# Accountability and Transparency at ICANN
## An Independent Review

Memorandum: Procedural Justice and the Importance of Being Heard
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## *Background*

In the course of our review of ICANN's governance, transparency, and dispute resolution procedures, a perception that the inputs from individuals and groups were "not being heard" was a recurring theme in some of the stakeholder interviews and in some of the narratives and cases we examined. This memorandum will examine these considerations against the backdrop of what is often termed "procedural justice" which may provide at least a partial explanation for the dissatisfaction these perceptions produce and suggestions for improving the response of ICANN to these perceptions.

In pursuing this idea, it is useful to make a distinction between those participants in ICANN processes for whom outcomes dominate and those for whom process, inclusion, and identity are important for their own sake. As ICANN fully recognizes, it stands at the intersection of a number of Internet constituencies. Since its earliest days, ICANN's governance structure has sought to include a balance of interests. For some constituencies, often those involving large corporate or governmental interests, the participants view their engagement in ICANN as dominated by *outcomes*. The decisions of ICANN are viewed instrumentally – and most often in terms of economic impact. If ICANN does something economically favorable, then the process must be good; if the outcome is economically negative, it must be bad. In such a case, procedural reform by itself is unlikely to materially affect "customer satisfaction".

Other participants, however, view ICANN as one of the few places in which a kind of "Internet Citizenship" can be established and exercised. While not indifferent to outcomes, these players often view the opportunity for involvement in ICANN, and its respect for their views, to have its own importance. While the actual function of ICANN as guardian of the domain name system is fundamentally important to the functioning of the Internet, it is in fact a relatively constrained piece of the Internet puzzle. Precisely because it has always been set up to be widely transparent and inclusive in its governance, however, ICANN and its processes are sometimes viewed as a kind of "Town Meeting" for the Internet community. There are, of course, some alternative fora for voicing ideas and concerns on the Internet, most notably The Internet Society (ISOC) and the Internet Governance Forum (IGF). The fact that real decisions get made at ICANN, coupled with its very openness to input from a broad range of constituents, however, helps to target ICANN in the minds of many as the place where a true Internet Citizen should be active and able to be heard.

Unfortunately, there is evidence that ICANN's processes may not always be welcoming to this kind of voice. Because the underlying question to be decided may be only be a "pretext" for input from such players, their participation, through comments, questions at meetings, etc., may perhaps seem irrelevant and a waste of time to busy, committed ICANN administrators. Efficient triage of participants by knowledge and relevance can translate into an attitude of dismissal in the eyes of those dealt with brusquely. The apparent efficiency gains of such brusqueness may result in stakeholder dissatisfaction, a real cost with impacts on ICANN's effectiveness and perceived legitimacy as a decision maker in the Internet. And the push-back against this perception can lead to complaints which themselves take time to resolve.

The legitimacy and satisfaction tied to a perception of being heard has been researched in the legal process context, often under the label of "procedural justice," and creating both empirical data and theoretical work on this that may prove useful for ICANN as it considers its next steps.

## *Procedural Justice Research*

There is now a considerable body of research and scholarly literature, accumulated over several decades, looking at the interest that people have in how they are treated in a determinative process. Tom Tyler, an NYU professor and chair of its Psychology Department, is a leading scholar in this approach (e.g. Tyler 1988, 2004, 2005, 2006). Much of the work of Tyler and others in the field has been summarized by Berkeley's Robert J. MacCoun in his useful chapter "Voice, Control and Belonging: The Double-Edged Sword of Procedural Fairness," which appeared in the 2005 *Annual Review of Law and Social Science*. As he explains, in considering litigant satisfaction, many observers have "assumed that litigants were motivated primarily by economic concerns—dollar outcomes and transaction costs." MacCoun continues:

> "Of course, litigants do care a great deal about these factors. But three decades of socio-legal research have demonstrated that citizens also care deeply about the process by which conflicts are resolved and decisions are made, even when outcomes are unfavorable or the process they desire is slow or costly [citations omitted]."

