as a valid means to select board members.** Critics here wonder whether the public really cares about ICANN, and if it does, whether it will continue to care. These critics are concerned that even if the novelty of the first, or the first few, ICANN elections attract press and public attention, that interest is likely to fade over time, which will leave the elections within the control of a relatively small handful of ICANN “insiders” who cannot be said to represent the views or interests of the public at large.

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<sup>66</sup> But as the Africa regional report observes, there seems to be a good correlation between Internet usage in Africa and the numbers of At-Large Members. See 2.2.1. ‘Outcome of the Recruitment Drive and Outreach Program’ in this report.



The response to these problems is one that reframes the question. The criticisms measure the representative "legitimacy" of ICANN elections using the same "yard stick" that is applied to democratic elections for governmental representatives. But ICANN is not a government—it doesn't have the power to police, to send people to jail, or to raise armies. Rather, the point of ICANN elections is to choose representatives who have the perspective of public users of the Internet, and who can speak in a public voice on issues of policy concern about the Internet.

In other words, ICANN elections could not—and are not meant to—replicate elections for governmental office, and they should not be judged by such a standard. They serve a different purpose and will necessarily be conducted by a less stringent set of criteria than would be acceptable for governmental elections.

What we seek is a proper "fit" between the functions of ICANN, the need for a public voice to provide legitimacy for those functions, and the kind of election that is practical and appropriate to serve that need. One degree of "fit" would serve governments, but another can serve ICANN. To confuse those different standards is to judge ICANN's elections by a measure that is unrealistic, unnecessary and unfair.

Moreover, ICANN is a membership organization, not a government. The elected At-Large directors are not meant to "represent" the entire worldwide public at large, nor even all Internet users. The elected directors are chosen by the members of the organization and, in their service as Directors, are expected to bring the perspectives of those members to the Board.

Membership in ICANN should be open to any individual with an e-mail address and the interest to join. This low barrier to entry ensures that anyone with the time and interest to participate can do so. That very openness provides the *opportunity* for participation to those who want it, and in so doing validates the public legitimacy of the process. It is precisely the lack of barriers to public participation *as a member* that legitimizes the election as a selection process, not its "representativeness."

That is why last year's ICANN election was not inherently "illegitimate" because only 40,000 voters participated. The frame of reference is not that only 40,000 voters participated out of the billions of global citizens, or out of the hundreds of millions of e-mail users. The frame of reference is that 40,000 voters participated out of the 75,000 individuals who had the interest to register and activate their memberships.

The existing Supporting Organizations would be equally vulnerable if the sharp criticisms applied to the at large election were also applied to the SOs. It is not clear by what measure of legitimacy or representation a board director selected by the DNSO, for instance, can be said to validly represent the interests of all the various members of the various constituency groups within the DNSO. Few in ICANN criticize the DNSO because only a small handful of businesses, out of the millions of businesses worldwide, actively participate in the business constituency group and in the selection of the Names Council representative. The same is largely true of participation in the ASO and PSO, and of the legitimacy of the directors they select.

As in any election, there is an unavoidable possibility that some voters will engage in fraud or will attempt to inappropriately manipulate the election. To be sure, the nature of ICANN elections makes protection against these manipulations less reliable than in the offline context. However, we believe that the ICANN elections can tolerate a lower level of protection than governmental elections might.

The system of authentication by postal mail used last year provides a meaningful level of protection, and can be supplemented by additional steps that we suggest in our more detailed discussion of the problem in section 3.5. While ICANN should make every effort to protect against fraud and manipulation, the At-Large election will enjoy a margin for error resembling that of an organizational election, a standard of considerably less rigor than would be acceptable for governments.

Additionally, a strongly worded "code of conduct" might significantly reduce the incidence of questionable "electioneering" practices that occurred in certain regions in the 2000 election. In part, these efforts took place simply because they were not clearly proscribed. We urge ICANN to undertake a serious effort to develop and promote a uniform standard of conduct to be applied in the next election.

So too, we believe the problems of capture by governments or corporations are real, but overstated. There was some evidence of national efforts to capture in last year's election, while not so much evidence of corporate capture.

To some degree, "capture" can arise as a result of little more than a vigorously sponsored effort at voter registration and participation—generally a desired part of elections. Of course, one person's effort at "capture" is another person's get-out-the-vote drive.

More generally, the best response to capture is not less elections, but more democracy. In other words, if one nation mounts a voter drive to encourage its citizens to participate in ICANN elections, the hope is that other members of the global community might respond with efforts of their own to counter that drive. While in an ideal world the ICANN electorate would respond as citizens of a global cyberspace and not of individual nations, the problem of nationalistic voting is not one that fundamentally undermines the integrity of the elections. We believe that nationalist voting is a problem that can be countered by ensuring that the electorate is better informed about ICANN and by making potential members aware that the membership exists to give the individuals the opportunity to participate in and contribute to ICANN's work, not just to vote.

The cost question is also a real one. We address this at length in section 3.5. Ultimately, the expense of elections is one that must be borne by ICANN—in other words, from ICANN's budget revenues raised from those registries and other organizations that profit from the existence of a stable DNS and addressing system, and hence benefit from the existence of a stable ICANN. These businesses should bear this as a cost of doing business because it is the cost of being legitimate.

This kind of cross-subsidization is warranted because those interests that profit from the stable management of the Internet have a strong financial self interest in ensuring the continued existence and legitimacy of ICANN, in order to forestall less favorable alternatives such as management by governments. It is, in our view, an inseparable part of the responsibility to ICANN these business interests have that they bear the costs of meaningful public participation in order to make ICANN robust and legitimate. Whether cross-subsidization is necessary as a permanent solution is not clear. We believe it is needed—and it is justified—at least during the start-up phase of the At-Large Membership.

As to the fear that public interest in ICANN will wane, leaving elections to the control of a fringe few ICANN zealots, that is a concern that can only be tested over time. We do not think this will happen because we believe that ICANN will become more, not less, relevant and visible to the public. Every indication is that the Internet will become increasingly pervasive in daily life. The policy issues faced by ICANN are likely to grow in their relevance to individual users, and that in turn is likely to stimulate interest and participation in ICANN.

### **3.3.3 Analysis of alternative models of selection**

The issue of whether elections are the best choice to select directors is one that must be made by reference to the question—as compared to what? While there are problems with direct elections as a means of best providing a public voice to ICANN, there are even greater problems with the most common alternatives suggested by others:

#### **3.3.3.1 At Large Directors selected by a User Supporting Organization.**

One option is for individual users of the Internet to organize a "user" or "customer" SO that would choose board members. What is not clear in such proposals is *how* the SO would actually select board members. The existing DNSO is divided into recognized constituencies, each of which is self-organized and elects representatives to the Names Council, which in turn selects three members for the ICANN board. But this model provides little guidance for how a very large user SO—which is potentially open to any individual on a worldwide basis—would conduct its selection process.

If the user SO were to operate by analogy to the existing SOs—and conduct elections through an indirect process of questionable "legitimacy"—it would provide such a restricted form of public participation as a practical matter that it could not meaningfully be said to embody a public voice. If the user SO were to operate by allowing any individual to sign up for membership and participate in an online election, then it is simply a vehicle for conducting global direct elections, a plan which

has the same virtues and flaws as the system for direct elections outlined in our own recommendations below.

The major difference, however, is that the creation of a user SO implies that this supporting organization should be on the same footing as the other SOs, and should be able to select either three board members (or some small number considerably less than the balanced nine-nine arrangement that is the *status quo*), just as the other SOs each do. We believe this seriously undervalues the public voice because it equates the public interest to be protected by the user SO with the interests represented by each of the ASO, PSO and DNSO. This approach fundamentally misconceives the role of the public voice, which is to operate as a check and balance to the narrower and more specialized commercial and technical interests already represented in the SO structure, and to ensure a significant level of public input into the decision-making process on issues of broad public policy faced by ICANN.

### 3.3.3.2 At Large Directors appointed by Governments.

Another model proposes that governments—often viewed as the traditional representatives of the public—select the “public” or at-large members of the ICANN board. The argument for this approach is that governments are institutions that by definition embody the public interest of each sovereign state, and are therefore best situated to select representatives to protect the public interest in the work of ICANN.

But this approach raises problems similar to those, discussed above in section 3.2.3, of relying on the Government Advisory Committee to adequately represent the public voice in ICANN.

Above all else, the selection of at-large directors by Governments would turn ICANN into the functional equivalent of a multilateral treaty organization—an international body composed, at least in significant part, of government-appointed representatives who sit on its board.

This is in fundamental conflict with an essential tenet of ICANN—which is to be a *non-governmental* entity. ICANN was created in order to privatize regulation of the Internet—not just from the U.S. Government but from governments in general. It is a commonly said that governments do not work in “Internet time”—that they are dilatory and inefficient, and that a multilateral organization is a poor substitute for an effective private organization that is structured to embody a public voice. That was the promise of the original White Paper and we think it was right.

An additional ‘governmental’ strand of thought is to have governments appoint public trustees to the board of ICANN. The envisaged advantages of these public appointments include independence, status, expertise and continuity. However, as the lessons with “quangos”<sup>67</sup> in the UK and elsewhere have indicated, public appointees are often seen as lacking the legitimacy required to represent the public interest, are often unconnected with the constituency they are supposed to serve and are prone to patronage. For these reasons “quangos” have become an increasingly unpopular and uncommon means of governance.

### 3.3.3.3 At Large Directors selected by intermediary “public interest” organizations.

Yet another model proposes that existing intermediary organizations be delegated the right to appoint public “trustees” to the ICANN board as At-Large directors.

Such public-spirited “ombudsmen” could work with independence within the ICANN board to represent the public interest.

Yet there are practical problems with this model as well. It would not be simple to identify the appropriate intermediary organizations to choose the At-Large directors. There is little agreement on what constitutes a “public interest organization” even in the United States, where such

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<sup>67</sup> The word ‘quango’ is derived from ‘Quasi Non Governmental Organization’. Generally associated with governance in the United Kingdom, quangos are public bodies that, although they have a role in the processes of government, are not a part of any government department or office. To quote from the UK Cabinet Office, quangos “operate to a greater or lesser extent at arm’s length from Ministers. More simply, this means a national or regional public body, operating independently of Ministers, but for which Ministers are responsible.” (<http://www.cabinet-office.gov.uk/quango/index/whatis.htm>). Quango members are appointed, not elected, and quangos themselves generally operate behind closed doors and without strong accountability.

organizations play a significant role in public life, much less in the rest of the world. Such organizations are much less likely to exist at all in many parts of the world. There is no clear mechanism for how the appointing organizations would be identified or how to allocate appointments to particular organizations or groups of organizations.

Our own solution is in some ways a variant of this idea, and has its virtues without its flaws. The At-Large Membership itself can be seen as an intermediary global "public interest organization" that is created for the purpose of bringing together citizens from around the world who are interested in the work of ICANN, much like other public interest groups organize around a particular cause or issue. The advantage of the ALM as the intermediary organization is that it is global and it consists of those members of the public who self-select to join it because of their interest in these issues and their desire to participate and contribute. It is appropriate for *this* intermediary organization to be the one that chooses the "public trustees" to serve on the ICANN board. We think it should do so through elections.

#### **3.3.3.4 At Large Directors selected by the ICANN board.**

This is a model that is not uncommon in the commercial world, where a corporation might appoint a "public member" to protect the public interest.

But the corporate selection of such trustees in the private sector is a very incomplete analogy here because ICANN is a very atypical corporation, having the character of a public/private hybrid.

The hope is that the board might select highly qualified individuals who would, by dint of their stature, background and reputation, command public confidence in their role as a trustee. The risk, however, is that entrenched incumbents might only appoint like-minded Board members to the exclusion of other views important to the broader public..

Public confidence in the selection of At-Large Directors flows from the *process* as well as from the result. Because an elected Director is chosen by the community through a public means, it is likely that his or her selection will be accepted by the community. That is one of the lessons of last year's election, where there has been a great deal of acceptance of the five At-Large Directors selected, almost without reference to a particular individual's objective qualifications as compared to other candidates on the ballot, or other possible selections. The fact of a choice made through public participation best validates the role of the board member as public trustee. Selection of a public trustee for the board by the incumbent board members is not likely to achieve this goal.

#### **3.3.3.5 Indirect Elections.**

Indirect elections appear to provide greater stability to an organization because they serve as a filtering mechanism that can improve the quality of the directors selected. Under this approach as it was originally proposed by ICANN, members would elect an At Large Council, which would in turn select the At Large Directors.

The overriding problem of indirect elections is that they dramatically dampen down the sense of public participation in the selection process. Voters are selecting only someone who will do the actual selection. This is likely, in the ICANN context, to depress participation and to weaken the sense of public involvement in the organization. In this sense as well, it fails a fundamental test: the purpose of elections in ICANN is not just to select directors but also provide a sense of participation and empowerment. Indirect elections are unlikely to do that.

Finally, while they lack most of the advantages of direct elections, they do have many of the same flaws. Indirect elections raise comparable problems of fraud and authentication, as well as being equally (if not more) expensive. Further, they present heightened concerns of capture because a relatively small number of members of the intermediary body would control the selection of all directors.

#### **3.3.4 Conclusion**

We recognize the problems posed by direct elections. We think there are answers to those problems that make the risks and disadvantages tolerable, even if not non-existent. But moreover, the evaluation of direct elections as a selection mechanism cannot be made in a vacuum. It can be made

only by reference to the competing possibilities. In this broader context, we believe the choice of elections rests on even firmer ground, for none of the alternative models provides a satisfactory solution to the root problem of how to build an effective public voice into the ICANN board in order to establish ICANN's underlying legitimacy. That is why we recommend elections as the best option.

### 3.4 At-Large Membership: Concept and Structure

As indicated above, ICANN has struggled with legitimacy and democracy deficits that may, if not addressed properly, affect its capacity to function. To date, most of the efforts to increase ICANN's overall legitimacy have focused on improvements to the At-Large election structure. But it is equally important to provide the Membership with an internal structure that ensures participation in inclusive, transparent, and accountable policy-making.

The concept, further developed below, of an At-Large Membership offers an opportunity to address this deficit and provide for a more democratic governance structure.

We propose that an "At-Large Membership" (ALM) be formally established as a bottom-up organization that facilitates participation and representation of the public's interest within ICANN. If designed properly, the ALM will empower the public to participate and will impact upon ICANN's policy-making processes in a constructive manner, and will provide an interface between the public and ICANN's governance structure.

#### 3.4.1 Mission and Objectives

The ALM's mission would be to constructively contribute to a more democratic and legitimate governance structure at ICANN by enabling "*full and fair representation of the public's interest in ICANN.*"

In particular, the ALM's goals should be to:

- Empower the public to participate and contribute to the ICANN process in a meaningful way;
- Select representatives of the public on ICANN's Board through direct and open elections;
- Offer an interface of deliberation and communication between the public, ICANN's constituencies and governing structures to foster the public interest;
- Assure accountability of ICANN by demanding and monitoring increased responsiveness from ICANN decision makers; and
- Guarantee the rights of the public to representation and participation within ICANN.

#### 3.4.2 Functions

To achieve these objectives, the ALM will initiate through its members and consequent structures the following functions:<sup>68</sup>

- Encouraging the creation of local, regional and global associations that will allow members to receive and discuss information about ICANN in the language most convenient for themselves;
- Offering information, guidance and public education on issues within ICANN;
- Facilitating deliberation and efforts to affect ICANN policy, such as (virtual) discussion platforms, working committees, petition tools, and outreach meetings;
- Monitoring ICANN policy- & decision-making processes and developing early warning systems for participation and action.

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<sup>68</sup> These functions should be considered as indicative. Once the bottom-up process is facilitated, we expect more innovative functions will be created to address the various needs of individual AL members and their self organized associations or networks.

- Provide opportunities for communication between the public and ICANN by facilitating interaction between At-Large Members and At-Large Directors, other ICANN constituencies, and other Board members;
- Select legitimate and effective representatives of the public on the Board;
- Creating a public space that fosters the integrity and fairness of the electoral process;
- Enabling the development of communities or networks around specific issues and concerns to facilitate informed debate.
- Identifying and fostering appropriate conduct;
- Ensuring transparency of the policy-making process, including consultation mechanisms that help inform and justify Board decisions; and
- Supporting reviews of the decision-making process through debate and analysis.

### 3.4.3 Membership

We propose a concept of membership in which an individual may join simply by *registering his interest* in participating. It is envisaged that, as an individual experiences the outreach inviting him to join, and undergoes the process of joining itself, the ICANN process and the public-interest issues involved will be described sufficiently to ensure that his decision to join is an informed one.<sup>69</sup> Such a low barrier to membership would significantly enhance the degree to which the At-Large Membership would reflect the interests and priorities of the Internet public or, more broadly, the global public.

#### 3.4.3.1 Membership Rights and Responsibilities

By joining the ALM, each member should gain certain rights meant to protect and encourage her participation in the Membership as a whole. These would include the:

- *Right to information*, such as to receive regular updates on decisions or upcoming policy issues;
- *Right to participate and to be heard*, including the rights to propose policies, organize working groups, formulate challenges to board actions, and the like;
- *Right to vote*, in the election of the AL Board members but also during on-line polling or petitions of the AL membership; and
- *Right to self-organize*, comprising the right to create AL communities or networks around specific themes or locality.

Shared responsibilities include:

- Commitment to the goals and mission of the At-Large Membership
- Commitment to participate in and contribute to the ICANN process and system within the framework of the At-Large Membership

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<sup>69</sup> Without elaboration on the procedures, one can imagine a scenario by which one fills in a form that includes basic (and verifiable) contact information, a short bio, as well as a list of "affinities"—from which the person select his or her key interests in ICANN (linked with an opt-in system to be informed or approached by ALM communities). The form may also ask to participate in one of the ALM working groups. After completion of the form, this information is entered into an AL Membership database administered by the Membership Council (see below). We expect that the Membership Council could use this data (in aggregate) to draw conclusions about the ways in which Members participate, but will also reinforce to new Members that their role as Members is to participate in the Membership process, not just to vote.

- Prevention of capture by acting as an individual (and not as a representative of industry, government, or any other constituency that has other means of participation within ICANN).

### 3.4.4 Structure

#### 3.4.4.1 Assumptions and goals

We suggest an ALM-structure, outlined below, that aims to facilitate participation and representation in ICANN. It is based upon assumptions that, to achieve maximum empowerment, the ALM-structure should:

- Limit the layers between the individual AL Member and the AL Board directors (based upon the understanding that the incentive to participate is linked with the direct impact one can make on the Board and the policy process);
- Facilitate bottom-up and self-organizing processes;
- Mobilize individual commitment and motivation effectively; and
- Ensure inclusiveness and equality of participation.

#### 3.4.4.2 Components

To achieve these underlying goals we suggest an ALM structure based upon four components:

- A Membership Council, directly elected by the membership, to oversee the ALM process, guide the Secretariat, and generally empower At-Large Members;
- A Secretariat to facilitate among the other three components the flow of information and the development of policy positions throughout the Membership;
- ALM working committees and groups to examine and develop common policy positions through debate and consultation; and
- Existence of an ALM public space in which self-organized local and regional associations and networks as well as individual members deliberate, communicate and participate.

#### 3.4.4.3 The Membership Council

The Membership Council would be responsible for monitoring the status of communication and policy-development within the Membership, for completing outreach to those groups that are underrepresented in the Membership, and for promoting the development and implementation of new structures to further the effectiveness of the ALM within an evolving ICANN structure. It would also provide policy guidance to the Secretariat in activities supporting the Membership's activities.

Since the Membership Council will have the opportunity to directly influence individuals' experience as Members, it is important that the Council have strong accountability ties to the Membership. Direct elections are the best way to achieve that accountability—but the logistical complications of holding a separate Membership Council election in addition to the election of At-Large Directors could prove daunting. For that reason, we propose that the Membership Council, at least initially, be populated by those candidates elected to the Board and the second-place "runners-up" in the election for At-Large Directors. That is, under the status quo of nine At-Large Directors, we propose that the Membership Council would have eighteen members.

The Membership Council has an obviously important role in guiding both the participatory and representative activities of the Membership, but it will take time for the Membership Council to establish a precise slate of activities and effective internal structure. For that reason, the first and primary responsibility of the Membership Council should be to develop a set of policies regarding the



Membership Council's future structure and activities. Once this first responsibility is discharged, those activities could include:

- Begin to explore means for the At-Large Membership to help support itself financially.
- Review and determination of internal policy, strategy and operational issues related to the ALM;
- Development of consensus guidelines and procedures that Members can use in establishing working groups and associations;
- Establishment of "Council Working Groups" or local/regional discussion forums, consistent with the need for such groups, as identified by the Membership Council;
- Proposal and management of outreach activities, designed to educate and inform members of the Internet public, particularly in developing regions of the world;
- Regular review of the Membership and ALM structure within an evolving ICANN structure;
- Budgeting and cash flow management, as well as fundraising; and
- Organizing the AL elections.

#### **3.4.4.4 The ALM Secretariat**

The ALM Secretariat, to be appointed by the Council (described below), and headed by a staff-level Secretary-General, would support efforts to empower participation throughout the ALM by:

- Providing At-Large Members with information on relevant developments, issues and events;
- Developing and maintaining an interactive electronic site;
- Supporting interactions between the Membership, local associations and public interest organizations;
- Maintaining the rolls of At-Large Members, working groups, and partners;
- Providing administrative support to the Membership as a whole, to its working groups, and to the Membership Council;
- Assisting the Membership Council in its funding obligations by maintaining close contacts with existing and potential sources of funding;
- Preparing budgets and performing general accounting for the ALM;
- Organizing and coordinating discussion platforms such as (virtual) meetings, conferences, workshops, seminars, etc. associated with ALM.

The Secretariat would provide critical administrative support to the At-Large Members and to the interest groups and associations that emerge through discussion of the issues facing ICANN. The position is designed to be a non-partisan one, since a Secretariat with strong interests in certain policy outcomes would be well-positioned to promote his own agenda while blocking others. For that reason, the Secretariat should be selected by, and should serve at the pleasure of, the Membership Council, from which it should receive regular direction on its activities.

#### **3.4.4.5 ALM Working Groups or Committees**

ALM Working Groups or Committees could be initiated upon request of individual AL Members, registered ALM associations or the Membership Council. Topics would be expected to vary widely. The procedures and codes of conduct within these committees should be drafted by the Membership Council. The ALM Secretariat would provide the logistical support to the working committees.

#### **3.4.4.6 ALM Local/Regional Associations**

ALM Local/Regional Associations, like working groups and committees, could be recognized, and thereby achieve access to the membership rolls of the ALM, through a simple process of registering and submitting a description of the association's purpose and support within the Membership to the ALM Secretariat. These groups could and should be encouraged to self-organize. As an alternative, the Membership Council could affirmatively encourage the development of these spaces. It is expected that they would play a major role in forming the backbone of the public space/sphere within the ALM.

### Sidebar: The ICANN Membership Under California State Law

ICANN is organized as a nonprofit corporation under California law. California law defines members of such a corporation as "any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors..."

However, since its founding ICANN has been careful to avoid having statutory "members." Indeed, the by-laws state that ICANN "shall not have members as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these bylaws..." Art. II, Sec. 2.

It is clear from the history of this issue that ICANN has taken this position in order to carefully skirt the rights and privileges under California law that are granted to statutory "members." These rights include:

- The right to call special meetings by a vote of 5 percent of the members.
- The right to receive written notice of member meetings.
- The right to bring derivative actions.
- The right to receive an annual report.
- The right to have access to membership lists and accounting books and records 'for proper purposes.'
- The right to remove directors elected by the members.

Of these rights provided by California law, the one that has attracted the most attention is the right of members to bring derivative lawsuits, which are suits in the name of a corporation to enforce some right of the corporation.

The Membership Advisory Committee (MAC), in its 1999 report, recommended that "the right to bring shareholder derivative suits should be limited." The MAC said that this "is a right that can be abused to the point of crippling ICANN's ability to function. Given alternative (and more accessible) review and reconsideration processes built-in to the ICANN structure, rough consensus [is] that members should not have right to bring derivative actions, which could be abused."

In a subsequent ICANN staff memorandum, prepared in August, 1999, the interest in limiting the right to bring derivative lawsuits was asserted as a principal reason for avoiding statutory "members":

"The right to bring derivative actions cannot be taken away from Statutory Members. However, as the MAC recognized, this is subject to abuse, and given the numerous and various process and substantive protections set forth in the ICANN bylaws and articles, and the unique nature of the entity, it is not clear that this "right" is one that is either necessary or appropriate. Thus, this issue does provide a strong reason for considering a [Nonstatutory Member Structure]."

*<http://www.icann.org/santiago/membership-analysis.htm>*

Other reasons cited in the staff paper for avoiding statutory members were to limit the access to membership or financial information, to limit the ability of members to amend the bylaws and to limit the ability of members to challenge the validity of elections.

Based on the staff analysis, the Board took a simple route to skirting the membership requirements

in California law. Because a statutory "member" is one who has the right to vote for election of a director "pursuant to a specific provision of a corporation's articles or bylaws," ICANN has provided a right to elect directors *only pursuant to a board resolution, not pursuant to any provision in its articles or bylaws*. (Thus, for instance, the bylaws provide in reference to last year's election that the five elected at large directors were to be chosen "according to a selection plan adopted by the Board." Art. II, Sec. 2.). This approach is consistent with the 1999 staff recommendation, which said that in order to avoid the membership requirements of California law, "ICANN could simply set up its membership by Board resolution rather than in the articles or bylaws."

We believe that this issue should be reconsidered. It is unclear whether the threat of potential derivative actions is so grave as to justify a distortion of the membership structure of ICANN. The fear expressed by the MAC that derivative lawsuits might be "abused" by ICANN members is largely speculative. Such lawsuits are neither easy nor cheap to bring. And indeed, such lawsuits are typically viewed as a powerful means by which shareholders can ensure accountability in the actions of a corporation's board.

Nor does ICANN insulate itself from all litigation by this structure. It is subject to non-derivative suits in U.S. courts (as well, potentially, in the courts of other nations) and it has already been sued a number of times. It is far from clear that exposure to hypothetical derivative liability would manifestly increase its litigation burden.

In any event, even if further study of this issue concludes that it remains wise to deny this tool to members, ICANN can still do so, consistent with our other recommendations. It can provide for a structured membership in its bylaws, but continue to provide a specific plan for "selection" of directors as a matter of board resolution, rather than by a specific by law provision. This would allow ICANN to continue, as a formal matter, to have a "non-statutory membership structure" that would allow ICANN to continue to operate outside the membership requirements of California law.

In short, the threat of derivative lawsuits is not, in our view, an adequate reason for ICANN to avoid the creation of a stronger and more structured membership, or to avoid institutionalizing the regular selection of At Large directors by the membership.

## 3.5 Election Mechanisms and Structure

While in our proposal the ALM will have a much broader role than simply to elect Directors, the selection of Board Directors is a central function of the Membership and core to this study. In this section we propose a detailed model for that selection process.

### 3.5.1 Selection Mechanism—Direct Elections

The only board selection mechanism that can assure ICANN's legitimacy is a direct election for At-Large seats on the board of directors. **The number of these seats must be at least equal in number to the aggregate number of seats granted to the Supporting Organizations.** If the overall structure of ICANN remains as it is today, this means nine directly elected board seats for the at-large membership, with five elected according to the existing regional model and four elected on a global basis (with controls to prevent nationalistic capture of several seats).

As explained above, the crucial issue for ICANN at this stage in its evolution is to establish itself as a legitimate decision-making body. This legitimacy must be linked to a clearly defined expression of the public's interest in ICANN's decisions. We believe that direct online elections are the best mechanism for establishing this link, despite some valid concerns about implementation.

#### 3.5.1.1 Diversity crucial

A major part of ICANN's quest for legitimacy is contingent upon attracting a broad, diverse group of stakeholders who are engaged and informed, and who are able to hold ICANN accountable for its decisions. The surest way to do this is by establishing a process where the ties between stakeholder and board are clearly defined. Certain specific constituencies have established this tie through the Supporting Organization model. However, for the representation of the broad public interest a direct election mechanism best provides an incentive for participation and a means to hold ICANN accountable.<sup>70</sup>

#### 3.5.1.2 National governments the wrong model

It may be suggested that the best way to secure the public interest in ICANN would be to increase the role of national governments. While we believe that there is an important advisory role for governments (as embodied in the GAC), the transnational nature of the Internet was part of the reason for creating a unique body like ICANN in the first place. Much of ICANN's work transcends the traditional boundaries of nation-states for governments to adequately and effectively represent the larger, global public interest.

#### 3.5.1.3 Direct elections best path to accountability, representation

Other non-electoral means of board selection—from appointment by existing board members, to elimination of all at-large seats in deference to the Supporting Organizations—leave ICANN with a serious gap in accountability and legitimacy for the reasons already listed. The one method of board selection that we considered as a possible alternative to direct elections was some kind of indirect election mechanism. This would entail the direct election of some form of At-Large Council, or of several regional councils, which would then select the At-Large Board members.

In the final analysis, however, direct elections were found to address several important election issues more completely than indirect ones:

- Direct elections achieve a higher standard of accountability than indirect, since indirect elections introduce an additional intermediary between the member and the decision-making apparatus of ICANN.

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<sup>70</sup> The Supporting Organizations model is effective at securing the interests of specific constituencies, by giving these constituencies a direct line to the actual decision-making entity of the organization. But ICANN makes decisions that have policy impact well beyond these narrowly defined interests; they have ramifications for the public as a whole. As such, there must be a means for the public to participate in the decision-making process in a way that reflects this.

- Direct elections seem to encourage a higher level of robust, diverse participation that is essential for truly broad and diverse representation, for the same reason.
- Direct elections are more resistant to capture. In an indirect system, in which Board members are chosen by a small body such as a Council, the capture risk is substantial. As we discuss elsewhere in this report, some sort of Council or “steering committee” may be beneficial to ensuring strong and meaningful participation within the At-Large Membership. It is not, however, an acceptable substitute for direct elections as far as the selection of board members is concerned.

### 3.5.2 Structure and Balance of the Board

We recommend that:

- At least one-half of the seats on the ICANN board be filled through direct At-Large elections. This ratio should be maintained even if the Board changes in size.
- A majority of At-Large Directorships should be filled through regional (rather than global) elections. Should the ICANN Board retain its current size, five At-Large Directors should be chosen regionally, and four on a global basis.
- Measures be implemented to deter the possibility of nationalistic “capture” of several board seats.

#### 3.5.2.1 ICANN about more than just technical management

We believe that an elected one-half of the board represents an appropriate level of representation to assure the accountability of ICANN's policymaking endeavors. As discussed in the first part of this section, it is a fallacy to assert that ICANN is merely a technical management body with a narrow mandate and no policymaking role. While ICANN does in fact have technical responsibilities, many—in fact, most—of the decisions it makes have *policy implications*, whether or not rooted in technical issues. Thus, we believe that the ICANN board must, at minimum, have at least half of its members as representatives that are broadly and directly accountable to the public interest. We find such a structure necessary for the following reasons:

- The structure appropriately balances stakeholder interests represented in the Supporting Organizations with the diverse public interests represented through the At-Large Membership, and recognizes that ICANN's activities tread a line between so-called “private” coordination and broad “public” effect;
- Further, it provides the ALM with a meaningful counterweight against the actions that the Board's vested interests might otherwise impose by majority on the public and so satisfies needs for accountability and legitimacy in ICANN. For instance, it provides the appropriate check and balance on fundamental issues of ICANN's corporate behavior by requiring a coalition of At-Large and SO Directors to achieve the two-thirds supermajority required to amend the ICANN bylaws;
- It enables a diversity of viewpoints on the Board, helping the ALM Directors to properly reflect the breadth of perspectives that they represent; and
- It is consistent with concepts of historical balance expressed in ICANN's founding documents.

#### 3.5.2.2 Regional/Global At-Large Directorships

Assuming that the status quo in ICANN's overall structure is maintained, this would mean one board seat for each of the five regions, plus four more seats that are elected on a global basis. This division would serve the dual purposes of providing geographically specific representation, while also providing for representation of the community's non-geographic sets of interests.

Regionally-selected seats help to promote geographic diversity in the At-Large Membership's Board-level representation. The presence of globally-elected seats, on the other hand, promotes the idea that the Board's decisions have global impact, and should be considered broadly as such, without

reference to their impact on any single region. While it is of course impossible to dictate that voters not apply regional or even national criteria when casting their votes for global representatives, ICANN can and should encourage voters and globally-elected Directors to take the notion of non-geographic representation seriously.

There is a question of how the parameters for election of "global" Directors might differ from "regional" ones. Without delving too far into the specifics of the 2002 or future At-Large Elections, we suggest that a separate ballot be established for "global" Directors, and that voters cast their ballots separately for regional and global elections.

We recognize the validity, however, of concerns about nationalistic capture with global, non-regional elections; for this reason, we recommend that:

- No country be permitted to occupy more than one globally-elected At-Large Directorship at a time;
- No region be permitted to occupy more than twenty-five percent of the globally-elected At-Large Directorships.

These measures can be enforced through ballot-counting rules or some other mechanism.

We also recognize that no regional structure can completely eliminate concern about nationalistic capture. We therefore acknowledge that ICANN may want to revisit the five-region structure and consider other regional groupings that may be more representative in nature. Nonetheless, it is essential that at least half of the total number of At-Large Directorships be elected through some regional structure.

Nationalistic capture is by no means the only type of capture that is both possible and dangerous. Opponents of direct elections to the ICANN board often cite the nationalism issue as justification for eliminating the At-Large seats. In fact, the threat of capture by powerful commercial and other interests is equally troubling and just as likely; in fact, it is even more likely when no meaningful check is present to hold decision-makers accountable in a broadly representative fashion. We believe that direct elections are the best way to establish this check, and that controls are possible to minimize the threat of national capture.

### **3.5.3 Election mechanics: Authentication**

Using the 2000 experience as a baseline, we can expect that the At-Large Election's long-term viability will depend heavily on the system's security, accuracy, and resistance to fraud. A system in which voter data is easily altered or corrupted, or in which some participants are able to manipulate the system and vote hundreds or thousands of times would fail to meet basic requirements of the democratic process. This would not only interfere with the At-Large election, but could ultimately delegitimize ICANN.

Questions about security, accuracy, and fraud resistance eventually lead back to the problem of authenticating users in an election with such a broad electorate. In a fair election, there should be reasonable protection that the person voting is a real person entitled to vote and that no person can vote more than once. Practically, this means that each person participating in the At-Large Election must have their online voting right tied to a real offline personality and be limited to one and only one "voter" record in the At-Large database.<sup>71</sup>

#### **3.5.3.1 The 2000 Election—Postal Return**

In 2000, ICANN used offline mailings for authentication; voters, upon registering, were e-mailed a login ID and password, and were sent a PIN (Personal Identification Number) by postal mail. All three were needed first to "activate" one's At-Large Membership, and again to cast one's vote. Four weaknesses of the postal return system were identified:

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<sup>71</sup> This should not imply that it is either necessary or desirable to correlate specific voting records with offline identities. The secret ballot becomes no less important to democracy when placed in an online context.

- *Expense.* International postage, even for a simple letter, costs as much as eighty US cents per letter. In 2000, that cost was in excess of US\$100,000. For larger elections, the system scales poorly—mailing costs for an At-Large Membership numbering in the millions, for example, would exceed the entire current ICANN budget.
- *Reliability.* Even in developed countries, there were complaints that PIN letters arrived late, if at all, while difficulties in developing (and especially non-Latin-alphabet) countries were exponentially greater.
- *Complexity.* Those who received PIN letters were frequently confused about the letters' utility or importance, and unaware that the letters would be required not only to activate memberships, but also weeks or months later for voting. PIN numbers, once lost, could not be replaced.
- *Fraud.* The postal return system does not offer complete protection against multiple registrations. A motivated user could almost certainly find ways to register more than once, say by registering (real or fictional) family members or by establishing multiple mailing addresses.

Some of the practical problems might be overcome through consultation with the international postal service, particularly over issues such as envelope addressing. These difficulties notwithstanding, proposals to replace the postal return system have generally been unsuccessful without running afoul of democratic values or incurring astronomical expense. The proposals so far have fallen into six general categories: issuing digital certificates, imposing a membership fee, relying on reputation-based systems such as the PGP "web of trust," relying on e-mail authentication, publishing the voter rolls for public transparency or limiting membership to domain name holders and then authenticating through the Whois database.

### 3.5.3.2 Digital Certificates

While they may become useful in the near future, at present digital certificates have yet to answer critical questions touching on the method's viability. The administrative infrastructure necessary to verify users' identities or to transmit the certificates themselves does not currently exist on a worldwide basis, nor are there agreed-upon global standards in the area. Even were the At-Large to adopt digital certificates as a means for additional security, it would be forced to depend on the postal return system or some other system to match real-world users with digital "voter" records. Finally, the strong encryption on which digital certificates depend is not yet universally available, and is in fact illegal in several parts of the world.

However, the digital certificate is an authentication model with obvious potential, once the administrative difficulties are resolved. It may be possible for the At-Large to begin using digital certificates on a "testbed" basis—for example, the Membership could permit any registrant with a certificate from a trusted authority to bypass the postal return system. However, it seems clear that the digital certificate model is not yet ready for usage by all At-Large Members.

### 3.5.3.3 Membership Fees

By attaching a small but significant monetary cost to entrance into the Membership, the number of frivolous or duplicative registrations might be reduced. Moreover, the level of commitment from those paying the fee might be increased since the fee requirement might discourage non-committed registrants. More extensive discussion of the fee concept appears below as part of a larger discussion of funding; in brief, however, fees provide at best an incomplete authentication system, and create more problems than they solve. Fees seem to hinge voting rights on economic status and are therefore contrary to basic notions of democracy. Further, while they may discourage small operators from mass registering, they may have limited impact on large, moneyed interests that could "buy" (bulk-register) hundreds or thousands of voters.

While the notion of a membership fee as a global requirement is not acceptable, a fee-based system (paid by credit card, for example) offers a promising solution if other registration options are available to members who do not wish to or are unable to pay a fee. We suggest that a voluntary fee system be tested in the next election, in which those people willing and able to pay a fee could authenticate their membership without using the postal return system.



#### **3.5.3.4 “Web-of-trust” / Reputational Models**

A third model of authentication, the so-called “web-of-trust” has so far been deployed only among fairly limited sets of specialized users. The model depends on a user’s reputation among peers to authenticate her; the degree to which a user is “trusted” by those who have interacted with her determines the degree to which said user is authenticated. Since the authentication is not binary, an arbitrary threshold of “trust” would need to be set.

While the “web-of-trust” model, like the digital certificate model seems to hold significant potential, on the whole the system is still too undeveloped to be recommended here. Among its possible weaknesses are the fact that it seems to unfairly discriminate against new users, and against those users who lack resources to participate enough to become recognized by their peers (e.g., money, ability to travel, language skills, regular Internet access). Further, it might be trivial for a malicious user to establish a large number of false personas, all “trusting” each other. This would unfairly grant such a user the ability to vote a large number of times.

#### **3.5.3.5 E-mail Authentication**

The costs associated with the above authentication methods could be avoided entirely were ICANN to rely entirely on e-mail for voter authentication, e-mailing users their login IDs and passwords and dispensing with the postal return system.

This leaves the election open to fraud on a large scale; free e-mail services (both Web- and POP-based) have lowered the cost of an e-mail address to virtually nothing, and it would be trivial for a malicious user to register and vote tens, hundreds, or thousands of times. Without relying on authentication methods such as those described above, it seems impossible to ensure that users would not abuse the system by registering from multiple e-mail addresses.

Further, e-mail is an insecure medium, and traffic cannot be reliably protected without the use of third-party systems (such as public-key encryption) that raise problems in their own right. E-mail encryption systems like PGP are not yet universally available, nor does the majority of Internet users use them. To require the use of PGP or any other third-party encryption program could effectively raise the cost of membership in inappropriate ways.

#### **3.5.3.6 Transparency of the Voter Rolls**

It may be possible to boost the effectiveness of any or all of these authentication mechanism by publishing the voter rolls for review by the Internet community. Voter rolls are treated as a public record in several countries. Since all records could (and likely would) be reviewed by individuals and organizations seeking to ensure the election’s proper functioning, transparency could be a significant disincentive for those who might otherwise register and vote multiple times. Access to such data could significantly improve intra-Membership communication and would provide the community with valuable data about the conduct of the registration process.

Not to be ignored, of course, would be the implications on voter privacy that publication of the voter rolls would entail. The data fields to be made public would have to be chosen carefully—and might not include street or e-mail addresses—and the possibility of an “opt-out” should be explored.

#### **3.5.3.7 Whois/Domain Name-Based Authentication**

If, as some have proposed, participation in the At-Large Membership were to be contingent on ownership of a domain name, authentication could be conducted through use of the Whois database. Domain name registrants in “.com,” “.net,” and “.org” are required to provide administrative and billing contact information, which are then verified through the registrars’ dealings with the registrant. Domain name holders’ status as real people is thereby authenticated.

Dependence on the Whois database is flawed, however, when looked at broadly and pragmatically. Basic fairness seems to demand that the entire Whois databases of every TLD be captured and analyzed simultaneously. It is not clear that bulk access to the databases of over 240 TLDs could be coordinated so precisely.

Also, billing and administrative contacts often differ even within a single Whois record. Administrative contacts can be changed without notice and without verification by the registrar; to

provide false administrative contact information is trivial and hard to detect. Many Top-Level Domains have differing or non-existent policies regarding the Whois database—some TLD managers keep Whois information private, others do not maintain Whois information at all, or only maintain certain fields. Therefore, we find the Whois database to be extremely problematic as a means for authentication.

### 3.5.3.8 Recommendations

In the final analysis, none of the proposed authentication schemes offers the coverage or accessibility that the postal return system does. While the system is limited in its fraud protection, we believe it provides acceptable protection, especially when coupled with added safeguards. We recommend continued use of the current system as the default means of registration. Several additional reforms are required before the next At-Large election.

- *Better Outreach in Early Election Stages.* The postal return system adequately addresses a number of questions surrounding user authentication, but it is not speedy. Several of the problems seen in 2000 were the result of a compressed time frame and incomplete outreach; by pacing itself properly and providing clear, accurate information as early as possible, ICANN may avoid them. Codes of conduct for appropriate outreach and member recruitment should also be drawn up.

Registration for the 2000 Membership began in late February, but daily registration numbers were low until June. For the large majority of registrants, the registration process was compressed into two months, with activation occurring for an additional month. In light of the limitations of the international post, three months was a barely sufficient amount of time. It left little flexibility for re-sending of lost or misplaced PIN numbers, and a significant number of PINs arrived late in the first place. The problems were scarcely avoidable; in many ways they were the result of important deliberation on the specifics of the 2000 election mechanism, which did not conclude until the June Board meeting.

Still, the lack of clarity seems to have encouraged voters to wait before registering. It also impaired the community's ability to offer assistance through independent education and outreach. In future At-Large Elections, ICANN should strive to elucidate as many election specifications as possible before opening registration, with a period of at least six months between the opening of registration and the election itself.

- *Cost-effective Mailings.* In hindsight, the cost associated with sending PINs by letter post may not have been justified. When budgeting for the election, it may be more useful to leave some money available for re-mailings than to pay for the (perceived or actual) security of letter-post mailings. Sending PINs by aerogramme or postcard (at a cost of about US\$0.70 each<sup>72</sup>) rather than letter-post (US\$0.80 each to most countries) would trim 12.5% from ICANN's mailing costs—enough to send a second letter to approximately 25,000 of the 2000 election's registrants. Mailings with addresses and instructions regarding PINs, etc., in local languages would be highly desirable. Further, if mailing could be conducted locally, the costs and problems would be greatly reduced.
- *One-time voter activation.* Voters should be encouraged to activate their membership as soon as possible using the PIN received by mail, after which they should be required to change their password and should feel free to discard the PIN. Requiring that voters enter their PIN to activate their membership, and then again prior to member-nomination or voting is unnecessary, and seems to have caused problems among users who had thrown out or lost their PINs. Once authenticated, an account should be considered valid for a period of at least one year; during that time, login using their e-mail address and password should be sufficient.
- *Flexibility in Implementing New Authentication Schemes.* At present, the postal return system seems the best fit for the At-Large Membership, but the field of digital authentication is changing rapidly and new options may emerge in the near future. In the immediate term,

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<sup>72</sup> See <http://pe.usps.gov/cpim/ftp/pubs/pub51/pub51.pdf>

managers of the At-Large election should provide users with the option to use some alternative authentication systems (such as digital certificates). Those willing (and able) to do so could thereby avoid the inefficiencies of the postal return system while at the same time providing the Membership with valuable experience about the viability of such systems. Likewise, those inclined to use a credit card to pay a nominal membership fee should be provided the opportunity to do so. Individuals utilizing alternative authentication schemes should be rewarded with instantaneous activation. Further, the question of new authentication systems should be placed firmly on the agenda of the At-Large Membership.

- *Increasing ease of authentication over time.* As the At-Large Membership expands and establishes itself, it will likely become easier and cheaper for it to identify and authenticate its Members. Many of the most trenchant authentication problems facing the Membership in 2002 will ease in future years, both as the Membership's structure and activities settle and as the Membership learns from its experiences.

### 3.5.4 Setting Election Policies

This report sketches, in some detail, a model for public representation in ICANN, but it cannot hope to answer every question of implementation or to address every detail. As in 2000, we expect that ICANN in 2002 will solicit input not only from the community as a whole, but from committees of outside experts in filling out the models of future elections.

The concept of separate Election and Nominating Committees seen in 2000 provides a useful starting point for policy-setting, but without adequate controls there are possibilities for dangerous abuse. Above all, the committees must be fair and open, and their activities should at all times be consistent with the interests of the public.

However, the role of the Election and Nominating Committees in future (post-2002) At-Large elections is unclear. We believe that the Membership Council should have a significant role to play in deciding whether and how such Committees would be reconstituted for future At-Large elections.

#### 3.5.4.1 Election Committee

The Election Committee—which explores details of the voting system, technical specifications, security, and other implementation issues—occupies the center of policy-setting for the election. While it lacks concrete authority (its recommendations must be ratified by an appropriate body, be it the ICANN Board or the At-Large Membership Council), its recommendations hold significant sway in the community, and can in fact mean the difference between a successful and a failed election.

In recognition of this, ICANN should make every effort to ensure that the committee as a whole remains nonpartisan in its recommendations. This can be best achieved through an open, transparent process for proposing and ratifying committee appointments, combined with a principle that no officers of ICANN or its constituent organizations shall serve on the Committee.

Properly constructed, an Independent Election Committee would be insulated from political pressure and may therefore focus its energies on election decisions supported by political science and experience. Further, an IEC could play a broader role than just recommending election policies; it could be tasked with oversight and assume responsibility for election monitoring and reporting.

#### 3.5.4.2 Nominating Committee

One of the most noted complaints from the community regarding the 2000 election (see above) was that the Nominating Committee had exerted an inappropriate level of control over the ballot, effectively limiting the number of member-nominated candidates on the ballot to as few as two. Such discrimination is clearly inappropriate; the number of nominated and petition candidates should be consistent for all ballots.

The Committee-nominated candidates themselves in 2000 were chosen through an opaque and unaccountable process that left criteria for selection and other issues unexplained. Future iterations of the Nominating Committee should be as transparent in their operations as possible, and should use established, non-discriminatory practices to identify Committee-nominees. ICANN and the At-

Large Membership as a whole should also take it upon themselves to ensure that member-nominated candidates are accorded the same rights and support as committee-nominated ones.

Further, the membership of the Nominating Committee should reflect the import of its activity and the nature of the task before it. Potential Committee members should be considered in light of the Committee's need for ethnic and gender diversity, for substantial bases of knowledge and experience, and for compatibility with the public's interests. Whether one Committee can adequately address these needs on a worldwide basis is an open question; in planning the 2002 and future At-Large elections, the notion of regional Nominating Committees should be considered.

#### **3.5.4.3 Voting System**

Clearly ICANN has a strong interest in seeing to it that election results are contested as infrequently as possible. As any number of offline examples will demonstrate, contested elections interfere not only with an institution's short-term operation, but can damage long-term legitimacy in a way that ICANN cannot afford.

Traditional mechanisms to avoid contested elections may be a poor fit for ICANN. The most common remedies, primary and/or runoff elections, would entail tremendous expense and probably a severe drop-off in participation for each additional round.

For that reason, ICANN in 2000 instituted "Preferential" (a.k.a. "Instant-Runoff") voting. While preferential voting has had limited deployment in the offline world—examples include Australian parliamentary elections—it seems well suited to the online context.

Under the preferential system, voters rank candidates on their ballot in order of preference. In an election where one candidate fails to win an absolute majority of votes (50% of the total votes cast, plus one), defeated candidates are eliminated and votes cast for them are redistributed according to voters' expressed preferences. The process is repeated until enough votes have been redistributed to give one candidate an absolute majority, at which point the runoffs stop and the winning candidate is declared.

The system's main advantage is that its winning candidates always have absolute majorities, without the use of further runoff elections. It also encourages voters to look beyond their immediate preferred candidate to the whole ballot, and encourages people to try and better understand the candidates and the issues.

The system's significant disadvantage is its complexity, since the idea of voting for more than one candidate is non-intuitive to many. It is difficult to fully evaluate the system based on the 2000 election, since only one region (North America) failed to produce a winning candidate on the first ballot. (North America's eventual winner, Karl Auerbach, was largely accepted as the legitimate victor.)

#### **3.5.4.4 Recommendation**

The preferential voting system has potentially significant merits, and we believe that the At-Large Membership should probably continue to use preferential voting in its elections. However, a final decision about the continued use of preferential voting should only be made after a specific study by the Independent Election Committee to examine the appropriateness of the system in each of ICANN's geographic regions. Clearly, preferential voting should only be used after strong efforts to educate voters about the system's complexity and the reasons for its adoption. Complaints that the 2000 election FAQs were available only through web access, and were both long and confusing, should be addressed, and the Membership should be prepared, if necessary, to reevaluate the preferential voting system.

The Membership's campaign of education and outreach must be substantial, informing voters about the intricacies of the preferential voting system and addressing their questions about its use. The voting system is unfamiliar to most voters and cannot be expected to work properly unless the Membership assumes responsibility for illuminating users about its operation.

### 3.5.5 Funding

To ensure that the Membership's short-term development continues unimpaired, we recommend that ICANN commit itself to funding the membership's full expenses out of the ICANN operating budget for a period of at least the next several years.

We recognize, of course, that the expenses associated with maintaining the At-Large Membership could be considerable. Not only will the periodic elections have significant costs, but so also will the structural support for the membership and the variety of activities described above. In light of ICANN's relatively small budget—approximately US\$5 million in 2001—the funding issues present a real challenge to ICANN.

#### 3.5.5.1 The ICANN community's funding responsibility

It is, however, a challenge that ICANN and its supporters must meet. A functioning At-Large Membership is not a luxury, or an "add on" to ICANN. It is an integral component of ICANN's short term and long term legitimacy. In that light, ICANN can ill afford *not* to fund the At-Large Membership, particularly at the early stages of its development.

Moreover, a conceptual pillar of ICANN's funding structure has been the notion that those groups deriving financial or other benefits from ICANN's operation should shoulder the responsibility for supporting ICANN's activities.<sup>73</sup>

The underlying rationale of this existing approach makes sense. There are a growing number of commercial interests that have a huge financial interest in carrying out the "business" of the Internet—including registering domain names or maintaining registries. The business interests of these companies are greatly enhanced by a stable and legitimate ICANN, which provides the rules for a predictable and rational marketplace in which companies are able to prosper and profit. Indeed, many of these companies have contractual or other arrangements with ICANN from which the companies derive immediate financial benefit.

But ICANN can only successfully do its work, and those companies can only derive their benefits, if ICANN is perceived by the public, by governments and by the diverse myriad of Internet interests as legitimate. A functional At-Large Membership is essential to the legitimacy of ICANN. We therefore believe that these commercial operators have a strong interest in establishing a robust At-Large Membership, and they should fund the At-Large Membership exactly as they would ICANN's other legitimizing activities, such as public meetings, technical provisioning, and administrative costs.

We recognize that money paid by the registries and registrars to support this increase in ICANN's operating expenses would ultimately be passed on to the customers of those entities—namely, the community of users who purchase and hold domain names. This is a major component of the global community that the At-Large Membership would represent, and there is an intrinsic justice in the fact that it would bear the final costs of the Membership's existence.

Nor do we believe that those final costs would be unmanageable. Successful establishment of an At-Large Membership would not be inexpensive—the 2000 election cost US\$ 350,000, and future elections might well cost more. Post-election commentators have segmented that figure into fixed and variable costs: US\$ 200,000 in fixed costs (such as outreach, systems design and purchasing, administration, etc.) and US\$ 150,000 in variable costs (per-voter expenses such as the mailing of PIN letters).<sup>74</sup> These costs are likely to increase in the near term, as more complex systems are established for the Membership structure and, perhaps, more members of the Internet community register as At-Large Members.

But even a Membership costing US\$ 1 million (US\$ 500,000 in fixed costs, and US\$ 500,000 in variable costs—enough to register more than three times the 2000 membership), when distributed across the organizations funding ICANN and passed on to consumers purchasing domain names, would entail a

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<sup>73</sup> In FY2000-2001, ICANN's revenues derived from five sources: gTLD registries, gTLD registrars, ccTLD registries and registrars, IP address registries, and accreditation fees. See <http://www.icann.org/financials/budget-fy00-01-06jun00.htm>.

<sup>74</sup> See Michael M. Roberts, "Towards Improved Representation in ICANN," [http://www.atlargestudy.org/roberts\\_paper.html](http://www.atlargestudy.org/roberts_paper.html)

price increase of less than four American cents per domain name registered in “.com” alone. Even with a 10% markup to cover transactional costs borne by the registries and registrars, this would increase the price of a domain name by less than seven thousandths of a percent.

Moreover, we expect the variable costs of the Membership to decrease sharply as Membership stabilizes. With a robust system for “one-time” authentication, it would become unnecessary to authenticate the entire Membership every election and this category of cost would be held stable, or decline.

### **3.5.5.2 Independent funding sources**

In the future, it would be desirable for the At-Large Membership to augment any money received from ICANN's operating budget with independent revenue streams. In the future, such streams might become large and reliable enough to establish real financial independence for the Membership from ICANN, thereby not only fueling the growth of the At-Large Membership, but helping the Membership resist inappropriate forms of influence. One of the initial tasks the Membership Council must undertake is to begin to study ways for the Membership to augment its funding from ICANN, or to become self-sustaining.

At the current time, however, many proposals for creating such revenue streams are of untested reliability, while others seem to undermine basic principles of democracy and fairness that the At-Large Membership is designed to promote. In light of some models' potential for the future, however, we list several options that the Membership should explore.

### **3.5.5.3 Membership fees**

Membership fees are the first obvious possibility for a self-funded At-Large Membership. Fees are discussed above as a means of authenticating the membership for electoral purposes, but authentication is just one benefit of collecting fees. A structure of dues, paid upon joining the At-Large Membership, or even collected on a yearly basis, could provide the At-Large Membership with a revenue stream entirely separate from ICANN's operating budget.

Fees would also have the collateral benefit of deterring voter fraud, since multiple registrations by a single person would have an obvious monetary cost. But we believe the notion of imposing a fee for membership fails, for at least two reasons.

First, fees hinge voting rights on economic status—a low-income person, whether in a developed or developing country (for which some have advocated fee subsidies) will find his or her ability to participate in the At-Large Membership significantly curtailed. This is contrary to basic notions of democracy and fairness. Most fair fee proposals would necessarily include a highly indexed fee scale based on national income levels (available from various international bodies), such that the cost of membership would basically be free in the developing world. But besides the fact that a highly-indexed scale might not bring in enough monies to fund even the Membership's most basic activities, such a proposal is unfair to low-income members from the wealthier countries. Further, it leaves open the possibility of an overflow in registration from poorer countries, negating the benefits (in reduced vulnerability to capture) that might have been seen in the developed world.

Second, transaction costs could rapidly outstrip revenues collected. Even for small amounts, international wire transfers can be quite expensive—almost certainly more than any proposed fee—and access to credit cards is unevenly distributed worldwide. In short, the transaction costs of collecting the fee could exceed the fee itself. Some have proposed that the At-Large Membership could rely on the pre-existing institutions of Local Internet Communities to assist in collection of the fees, but no infrastructure exists to do that collection today and it may be some time before such an infrastructure is developed.

In time, as the Membership grows and achieves definition, it will become possible to make demographic observations and, ultimately, draw conclusions about types of fees and fee scales that could minimize the disenfranchisement effect. It would then be far easier to confidently create an indexed fee scale, suited both to the Membership's needs and to the means of its members. However, since the effects of a capriciously-created fee structure could be extremely negative, the Membership should proceed carefully and deliberately in this regard.

Also, creatively-developed collection systems may help make a fee system cost effective. Emerging technologies of money transfer—including online payment schemes, credit cards, and electronic currency—have not yet become widely established, but are developing at a rapid pace. But there are other approaches to collection that could prove useful, particularly as the Membership gathers legitimacy. A stable Membership over time could establish relationships of trust with other bodies that could play a role in fee collection (and in authentication), particularly on a local or a regional level. For example, in a developing country a trusted group with roots in the Internet community (say, the organizers of a popular Internet conference) might prove extremely useful as a tool to contact, authenticate, and collect contributions from that community.

At present, however, neither of these possibilities is reality. Practicality and legitimacy concerns make it hard to envision a fair, efficient membership fee structure in the foreseeable future. We therefore recommend that ICANN table the idea of a membership fee system and consider other long-term funding sources for the Membership.

#### **3.5.5.4 Government contributions**

The Membership might also turn for support to national governments. ICANN to date has made it a point *not* to request government support, lest financial contributions lead to increased governmental involvement in ICANN decision-making. Still, it may be possible, on a limited basis, to request that national governments provide some measure of financial support to the At-Large Membership.

Any movement towards government funding, however, should be undertaken with care. Government bureaucracies are not known for their speed or responsiveness, and the Membership might need to negotiate its funding significantly in advance. But the greatest problem is a risk that governments might seek to use any degree of financial dependence on the part of the At-Large Membership as leverage to pursue political ends. .

These concerns, although serious, should not eliminate the possibility of government funding, which may have a legitimate role to play in supporting the At-Large Membership. Many NGOs and research organizations have cooperated with governments for years, and their experience may offer important lessons in how to proceed in this area. The risks that flow from government funding can best be managed by seeking as great a diversity of funding sources as possible.

#### **3.5.5.5 Voluntary donations**

It may be possible for the Membership to collect some, though almost certainly not all, of its operating budget from the voluntary contributions of its members, especially if such a contribution were made very easy. The Membership could establish a wide variety of voluntary contribution mechanisms without running afoul of democratic values, and should be encouraged to do so. This experience might also prove valuable in the future, should the Membership decide to revisit the concept of membership fees.

One promising idea, suggested during our study, included voluntary contributions solicited at the time of domain name registration. Through this system, a domain-name registrant could decide to donate—in collaboration with the registrar—a small percentage of the registration fee to the At-Large Membership. This donation could be part of the registration fee (with the cost thus borne by the registrars) or it could be in addition to the registration fee (with the added cost borne by the user). Either way, the ease of donation and collection at registration should help with administration of the donation. This would also have the useful side effect of informing and educating registrants about the role and function of ICANN.

#### **3.5.5.6 Recommendation**

We strongly recommend that ICANN continue to support the At-Large Membership out of its operating budget in the near term.<sup>75</sup> It is likely that the Membership will grow and its activities will

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<sup>75</sup> During its "start-up" period, the Membership will stabilize its set of activities and internal structures and accrete support from the Internet public. It is imperative that ICANN (and its supporters) commit to supporting the Membership at least during this period, lest interest in the Membership wane and its development falter due to uncertainty about funding. We therefore advise that the Board assume responsibility, using the ICANN operating budget, for the At-Large Membership's expenses for a period of not less than five years. This would proceed with the understanding that, in those five years, the Membership would seek to identify independent revenue streams for long-term self-sufficiency.

diversify as time passes. As the Membership establishes itself and creates a core constituency of voters, some funding issues may become less intransigent and solutions may present themselves. While it does not seem immediately feasible to establish At-Large Membership funding entirely independent from ICANN, future exploration of this issue is desirable. In any event, the search for funding should be a major priority of the Membership and of the Board.



### 3.6 Other Mechanisms to Ensure the Public's Voice in ICANN

The ALM and the AL Directors are only one method—though an essential one—for enhancing ICANN's legitimacy and stability. A well-functioning ALM alone is not sufficient to ensure legitimacy. Below we outline a series of other reforms to be enacted in parallel to the changes outlined for the ALM, including:

- *Structural Constraints on ICANN's Authority* - Limitations on the scope of the ICANN Board's mission and powers, including bylaws and charter changes, explicit statements of user rights, and internal checks and balances within ICANN.
- *Accountability Mechanisms* - Suggested mechanisms, external to the ALM, for improving the accountability and transparency of the ICANN Board.
- *Supporting Organization Reform* - Some comments on ongoing efforts to restructure or improve the function of ICANN's Supporting Organizations.

#### 3.6.1 Structural Constraints on the Powers of the ICANN Board

##### 3.6.1.1 The Need to Limit ICANN's Mission

However ICANN resolves the issue of providing adequate public participation in its internal governance, it still must—in a clear, explicit and binding fashion—impose constraints on the scope of its mission.

The argument for some form of public participation in the internal governance of ICANN is dependent, in part, on the fact that any reasonable description of ICANN's current mission includes policy-making that ranges well beyond a mere technical coordination of Internet parameters.

In grounding the need for public participation on the fact of ICANN's policy-making, there is a tension with the widely shared view that ICANN's mission is, and should remain, highly limited. On the one hand, ICANN must provide for public participation because it inherently engages in a form of public policy-making, yet on the other hand, the scope of that policy-making should remain as constrained as possible.

One common fear expressed about ICANN is that it will gradually lessen its resistance to undertaking an even broader range of policy decision-making, and thereby extend its agenda into highly charged areas of substantive regulation of the Internet, such as content regulation, privacy, speech protection, taxation and other such matters. Yet ICANN was never conceived of as an organization to make these sorts of broad governance decisions for the Internet, and its organizational model—even with the changes we propose—does not provide a level of global inclusion, representation and accountability sufficient to support such broad policy-making.

This fear is fuelled by a concern that pressures will be brought on ICANN to assume responsibility in these and other similar areas because there is no alternative forum for the global resolution of these controversial questions of Internet policy. ICANN may be pressured to fill the vacuum. Further, there is a well-recognized tendency for organizations to succumb to "mission creep," and to extend their jurisdiction bit by bit into related areas. In ICANN's case, this kind of mission creep would almost inevitably embroil it in matters of even more overt policy-making than it has ventured into to date.

For some, these fears are heightened by proposals that there be some strong form of public participation in ICANN's internal governance, particularly in the form of elections for its board. The fear is that elections for ICANN's board may make it look like a legislature, and then the board may start to think of itself as a legislature, and in particular, as having the public legitimacy to undertake a decision making role on broader questions of substantive policy. In other words, the concern is that "too much" legitimacy could be conferred on ICANN if it addresses the need for public participation, with the result that others will start viewing ICANN, and ICANN will view itself, as freer to engage in forthright and unbounded policy making.

This is a real concern, and we do not diminish it. But there are three responses that should be considered as well.

*First*, if the concern is that ICANN may be tempted to abuse its legitimacy, it is a poor answer to state that it should therefore be kept illegitimate. In other words, ICANN engages in a bounded policy-making now, within the mostly respected confines of its current mission. For the reasons stated above, it is necessary to base its current policy making on some form of public participation. The fear that ICANN may extend its policy making to additional areas should not be used as an excuse for blocking the legitimacy ICANN needs for what it actually does now.

*Second*, some believe that a stronger public voice in ICANN's decision making will retard rather than accelerate any impulse within ICANN to extend its jurisdiction. The public voice may well serve as a check on internal pressures to extend its mission.

*Finally*, and most importantly, ICANN should address the question of its mission creep directly, effectively, and independently of the need to provide for public participation in its internal governance. The suggestion has been made repeatedly that ICANN find a way to constrain its jurisdiction in a binding fashion. ICANN should directly confront the reasonable fear that it will venture into an even broader policy agenda than it now does.

The limitations currently in ICANN's bylaws do not effectively serve this purpose, both because ICANN has shown a distressing tendency to amend its bylaws casually, and because there is little public confidence in the restraints that already exist. ICANN needs to address this problem squarely, and in so doing, to lessen the fears that it will abuse the very legitimacy it needs to gain. In fact, it is essential to ensure that ICANN's powers remain limited in order to ensure that it remains legitimate.

### 3.6.1.2 A Proposal for Limiting ICANN's Mission

Traditional governance models present a variety of methods for constraining the power of governing bodies. These include careful definition of the powers of governance bodies and the rights of those impacted, often codified in a "constitution" or some other public and visible document; a system of checks and balances designed to limit the power of any particular individual or body; and the ability to appeal and reject actions that violate these "constitutional" strictures.

Using this analogy as a model, we suggest that ICANN undertake to limit its own power through the following four elements:

- **Create "constitutional" limits in charter and bylaws.** ICANN should develop and adopt revisions to its charter and to its bylaws that explicitly enumerate the types of issues and powers that the Board may exercise. This should include:
  - An enumeration of the types of activities ICANN may undertake
  - An enumeration of the scope of topics on which ICANN can make decisions - i.e., those surrounding the technical coordination of Internet naming and numbering and unique protocol assignments.
  - A specific statement that all powers not enumerated for the board should devolve to the stakeholders in ICANN and the individual users of the Internet.
  - A policy directive that when in doubt, the board shall resolve conflicts about its jurisdiction by limiting the policy-oriented character of decisions in favor of technical coordination.
- **Declaration of user rights.** As an affirmative check on overreaching actions by the Board, ICANN should enact a formal declaration of rights reserved for ICANN stakeholders and Internet users. These reserved powers and rights should generally guarantee individuals and organizations around the world the protection of their individual liberties (of the sort contemplated by the UN Universal Declaration of Human Rights), their property, their expectation to be treated fairly and with due process. Specifically, ICANN's charter and bylaws should prohibit the ICANN Board of Directors from adopting any policies that infringe –

- The right of all individuals and organizations worldwide to participate in the domain name system and the IP addressing system without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- The right of all individuals and organizations worldwide in full equality to a fairness and due process in the determination of their rights and obligations with respect to the assignment and subsequent maintenance or possible loss of domain names and IP addresses, and other attendant rights and obligations, which ICANN may seek to enforce.
- The right of all individuals and organizations worldwide to freedom of opinion, which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of national frontiers.
- The right of all individuals and organizations worldwide to privacy. No one shall be subjected to arbitrary interference with his or her privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>76</sup>
- **Limits on amendment power.** Codified limitations and rights provide an incomplete guarantee without restrictions on their future amendment. For example, while ICANN's current bylaws require a two-thirds majority for amendment, in its first two years of operation ICANN modified its bylaws nine (9) times, often in ways that substantially changed key governance strictures. (See <http://www.icann.org/general/archive-bylaws/bylaws-history.htm>) ICANN is currently in violation of its bylaws regarding the timing and implementation of its ALM study, with little apparent consequence.

In order to protect the rights of the public in the face of majoritarian impulses by the Board, ICANN should adopt a much heightened amendment process for those charter and bylaws provisions governing the scope of its authority and the rights of users. This process should include—

- Approval of changes by a super-majority of board;
- Approval by a super-majority of SOs (possibly including the GAC); and
- In some cases particularly involving the rights of the ALM, approval by referendum of the ALM.<sup>77</sup>
- **Enforcement of constitutional limitations and rights.** Finally, limitations and rights can provide only limited legitimacy without some enforcement mechanism for ensuring that the Board acts in accordance. Currently, it is the Board itself that is responsible for overseeing the Board's activities. ICANN should institute a system of checks and balances through some appeals process should decisions of the board violate the constitutional guarantees outlined. These might include:

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<sup>76</sup> See, e.g., United Nations Universal Declaration of Human Rights, GA Res. 217 A (III), December 1948, available online at <http://www.un.org/Overview/rights.html>. Specific references are provided to Articles 2 (non discrimination), 10 (fair trial), 12 (privacy), and 18 (free expression).

<sup>77</sup> Such provisions are common, and clearly contemplated by the California non-profit law under which ICANN is incorporated:  
 “(c) The articles or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal any or all bylaws . . .  
 (d) Bylaws may also provide that repeal or amendment of those bylaws, or the repeal or amendment of specified portions of those bylaws, may occur only with the approval in writing of a specified person or persons other than the board or members.”

CAL. CORP. CODE § 5150 (Deering 2001).

- Inclusion of language in charter of organization - This could allow enforcement under law of the state of incorporation (e.g., California, USA).
- Creation of a "judiciary" that serves as a real oversight body (see below) - As noted in the accountability section, the creation of an independent oversight organization for appeal of ICANN actions could provide a means of such enforcement. Note that the Independent Review Committee, originally intended to provide such a role, is viewed by many as insufficiently independent to play this role
- Self-enforcement - We note that the mere existence of a statement on limits and powers does provide some measure of protection, by providing guidance for the Board and ICANN community in considering proposed actions. But many will find this of only limited value, as it remains for the Board to show that it can act against what may be perceived as short-term interest in favor of long-term limitations that provide legitimacy.

Other methods for imposing structural limitations may exist. We note with approval but caution the attempts by some in ICANN to use "*consensus*" and bottom-up policy development as a limitation on ICANN activities and as protection for individual interests impacted by those activities. While this is a most promising alternative to date ICANN has increasingly rejected the consensus process, and it remains unclear how consensus could be meaningfully achievable for contentious policy decisions.

In the absence of such measures, we believe the package set forth above is essential to ensure that the governance and participation mechanisms set forth provide ICANN with sufficient legitimacy.

### 3.6.2 Accountability

The notion of "accountability" is viewed by many as an essential component of legitimacy for ICANN. The discussions of representation and participation that are the subject of this report are directly linked to providing forms of direct and indirect accountability by the Directors to the At-Large Membership and the interested community in general. This section focuses on other aspects of accountability, including mechanisms for promoting good conduct, openness, transparency, and oversight to the activities of the Board and ICANN in general.

#### 3.6.2.1 Accountability Mechanisms

Accountability has multiple meanings but in its broadest sense, accountability implies responsive governance. By enabling the "governed" to hold representatives responsible for the outcome of their decisions, accountability ensures responsiveness of the governors to the governed. As such, in most (democratic) governance structures, accountability mechanisms are in place to assure governors to be responsive to the governed. These mechanisms generally temper gross opportunism and prevent usurpation of power and authority from the governed. The array of devices to assure responsive or accountable governance is given below.

One set of mechanisms is based on the creation of rules designed to "control" or regulate the behavior of governing institutions. These rules can be substantive, setting forth principles and limits that define the mandate of a particular set of governing officials (be it staff or board members). Alternatively, these rules can be procedural, requiring a particular mode of decision-making that gives individuals and groups affected by the decisions meaningful input into them. This implies the need for:

- Codes of conduct and other rules setting out the mandate and professional conduct of officials; and
- Consultation mechanisms that solicit the interests and opinions of those affected.

A second mode of *ex post* mechanisms allows the governed to respond, review and/or reject governance decisions already taken. For elected officials and many of the bureaucratic officials they appoint and control, the mechanism used is typically elections. For non-elected officials, such as judges, the mechanism may be requirements that they provide a public rationale and justification for

their decisions, often referred to as 'giving reasons requirements'. These permit regular response and critique by those who are subject to decisions. Other *ex post* accountability devices includes monitoring, auditing and independent review whether the governors have acted within their mandate and consistent with agreed upon principles. In sum, within this context, accountability usually manifests itself through periodic elections, the furnishing of timely updates to the stakeholders and being answerable to the members of the organization and flow of information, setting out the context and rationales of the decision making process, that enables those affected to review and respond; a review and monitoring process that enables handling of complaints or assures responsiveness from staff and representatives.

Both the *ex ante* and the *ex post* procedural requirements typically include what is meant by 'transparency'. Policy-makers must be visible and accessible to the governed in a way that allows a meaningful response. Yet, enhancing transparency alone to address accountability may privilege form over substance and hence fail. Joseph Weiler for instance observes interestingly with regard to the charges of a democratic deficit within the EU: 'Transparency and access to documents are often invoked as a possible remedy to this issue. But if you do not know what is going on, which documents will you ask to see?' In sum, transparency without public education and context may not be able to address the underlying problems it aims to solve.

### 3.6.2.2 Accountability and ICANN

Accountability can thus have multiple specific meanings, reflecting an array of devices to assure responsive governance. When critics claim ICANN is not accountable, they are actually concerned with a number of specific and distinct problems, each of which may be linked with the presence or absence of one or more of the mechanisms identified above. The accountability critiques of ICANN are widespread. They can be distilled around several broad claims that include:

- *Unresponsive behavior of board members and staff.* This charge is in part linked with the invisibility and lack of access to the board members for constituencies affected by their decisions. It also refers to an absence of reporting and reasoning behind policy decisions and operating away from the areas of relative transparency.
- *Poor decision processes.* This charge refers to the premise that decisions made by the ICANN board are narrowly focused, not deliberative, not responsive to the full range of affected constituencies, and often not based upon clearly identifiable reasoning (and consensus).
- *Illegitimacy, which is closely related to the first two.* Within the context of ICANN, illegitimacy is not only fueled by exclusion of affected groups from decision-making processes but also by the very creation of a self governing entity, lacking real oversight, rather than a formal (governmental) institution.

### 3.6.2.3 Towards enhanced accountability

Each of the specific charges distilled above should be taken seriously and indicates the need for a broad plan. Based on these concerns, and the framework laid out above, a broad range of solutions suggest themselves.

Much of an approach to accountability can be found in the ALM structure and election mechanisms we lay out earlier in this chapter. The ALM organization we propose is specifically designed to provide the framework for participation by stakeholders likely to provide both *ex ante* consultative input and *ex post* information flow and review. The election of directors provides a strong form of direct accountability and review by the electorate.

In addition we suggest that the following approaches, based upon the lessons learned within a framework of administrative agencies, should be developed:

#### 3.6.2.3.1 Board and Staff Codes of Conduct

At present, there is no adopted standard for measuring the performance of board and staff or providing a baseline of acceptable behavior. ICANN should develop a code of conduct for all ICANN board members (elected or otherwise), as well as clarify their mandate. This code should encompass minimum standards for completion of responsibilities, obligations to the organization, rules

regarding issues such as conflicts, and basic standards which must be met or risk censure or replacement.

#### **3.6.2.3.2 Fair Administrative Procedure and Reporting**

ICANN should adopt a set of procedures for guaranteeing the openness and fairness of its governance activities:

- Decisions and meetings should be fairly noticed.
- Input should be openly taken.
- Documents should be made widely available.
- Stakeholders should be provided with detailed reasoning behind decisions made both by the Board and staff.

We note that ICANN has made some substantial progress in this direction and particular use of online resources to accomplish this, but much more can and should be done to promote the transparency of ICANN processes, which remain poorly understood beyond a narrow community.

#### **3.6.2.3.3 Active Independent Review Panel**

Accountability assures that governance is developed in a responsible and accountable manner, and that governance structures provide for guidance and monitoring of the responsibility and accountability of those who manage and supervise. ICANN's early promise to establish such a mechanism for the reconsideration of ICANN decisions, resulted in the creation of the Independent Review Panel. The mission of the Independent Review Panel is to compare contested actions of the ICANN Board to the Bylaws and Articles of Incorporation and to declare whether the ICANN Board has acted consistent with the provisions of those documents. The IRP is also responsible for reviewing determinations regarding the presence of a consensus.

Many have noted that the IRP does not provide adequate independence from ICANN, and the mechanism remains an untested check on the Board. ICANN should pursue the creation of a serious IRP of globally respected figures who can serve as a true balance to the Board, and whose decisions should hold great weight within the ICANN community.

We note that legal structures provide one final potential accountability mechanism: the courts. As ICANN's first Board Chair Esther Dyson has noted:<sup>78</sup> "ICANN is a private organization; its actions are fully subject to legal review and oversight. Thus, if any action is believed to impair some legal right, a complainant would have full recourse to any relevant court." While there may be some form of ultimate accountability for serious transgressions, we believe that the intricacies and vagaries of the local non-profit law of one state within one nation are a weak foundation upon which to lay the legitimacy of an important global organization. It is essential that ICANN adopt firmer and more globally sensible accountability mechanisms within its own structure.

### **3.6.3 Supporting Organization Reform**

This report's primary focus has been on ICANN's need for robust mechanisms of public participation. As has already been discussed, the Supporting Organizations cannot provide such mechanisms on their own.

But ICANN's responsibility to the Internet community does not end with the public voice. Equally important to a legitimate ICANN is a means for stakeholder input, yet the Supporting Organization structure is flawed in its participatory and representative structures. Reform is necessary if ICANN is to establish legitimacy in its core stakeholder communities, as well as in the public "at-large."

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<sup>78</sup> <http://www.icann.org/chairman-response.htm>

Within the SO structure, ICANN's Address and Protocol Supporting Organizations are frequently held out as evidence that the SO model can work. Policy proposals from the ASO and PSO are generally accepted as legitimately-developed, due to the ASO and PSO's effective internal processes. Dialogue among the Regional Internet Registries (in the ASO) and standards-setting bodies (in the PSO) is basically productive and substantive work products are produced.

The Domain Name Supporting Organization's activities, on the other hand, have been far more controversial. The DNSO has been variously criticized as captured, ineffective, unfair, non-representative, and illegitimate. The problem may be traceable to the history of the DNSO's formation.

The ASO and PSO processes evolved from those of existing organizations.<sup>79</sup> But the DNSO's constituencies were created anew in 1999, and have struggled since to establish themselves and to build open, effective policy processes.

The results of that struggle have been mixed. The stakeholder groups meant to be included in the DNSO range from the relatively homogenous (the gTLD registries) to the diverse (commercial and non-commercial domain name holders), and the obstacles that the DNSO constituencies face vary accordingly. Participation has been low across the board, and some have claimed that the Names Council and General Assembly present dysfunctional bottlenecks to the process. As a result, the Board has recently seemed to devalue the DNSO's role in consensus-building. If SO reform is to happen, it seems clear that it must begin with the DNSO.

### **3.6.3.1 The DNSO Constituencies**

The DNSO attempts to combine in one forum all the stakeholder groups with an interest in the Domain Name System. Unlike the ASO or PSO, interests in the DNSO are frequently financial. Either a stakeholder is in the business of providing names, or they are a purchaser of names, or (in the case of the Intellectual Property Constituency) the names market directly impacts their business interests.

As a result, the DNSO has been in the awkward position of attempting to develop consensus from competing "supply" and "demand" perspectives. Its policy process has become gridlocked and, since all policy must move through the Names Council, some DNSO constituencies' priorities have been consistently overrun in a general tendency towards the lowest common denominator.

No DNSO constituency is immune to this effect, but at the Public Meeting in Stockholm (June 2001), the ccTLD Constituency announced its intention to withdraw from the DNSO in frustration. Clearly reform is needed to address the concerns of the ccTLD managers, and of others in the DNSO, that the technical/policy agenda of the organization has been derailed.

### **3.6.3.2 The Name Providers SO**

One reform with significant potential would be to separate the supply side of the domain names business from demand, and to consolidate name registries and registrars into a single Name Providers Supporting Organization (NPSO). This would avoid several of the obstacles encountered by the current DNSO

First, while the ultimate goals of the NPSO members would diverge, we can expect that they at least would be concerned with the same sets of issues. gTLD registries and registrars, and ccTLD managers each contract with ICANN to receive and provide services and provide a significant amount of ICANN's income. Their stature in terms of their function and relationship to ICANN is comparable to that of the constituencies that form the other SOs. These three constituencies could find a shared frame of reference among themselves better than an amalgamate DNSO. And with that base to build on, the NPSO could be significantly more efficient.

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<sup>79</sup> Since its creation, the ASO has expanded from its original three RIRs (APNIC, ARIN, and RIPE NCC) to include two emerging registries, AfriNIC and LACNIC. These new registries' formation and operation has been basically consistent with those of the incumbent registries. The PSO evolved from standards bodies: the IETF, the ITU, W3C, and ETSI.

Second, the NPSO could avoid some of the DNSO's definitional problems. All three constituencies would have pre-established and well-defined memberships, which would facilitate meaningful representation in a way not possible elsewhere in the DNSO.

Finally, creation of an NPSO would address concerns of the ccTLD managers and others that they have been denied an effective voice in the ICANN process without disrupting ICANN's bottom-up approach to policymaking. Some of the ccTLD managers have proposed the creation of a "ccSO" that would directly represent ccTLD managers' interests at the Board level. This seems inconsistent with the way other ICANN components operate; the ccTLD perspective should be represented equally with other important interests in ICANN. Moreover, creation of a ccSO could encourage other DNSO constituencies to seek representation on the Board—for example, if a ccSO were established how long would it be before the gTLD registries and the registrars demanded similar recognition?

### **3.6.3.3 The Consumers SO**

The remaining DNSO constituencies—Business, ISP, Non-Commercial, and Intellectual Property—ought to be reformed into a Consumers Supporting Organization, but only with effective internal reform to all four constituencies. Each of these constituencies has been criticized, justifiably, for a wide array of problems ranging from representativeness to self-sustainability to openness and transparency. As a result, the DNSO process has suffered greatly and important policy discussions have ground to a halt.

The Non-Commercial Domain Name Holders Constituency's size, combined with the difficulties encountered in defining its own membership, call into question the wisdom of a constituency defined, as it is, in the negative. The NCDNHC has become a catch-all for interests that do not fit elsewhere, and as a result has found consensus an elusive, if not impossible, goal on many issues. It may be wise to divide the NCDNHC into two or more component groups, like NGO name holders, academic name holders, or individual name holders.

The Business and ISP constituencies, while their definitional questions are easier, are also small and therefore vulnerable to allegations of capture or non-representativeness. The Business constituency in particular has a very small membership and seems limited in terms of the type of businesses it represents (there are almost no small-to-medium enterprises (SMEs) in the constituency) and it also has limited geographic representation. Several have also claimed a lack of transparency by the Business Constituency. A restated outreach mission and internal reform seems necessary in both cases.

The question facing the Intellectual Property Constituency is complicated and difficult to understand as the IPC does not operate in a transparent manner. While the IPC has been one of the DNSO's most efficient constituencies, many have claimed that this is because its membership is extremely (perhaps excessively) homogenous, populated as it is (largely) by representatives from intellectual property industry associations and intellectual property attorney organizations. Many of these attorneys have name-holding clients, others represent organizations seeking to protect trademark and copyright online. In any case, discussion in the IPC to date has been tilted severely towards extending the rights and interests of intellectual property rights holders, with users and consumers of intellectual property poorly represented. Even-handed deliberation is unlikely in such an environment, and some attention to the IPC's membership structure is warranted. Indeed, some critics have gone so far as to call for the IPC's dissolution.

### **3.6.3.4 Restructuring in the Near Term**

Reform to the Supporting Organizations is a necessary feature of ICANN's attempts to gather legitimacy. Recently, the issue has gained support, partially as a result of the ccTLD managers' comments at the Stockholm meeting, June 2001, but also the DNSO's increasing dysfunctionality. As a result, some ICANN observers have sought to merge the issue of SO reform with that of At-Large reform.

Such commingling would be a mistake for ICANN. While SO reform that can properly represent stakeholders in ICANN is important, it is also separate from the need to establish strong public participation. Moreover, while the ICANN Board currently includes appropriate (though perhaps not ideal) representation from the stakeholder communities, it does not currently enjoy full participation from the global public. As such, it should resist any efforts to promote SO reform before its most immediate task, reform of the public voice in ICANN, is complete. We suggest that the reform of the



DNSO be considered as a separate issue and not be allowed to effect the implementation of measures to elect further At Large Directors, a process that must be begun at the November, 2001 meeting of the ICANN Board.

## 4. Proposed Action Plan & Timeline of Activities

Having established a theoretical framework for ICANN's legitimacy and proposed a set of structures to make that legitimacy real, ICANN still needs to establish the At-Large Membership in a stable relationship with the Internet public. Reform must happen quickly; the terms of office for the five At-Large Directors currently on the Board will expire in November 2002. Their replacements must be chosen and ready to serve by then. Considering the complexity and length of the election implementation, the Board will need to take strong action at its Annual Meeting in November 2001.

Not every detail of the At-Large Membership can or should be determined by Board action. Few observers expect that, in five years, ICANN's agenda, its slate of activities, and even its internal structures will be the same as they are now, and to create a Membership incapable of adapting would be to do a disservice to ICANN's basic need for legitimacy. The ICANN Board should provide the Membership with initial structures and a sense of purpose, but beyond that the Membership should be as self-directed and flexible as possible. Eventually, it is to be hoped that the Membership will wean itself from dependence on the Board for the Membership's own internal structures.

Further, the Board must provide the Membership with room to evolve, and an empowering environment for such evolution to occur. While the specific structures of the Membership will change over time, the Membership's basic function—to provide ICANN with necessary input from the broad public affected by ICANN's activities—will not. By acknowledging the basic fact of the Membership's importance, ICANN can not only provide the Membership with ultimate direction, it can provide those who work within the Membership with assurance of their work's value.

### 4.1 Bylaws Changes

Changes to the ICANN bylaws should establish the long-term inclusion of the public voice in ICANN, without being so prescriptive as to limit the Membership's adaptive flexibility in the future. Bylaws that are well-drafted and insulated from frivolous change are likely to increase the public's support for ICANN and their sense of the organization's legitimacy. Therefore, the ICANN Board should seek to make appropriate changes to its bylaws immediately—at the Annual Meeting in November 2001, if possible; at the Public Meeting in February/March 2002 if not.

#### Article II (Membership)

Description of the At-Large Membership structure constitutes Article II of the current bylaws. Article II is intentionally vague, however, and with the possible exception of Section 1 (describing the status of the At-Large Membership under California law<sup>80</sup>), the entire Article should be redrafted.

*Article II, Section 2: Creation and Structure of an At-Large Membership.* This section should lay out the basic structural elements of the Membership, including:

1. Membership should be open to any individual that has Internet access and an expressed interest in ICANN's activities. To the extent that the Membership may need to establish membership barriers for authentication purposes, those barriers should be as low as possible.
2. The Membership's internal functions shall be guided by a Membership Council accountable to the Membership itself. The Initial Council should be made up of the nine At-Large Directors elected by the Membership pursuant to Section 3 (see below), and by the nine "runners-up" in the 2002 At-Large Election. Upon assuming their seats, the Initial Council's first priority should be to propose a slate of activities for the Membership Council and a system for selection of Membership Council Members by the At-Large Membership.

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<sup>80</sup> The Membership's status under California law has been the subject of continual debate in the ICANN community. Article II, Section 1 as currently written constructs a Membership outside the provisions of California law—that is, statutory rights and responsibilities established by the state for a corporation's legal members do not apply. " See *supra* at section 3.4 (box).

3. The Membership's internal deliberations shall be facilitated and administrative support provided to the Membership Council by a Secretariat. This non-partisan, staff-level position should be appointed to a one year term by a majority of the Membership Council, and would be replaceable in mid-term by a two-thirds vote of the Membership Council.
4. Additions to this structure may be established by a two-thirds vote of the Membership Council.

*Article II, Section 3: Election of Nine At-Large Directors.* This section should describe a direct election by the full Membership of a number of At-Large Directors equal to the total number of Directors chosen by the Supporting Organizations. With the exception of the 2002 election (in which a full set of nine At-Large Directors should be elected), elections of At-Large Directors should be staggered, with a third of the total number of At-Large Directors elected each year.

*Article II, Section 4: Terms of At-Large Directors.* At-Large Directors should serve three-year terms on the Board and until his successor is elected and qualified, with the exception of those Directors elected in 2002. Of the Directors elected in 2002, one-third should be randomly selections to serve one-year terms, one-third chosen to serve two-year terms, and one-third chosen to serve full three-year terms. These selections should be announced at the time that the At-Large Directors assume their seats at the Public Meeting in 2002.

*Article II, Section 5: International Representation.* At-Large Directors should be elected in such a way as to ensure geographic diversity. This should include:

- The majority, but fewer than two-thirds, of At-Large Directors should be elected on a regional basis using the regions described in Article V. The remainder of the At-Large Directors should be elected on a global basis by the entire Membership.
- No two globally-elected At-Large Directors shall be from the same country concurrently.
- Not more than 25 percent of the total number of global At-Large directorships can be held concurrently by Directors from a single region (as defined in Article V).

#### **Article IV: Powers**

*Article IV, Section 11: Removal of a Director.* Any Director may be removed following notice and a three-fourths (3/4) majority vote of all members of the Board; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director. A Director selected by the At-Large Membership can be recommended for removal by the At-Large Membership Council through procedures adopted by that Council and ratified by the Board. A Director selected by a Supporting Organization can be recommended for removal by that Supporting Organization through procedures adopted by that Supporting Organization and ratified by the Board. Upon such recommendation for removal, the Board shall vote to remove such Director. If the Board, without a recommendation by the At-Large Membership Council or the Supporting Organization, seeks to remove more than one Director selected by the At-Large Membership Council or a Supporting Organization within a four-month period, the Board must show reasonable cause for its action.

*Article IV, Section 12, Vacancies.* Vacancies that may occur in At-Large Directorships shall be filled by the At-Large Membership Council, through procedures adopted by the Council and ratified by the Board.

#### **Article V: Structure of the Board of Directors**

*Article V, Section 4: Qualification of Directors After the Initial Board.* This section should be revised to provide for:

- Three Directors selected by the Address Supporting Organization, as defined in Article VI;
- Three Directors selected by the Domain Name Supporting Organization, as defined in Article VI;
- Three Directors selected by the Protocol Supporting Organization, as defined in Article VI;
- Nine At-Large Directors elected by the At-Large Membership, as defined in Article II; and
- The person who shall be, from time to time, the President of the Corporation.

Further, any newly-selected or -elected Directors should assume their seats at the conclusion of the Public Board Meeting immediately following their selection or election.

## **4.2 Timeline of At-Large Activities**

As stated above, ICANN needs act quickly in order to seat nine publicly-elected Directors next November. Past experience makes it clear that an At-Large election is a lengthy undertaking, and the Board should be prepared to pursue an aggressive timeline in order to fit in all the necessary activities, while avoiding the problems of the 2000 election. We therefore provide a model timeline for the Board and the ICANN community to consider; adherence to the targets laid out below will greatly facilitate ICANN's move towards an efficient, fair election.

### **November 2001 Public Meeting**

- *Begin revisions to the ICANN bylaws.* While the revisions enumerated above cannot be implemented overnight, ICANN needs to affirmatively commit itself to the concept of direct elections for the At-Large Membership and to begin the process of revising the bylaws. This may include passage of new bylaws at the November meeting; in any case it should lay the groundwork for bylaws changes at the following public meeting.
- *Issue call for nominations to 2002 Election and Nominating Committees.* ICANN encountered significant criticism for its treatment of the Election and Nominating Committees' creation and conduct in the 2000 election. While in the long run, we expect the At-Large Membership Council to shoulder some responsibility for creating Election and Nominating Committees of its own, in 2002 that duty will fall to the ICANN Board. As much as possible, the Board should pursue an open, deliberative process for creating these Committees; in order for the process to be completed in a timely manner, the Board will need to solicit nominations to these Committees as early as the November 2001 public meeting.

### **December 2001—January 2002**

- *Charter Election Committee.* In the interim period between the November 2001 and February/March 2002 Public Meetings, the Board must maintain its momentum, particularly regarding the important rule-setting functions of the Election Committee. Since the Election Committee's decisions will require substantial deliberation, ICANN should charter it as soon as possible, using names submitted by members of the Internet community. In its charter, the Board should place several critical responsibilities before the Committee.

- The Committee should be meaningfully independent from the Board, and should include experts from a diversity of backgrounds and ideological perspectives.
  - The Committee should operate in a non-partisan fashion.
  - The Committee should strive to propose election rules and codes of conduct that will bring about a fair, efficient election process in which fraud is minimized, vote-tallying is accurate, and five regional and four global At-Large Directors are elected without serious incident.
  - The Committee should provide technical recommendations to the Board regarding the installation of election servers, the contracting of election providers, and possible mechanisms for authentication.
  - After the election, the Committee should provide the Board with a report on the election's overall conduct, with non-binding recommendations for improvements for future elections.
- *Begin planning registration and election systems.* In order to avoid the technical problems and surrounding controversy of the 2000 election, ICANN should begin designing, in consultation with the community, its solicitations for election providers, complete with design parameters and initial assumptions regarding the election. While certain aspects of the solicitation process, particularly regarding corporate bidding, will necessarily be closed, ICANN should make every effort to be transparent whenever possible. The Board should consider opening a public comment forum or publishing a draft Statement of Work as early as January 2002. Particular attention should be paid to ensuring that the system scales and that the distributed nature of the Internet is utilized.
  - *Begin updates to members.icann.org.* In order to provide users with accurate, regularly-updated information about the 2002 election, the Board should instruct staff to begin revamping the At-Large Membership's web site, *members.icann.org*, as early as possible. As with other functions of the Membership, operation of *members.icann.org* may eventually be transitioned to an institution of the At-Large itself (such as the Membership Council); in the meantime, the Board should consider maintenance of the space a necessary election expense. The Board and Staff should begin creating informational documents describing ICANN, the At-Large Membership, and At Large Directors, their roles and interrelationships, to ensure that all who consider joining ICANN understand what the purpose of the election, the membership and all other components is. These documents should be translated into all major languages (membership registrations from the 2000 election will provide a guide as to which languages should take priority.)
  - *A registration template should be designed and made available for public comment and improvement.* This template must be translated into all major languages.

#### February-March 2002 Public Meeting

- *Complete revisions to the ICANN bylaws.* Consistent with its actions at the November 2001 Public Meeting, the Board should approve any remaining changes to the corporate bylaws no later than the February/March 2002 Public Meeting.
- *Charter Nominating Committee.* ICANN should use the most open, transparent process possible for creating the Nominating Committee, in recognition of its important activities and of criticism received in 2000. Committee members should be selected in public from names submitted to the Board. The Committee's charter should include:
  - The Committee should have a responsibility to transparency in its operations, and should elucidate its criteria and process as fully and as soon as possible.
  - In order to avoid inconsistency in the election, the Committee should be restricted to naming a uniform number of candidates to the ballots of each region, with that number not to exceed two-thirds of the maximum ballot size.

- The committee-nominated slates should be selected with reference to diversities of gender, expertise, experience, residence, ideological perspective, and occupation, and with a view to how the candidate is representative of individual user interests.
- *Issue Call for Participation in Community-Oriented Outreach.* ICANN should solicit participation from the community in an effort designed at educating Internet users about the At-Large, conducting press outreach, and fielding questions from the community about the 2002 election. This group should have input into the content appearing on *members.icann.org* and other forms of electronic outreach (possibly including mailings to the membership).
- *Status Report of the Election Committee.*
- *Begin accepting At-Large Registrations and Member Activations.* Shortly after the February-March 2002 public meeting, ICANN should be prepared to open servers to registration efforts by the public. These initial servers may or may not include experimental authentication systems like digital certificates or voluntary fee payment (recommendations from the Election Committee should be taken seriously in this regard) and should consider additional registration mechanisms that take into account how people in developing nations obtain Internet access. Shortly afterwards, one-time activation services should be available as well to those who have received PIN letters successfully.

#### April-May 2002

- *Continued Outreach/Education Activity by Community Outreach Group.*
- *Regular Updates to members.icann.org.*
- *Campaign Support Through Mailings to At-Large Members.* ICANN should encourage interaction between newly-registered At-Large Members and candidates seeking either committee- or member-nomination by providing candidates with the means to contact members by e-mail. ICANN should be non-discriminatory in its support to candidates, but should at all times offer Members the opportunity to "opt-out" (or better, "opt-in") of such mailings or to receive such mailings in digest form.

#### June 2002 Public Meeting

- *Receive Initial Election Rules from Election Committee.* ICANN should receive an Interim Report, including draft election rules, from the Election Committee at or prior to the June 2002 Public Meeting. As in 2000, those rules should be posted for comment by the public so that they may be revised by the Committee before the Board takes action.
- *Status Report from Community Outreach Group.*
- *Issue Request-For-Proposals from Election Contractors.* As soon as the Board has received the Election Committee's Interim Report, it should issue an RFP soliciting bids from election contractors capable of fulfilling the terms of that report in a timely and efficient fashion. The RFP should be publicly posted.

#### July-August 2002

- *Nominating Committee Publishes Committee-Nominees.* No later than July 15, the Nominating Committee should publish its list of Committee nominees. At that point, preparations should already be underway for beginning the member-nomination phase of the election.
- *Publish Final Election Rules.* Also no later than July 15, the Election Committee should publish its set of recommendations for management of the 2002 election, including the member-nomination phase of operations.
- *Begin Member-Nomination Voting.* The member-nomination period should, as in 2000, begin August 1 and last until September 1. It should be conducted in concordance with the final

rules of the Election Committee. Member registration and activation services should be continued throughout this period and as close as possible to the start of voting.

#### **September 2002 ICANN Meeting**

- *Begin Campaign Phase.* On September 1, the "campaign" phase of the election should begin. During this time, ICANN should redouble its efforts to support campaigns through access to the consenting members' e-mail addresses and web-based or digest-based information sources.

#### **October 2002**

- *Begin Voting Phase.* As in 2000, voting should take place from October 1 to October 10.

#### **November 2002**

- *Nine At-Large Directors seated at conclusion of Annual Meeting.*

## 5. Conclusion

In some ways, ICANN has achieved remarkable success in its short life span, and has already accomplished many of the threshold tasks set out in its founding documents and agreements with the U.S. Government.

In other important ways, however, ICANN remains remarkably fragile, uncertain of its procedures, roiled by internal disputes, and destabilized by ongoing restructuring. These internal problems are echoes of a common theme—an organizational identity crisis about what ICANN is and why it is legitimate.

ICANN's fate over the long term is inextricably dependent upon finding a compelling answer to these questions, and resolving the riddle of its legitimacy. Not a government; not a multi-lateral treaty organization; not a trade association; not a for-profit business; not a regulatory agency; not an NGO—it is easier to say what ICANN is *not* than what it *is*. But ICANN must define itself, even if doing so means creating a new category of definition. And then it must build a persuasive argument on that definition for how it is to attain *real* legitimacy.

In our view, given our conception of what ICANN is—an experimental quasi-public global organization with important responsibilities for a critical global infrastructure that must be managed as a public trust to serve the public interest—real legitimacy comes only when ICANN establishes robust and effective structures for a public voice to participate and be represented within the institutions of ICANN's internal governance.

There are important lessons to be learned from the election in 2000. ICANN created an At-Large Membership for the purpose of electing board members, yet failed to take steps to solidify that membership before, during and especially after the election period. As a result, community faith in the ICANN process seems to have been significantly shaken and, at the very least, an opportunity to harness a substantial amount of user energy was squandered.

Virtually everyone we interviewed commented on the lack of clarity of purpose that pervaded the elections and the opacity of process that accompanied it. Choices about pivotal details of the election (including voting and vote counting models and technical requirements) were made behind closed doors in what often seemed to be an arbitrary or inconsistent manner. After the election concluded, ICANN essentially dismantled the 2000 At-Large Membership.

These choices appear to be indicative of ambivalence by the ICANN staff and board about having a vibrant and diverse public voice in ICANN. But the public voice provides an essential component of ICANN's legitimacy, and therefore should not be viewed as simply an option or as a requirement of "compliance" with its founding documents. Rather, the At-Large Membership is fundamental to ICANN's long-term survival and its ability to make the kinds of public policy decisions that have proven fundamental to its work.

This is why it is essential for ICANN to establish a real, lasting At-Large Membership, with a clear means to participate in the decision-making process and a right to direct representation on the board. A formal internal structure for the membership will enable it not only to vote for board members, but also to participate in ICANN's processes in a meaningful way. At least in its initial stages, it is crucial that ICANN's current board and staff see the at-large membership as a priority, and act on that vision.

Our study considered other models for the inclusion of the public voice. We considered more restrictive parameters for determining who would be eligible for the At-Large Membership, which might have made voter authentication a simpler matter. In the end, we rejected this option as exclusionary and counterproductive to the goal of representing the public voice.

We also considered different ways that the public might exercise some level of authority in the ICANN process, such as giving the Membership some form of oversight role rather than actual board seats, or a strictly advisory role. We came back, however, to the recognition that the ICANN Board of Directors holds the real power to direct ICANN policies, and that it is therefore crucial that the public be represented in that space.



We view the direct election of At-Large Directors as the best way to legitimize ICANN and bolster its public voice. However, we arrived at this conclusion only after thinking about and debating the merits and flaws of this model as compared to others. Ultimately, our recommendations are based upon the realities governing ICANN's operation, history, and mission, and our conviction that the public's voice in ICANN is crucial to its success. We understand that the difficulties in establishing a functional At-Large Membership are not trivial; however, we also believe these difficulties are trumped by the need for ICANN to have the legitimacy to make the decisions it makes.

We recognize that realities change and that the At-Large Membership needs the flexibility to adapt to the times. The Membership is likely to find, as time passes, that some of its mechanisms work better than others. We endorse the idea of giving the Membership the ability to shape its own future, once it is launched.

In the near term, however, ICANN needs to take the lead in establishing initial processes that will enable the At-Large Membership to grow and mature. These include internal mechanisms such as the Membership Council and Secretariat, which will take the theory of a public voice and translate it into a real, practical membership body, as well as structures that will connect the At-Large Membership to ICANN's processes and decisions.

There is little precedent here; few guideposts by which to chart the path forward. ICANN itself is an experiment in the private regulation of a global public resource, and the At-Large Membership is an experiment within that experiment — the lack of ready models is part of what makes this problem so hard. We do not underestimate the challenge here, but we believe the success of ICANN hinges on meeting the challenge.

The Internet is about empowerment — about giving information, and giving voice, to individuals around the globe. What more appropriate opportunity than for ICANN itself to use the power of the Internet to harness the public voice needed to make its own work legitimate. By solving the riddle of this internal experiment, ICANN will take a great step toward securing a more stable grounding to ensure the success of its own, larger experiment.

## **Implementation Recommendations**

### **Conceptual Framework**

- ICANN more than technical body; decisions have policy implications
- ICANN must have baseline legitimacy to make decisions in these areas
- Role of public voice in internal governance crucial in establishing this legitimacy
- Existing structures are inadequate for incorporation of public voice

### **The Need for an Inclusive, Open Membership**

- At-Large Membership (ALM): bottom-up organization, open to all interested members of the Internet public, that provides a meaningful channel for input into the ICANN process.
- Membership open to all who complete a simple online registration and activate their membership through a postal-return-based system.
- Supported as part of the ICANN budget by the community of stakeholders that fund ICANN's activities, as a necessary component of ICANN's legitimacy.

### **At-Large Membership: Participatory Structure**

- Member Council, elected by members, will oversee processes and guide Secretariat.
- Secretariat (appointed) will facilitate flow of information within ALM and from ALM to ICANN's structures
- Working committees will develop policy positions
- ALM will foster the creation of local, regional, and national associations that encourage participation

### **At-Large Membership: Representation on the Board**

- Representation of the At-Large Membership provided through the direct election of a number of At-Large Directors equal to the total number of Directors allocated to the Supporting Organizations (i.e., nine At-Large Directors in the current Board structure).
- Board-level representation to be balanced along regional and global lines.
- Measures should be introduced to prevent nationalistic capture of board seats  
*Authentication Mechanism:* Each person voting in election must have online identity tied to a real offline "personality" and have only one voting record in the At-Large database. The postal return system continues to strike the best balance between security, cost, and inclusiveness.

### **Accountability Mechanisms**

- In order to prevent unwanted expansion of ICANN's mission, limitations on the scope of the Board's activities and powers, including bylaws and charter changes, explicit statements of user rights, and internal checks and balances within ICANN should be explored.
- In addition to the At-Large Membership, ICANN should pursue additional mechanisms to improve the Board's accountability and transparency.
- Separate from reform of the At-Large Membership, there is a strong desire by many in the community to reform the Supporting Organizations. We support reform of the Supporting Organization structure, but believe that such reform can and should be done independently of the At-Large Membership debate.

The NAIS Project welcomes comment and feedback on this document. For more information, please visit our web site at <http://www.naisproject.org/>. Comments or questions can be addressed to [comments@naisproject.org](mailto:comments@naisproject.org).

## Addendum: Options for At-Large Governance

As the NAIS team moved towards its final report, it produced a diverse set of options for consideration. Our final recommendations are explained in the body of the report above, but consideration of other ideas for representation of the public voice in ICANN continues to be valuable. These options for the ICANN's At-Large Directors and Membership, and public participation in ICANN more generally, range from relatively minor process points to wholesale revision of some of the organization's basic operating principles.

We present below a template of the larger set of options developed for consideration in the preparation of this report. These options were set forth in the Interim Report published by the NAIS group prior to the ICANN meeting in Stockholm in June, 2001.

Discussion of options is organized into two basic categories:

1. *Options Based on the At-Large Directors Model*—Many options retaining At-Large Director seats distinct from those of the Supporting Organizations. Within this strategy, there are multiple dimensions of questions for resolution, including:
  - Number of At-Large Directors
  - Selection Mechanism
  - Membership Criteria
  - Membership Role
  - Regional v. Global Structure
2. *Options External to At-Large Board Directors* - In addition or in conjunction with At-Large Directors, issues of public participation might be addressable through other mechanisms:
  - Limiting the ICANN Mission/Slate of Activities
  - Reforming the Supporting Organizations
  - Establishing new Bodies as a Check on Board Authority

Within each of these strategies, there are persistent questions about implementation and process; as a result, a number of viable options for public participation have emerged, ranging from peripheral changes to the 2000 election process to wholesale rethinking of the organization and its mission. And while a number of such options are discussed below, no single option alone will act as a panacea for the problems in ICANN. The best solutions for an effective public voice will probably come through a considered recombination of the elements listed here.

***1. Selecting At-Large Directors to the Board.*** Discussion in the ICANN community has frequently emphasized the importance of At-Large Directors as a means of public participation in Board activities. Many of those interviewed believed that an efficient, reliable, fair process for selecting At-Large Directors would provide the most likely path to successful reform of ICANN.

Within the approach of selecting Directors, there are a number of critical issues that need resolution. The 2000 election, in particular, displayed evidence of many problems that must be solved if we are to build a lasting, effective system for public participation. With that in mind, we offer here a list of options areas for consideration.

#### Implementation Questions

##### Number of At-Large Directors

- Continue *status quo* (No. At-Large Directors = No. of S.O. Directors)
- Reduce number of At-Large Directors
- Increase number of At-Large Directors

##### Selection Mechanism

- Direct election
- Indirect election
- Hybrid election
- Delegate to existing membership organizations

##### Membership Criteria

- Open membership
- Nominal membership fee
- Digital certificates
- “Webs of trust”
- Knowledge/experience-based criteria

##### Membership Role

- Electorate
- Policy-making
- Oversight/review
- Advisory

##### Regional Structure

- Five-region model
- Global model
- Expanded regional model
- Hybrid model

- **Number of Directors.** In the current model of the ICANN Board, At-Large Directors constitute a portion of the Board **equal to the total number of Supporting Organization Directors**: Nine At-Large Directors = Three ASO Directors + Three DNSO Directors + Three PSO Directors—plus a nineteenth seat reserved to the President/CEO. The *status quo* is seen as providing the Board with a certain balance. Other options expressed frequently in our consultations included:
  - **Reducing the At-Large Directors**, for example to five (tracking to the five-region model of geographic representation), or to three (matching the representation of a single Supporting Organization). Implementing either of these could include commensurate reductions in the number of Directors selected by the Supporting Organizations.
  - **Increasing the number of At-Large Directors** to ten (two from each of the five geographic regions), or more. And though it might be more accurately considered an external option, it would be possible to have the entire Board selected by some public membership—such a change would obviously entail the elimination of Board-level representation for all three Supporting Organizations.
- **Selection Mechanism.** In 2000, as is discussed above, five At-Large Directors were selected by **direct election** in each of five geographic regions. The strengths and problems of that election have already been discussed, and continuation of the 2000 model remains a viable option for future public participation. Other possibilities for a selection mechanism include:

- **Indirect election.** While indirect elections can raise questions of both accountability and transparency, they may provide a means not only to select qualified Directors, but also to facilitate a persistent role for the At-Large Membership itself.
- **Hybrid election.** If some kind of “council” that acts as intermediary between the user community and the Board proves desirable, it might be possible to establish such a council without sacrificing the legitimacy that comes with direct election of Board members. Some kind of combination election could be held, either with separate elections for Directors and council seats, or a proportional voting system could be used.
- **Existing membership organization(s).** Some of the difficulties that were encountered in voter verification, fraud protection, and outreach might be avoided by capitalizing on the membership structures of existing organizations, mapping their memberships onto ICANN’s At-Large Membership. Clearly, fair identification of such organizations could be difficult.
- **Membership Criteria.** Again, as discussed above, the 2000 election used extremely **open criteria for membership**, requiring only that voters 1.) be age sixteen or over, 2.) have a verifiable postal address, 3.) have an e-mail address. No fee was required. However, problems with the postal return system and other difficulties in voter verification may have complicated certain aspects of the election. Revision of the membership criteria might help.
  - **Nominal membership fee.** This could not only help the At-Large membership become self-supporting, but could discourage frivolous registration and/or certain types of voting fraud. However, membership fees run the risk of placing membership out of reach for would-be members in developing nations.
  - **Digital certificates.** These could assist with certain aspects of election administration, but in the absence of a robust, worldwide public-key infrastructure, they seem unlikely to assist with voter verification in its most intransigent forms.
  - **“Webs of trust.”** Webs of trust<sup>81</sup> have been used effectively to authenticate limited groups of users for purposes of public key exchange and in other instances of identity verification, but they are basically untested. Questions of scalability and robustness remain. Also, webs of trust may trend towards basically closed memberships.
  - **Knowledge/experience-based criteria.** In the interest of promoting an educated (and therefore presumably responsible) electorate, some have proposed that potential members be required to demonstrate their knowledge of/interest in issues of addressing and naming. One particular proposal in this category would be to restrict At-Large membership to those users that own domain names. Again, this clearly tends towards a closed membership.
- **Membership Role.** The role of those Internet users who registered as At-Large Members in 2000 has been a matter of significant controversy since the election’s conclusion. While some have claimed that the, the election being over, those users no longer have a specialized role in ICANN, others believe that the At-Large Membership is a lasting community that should have a persistent role in ICANN. Clearly, a user-oriented membership could easily play several of the roles listed below.
  - **Electorate.** The membership would play an obvious role in selecting Directors to the Board. This is the role that the 2000 At-Large Membership most obviously played.

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<sup>81</sup> In a web of trust, an individual in a community has his or her identity verified by other members of the community who vouch that the user is a real person, and is, in fact, who he or she claims to be. The degree to which an individual’s online persona is “trusted” depends entirely on the number of other people willing to vouch for him or her.

- **Policy-making.** As the S.O.'s serve to propose and review ICANN policies, so could a public membership. Some have raised concerns that a policy-making or policy-review role for the user community would be needlessly duplicative of the S.O. process, while others maintain that the S.O.'s do not adequately include a distinct user perspective.
- **Oversight/review.** The membership could play some role in validating Board decisions prior to their implementation. It could also/alternatively serve as an independent reconsideration authority, to resolve Board actions contested by parties in the ICANN process.
- **Advisory.** Finally, the membership could play a purely advisory role not only to the At-Large Directors but to the Board as a whole, or to the Supporting Organizations.
- **Regional Structure.** The 2000 election elected **five directors, one from each of five geographic regions.** As is discussed above, the model probably enhanced the election's overall efficiency and resistance to capture, but may not have provided certain Internet communities with ideal representation.
  - **Global At-Large Directors.** Future Directors could be chosen without reference to any kind of regional model. This model provides simplicity and some baseline fairness, but might result only in capture of Directors by populous or well-organized nations.
  - **Expanded regional structure.** ICANN has no especial commitment to the five-region model. More regions, or a sub-division of regions, could be established, and Directors adjusted accordingly.
  - **Hybrid structure.** Questions of geographic representation are not either-or models. It would certainly be possible to select some Directors on a regional level, and others globally.

## **II. Other Strategies**

While the selection of At-Large Directors remains an important and compelling strategy for promoting the public interest, it is not the only one. Other approaches to bringing ICANN's activities closer to public interest ideals could defuse certain problems in the selection of At-Large Directors, or even reshape ICANN in ways that would permit us to thoroughly rethink our approach to DNS administration. Below, we attempt to list a broad range of possible answers to the questions before ICANN.

**Limiting the ICANN mission/slate of activities.** If the public's interest in ICANN's activities stems from the policy implications of ICANN's decisions, then one solution might be to redefine ICANN's mission so that it is more closely confined to pure technical management.

- **Changes to the Articles of Incorporation.** While the ICANN Articles of Incorporation charge ICANN with administrative responsibility in four specific areas,<sup>82</sup> they do not establish meaningful limits on ICANN's activity within those areas. Many of those contacted for this report were concerned that ICANN may be entering areas of policy-making beyond what it was designed for. Changes to the Articles that limit ICANN to technical coordination might stave off the broad effects that inappropriate policy-making could have.
- **Disband ICANN and establish a new organization.** If ICANN in its current form is so resistant to reform that meaningful public participation can't be implemented without compromising ICANN's basic mission to efficiently administer the systems in its charge, then it might be advisable to scrap ICANN and establish a new starting point. With the flexibility that comes from a fresh slate, it might be possible to build an entirely new organization, learning from the successes and mistakes of the ICANN experience.

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<sup>82</sup> Coordinating technical parameters to ensure universality, coordinating the IP address space, coordinating the DNS, and overseeing the operation of the root server system.

**Reforming the Supporting Organizations.** Some of those interviewed felt that changes to the Supporting Organization substructure might address the need for public representation. However, the Supporting Organizations are sometimes thought of as providing representation to those affected directly by ICANN policy—a group that includes some, but not all users, since many users are affected mostly by secondary effects.

- **Changes to S.O. constituency structures.** Any of the Supporting organizations, but most notably the DNSO, might benefit from review of their internal organization. The DNSO's lack of an Individual Domain Name Owners' constituency, in particular, has been the subject of criticism from many sources, but addition of an IDNO alone is unlikely to provide a long-term solution. A new constituency structure that more accurately groups like interests together could greatly increase the efficiency and effectiveness of the S.O. process.
- **Addition of New Supporting Organizations/Radical S.O. Reform.** New supporting organizations—such as a ccTLD or User S.O.—might increase participation in the Supporting Organizations and provide a new policy role for the user community. Some have expressed concern that the S.O. structure as it currently exists fails to make allowances for important divergences of opinion on key ICANN issues, or that it underrepresents certain groups. By adding new S.O.'s or recalibrating the existing ones, it might be possible to bring the ICANN process more in line with the public interest. Clearly, this option would include a significant review of the Board's own internal structure.
- **Divest ICANN of the Addressing and Protocol Supporting Organizations.** Presently, controversy about public participation has been heaviest in and around the Domain Name Supporting Organization, since the area of domain name policy includes issues of obvious public concern. Addressing and protocol issues, on the other hand, have to date been less controversial and in any case seem to demand a specialized approach in fostering the public interest perspective. Addressing, protocol, and domain name policy work all demand different expertise, working styles, and priorities. In light of that fact, one may question the wisdom of placing all three under the authority of a single ICANN.

**Establishing new bodies to counter Board authority.** The current ICANN model has sometimes been treated as a top-down one, with significant authority centralized in the nineteen-member Board. One possible reform would be to temper that authority either by dividing it with another, as-yet-envisioned ICANN body (likely including a strong public interest perspective) or by establishing a meaningful oversight body capable of reviewing Board decisions and, in special circumstances, reversing or altering them.

- **Separation of Authority.** The authority of the ICANN Board could be at least partially decentralized, and a new deliberative body established to share that authority through a series of checks and balances. That body might be selected by a radically different method from the Board itself.

**Oversight Body.** Some kind of ICANN "judiciary" could be established, capable of reviewing decisions of the Board and comparing them both to the corporation's appropriate mission and to demonstrated consensus in the community. However, this option, like the one before it, would constitute a major change in ICANN's operating procedure, and could even run the risk of conferring inappropriate, pseudo-governmental legitimacy on the organization.