He then adds, tellingly for the ICANN story:

> "Although many aspects of procedure shape this fair process effect—lack of bias, thoroughness, clarity—two particularly important dimensions are voice (the ability to tell one's story) and dignified, respectful treatment [citation omitted]."

MacCoun points out that this effect is not just one of "feeling good" about the tribunal in question. Rather, it is a strong element in establishing the authority of the tribunal – the willingness to accept its dictates.

> "Tyler and colleagues have documented the role that procedural fairness plays in citizen's wiliness to cooperate with government decisions and policies, including Supreme Court rulings [citations omitted].... Tyler [citations omitted] has long argued that procedural fairness plays a key role in shaping the legitimacy that citizens grant to government authority. ...Tyler argues that this legitimacy or support for the system is critical to the ability to govern effectively without tyranny and coercion. He has repeatedly documented a pattern of correlations consistent with a causal chain in which procedural fairness leads to perceived legitimacy, which leads to the acceptance of policies."

Tyler and Blader have also argued that this effect is particularly important where the process is linked to the identity of a participant as a respected member of a particular group:

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"The group engagement model expands the insights of the group-value model of procedural justice and the relational model of authority into an explanation for why procedural justice shapes cooperation in groups, organizations, and societies. It hypothesizes that procedures are important because they shape people's social identity within groups, and social identity in turn influences attitudes, values, and behaviors. The model further hypothesizes that resource judgments exercise their influence indirectly by shaping social identity. This social identity mediation hypothesis explains why people focus on procedural justice, and in particular on procedural elements related to the quality of their interpersonal treatment, because those elements carry the most social identity-relevant information." (Tyler & Blader 2003, Abstract)

Studies since MacCoun's 2005 review continue to validate the procedural justice findings.  For instance, Beasely (2010), in a study of processes relating to nuclear energy regulation, found:

"... that believing one receives a fair outcome is associated with decision favorability, while all forms of fairness perceptions are associated with acceptance. The implication is that perceptions about both outcome and nonoutcome forms of fairness are important to consider when assessing public engagement."

Taken together, these findings support the idea, advanced above, that those who may identify themselves as part of the wider ICANN community, or a legitimate ICANN citizen or stakeholder, may be as concerned with being respectfully heard and specifically responded to as those with a monetary interest in a particular ICANN meeting, proceeding, or dispute.

## Suggestions for ICANN Action

This procedural justice research suggests that giving better attention to the need to be respectfully heard could increase the level of satisfaction with ICANN processes for at least some of the participants in its processes.  This memorandum will make suggestions in three particular domains that may help ICANN deal more effectively with this phenomenon.  The first involves cultural change, the second procedural change, and the third encouraging the development and use of other opportunities for "Internet Citizenship".

## Cultural Change

To some, ICANN's culture is businesslike and efficient.  Unfortunately, when perceived as brusque dismissal, an efficiency-driven desire to move on from a somewhat tangential piece of input can produce negative reactions of the kind documented in procedural justice research.  ICAAN should work to minimize the palpable dismissal of commentary by stakeholders.  Its patience need not be endless, but an ingrained cultural understanding that patience is not the same thing as wasting time will be helpful. Respectful hearing and acknowledgement is part of solving the longitudinal concerns

of community and legitimacy, even when the input has only a tenuous connection to the particular question currently under consideration.

## *Procedural Change*

ICANN can take even more care to ensure that each comment/input receives mention and/or some form of response in ICANN proceedings.  While time-consuming, such a commitment to dealing with comments expressly would codify the culture improvement suggested above.

## *Developing Opportunities for Internet Citizenship*

Part of the pressure on ICANN's processes derives from the fact that there are relatively few alternative fora in which an identity of Internet citizenship can be established and exercised, and those are seen as lacking the actual, if limited, authority that ICANN can wield.  As Wikipedia's entry on Internet Governance states: "ICANN's role in coordinating the assignment of unique identifiers distinguishes it as perhaps the only central coordinating body on the global Internet."  If ICANN wished to reduce some of the pressure that identity-related participation places on its procedures and deliberations, it could help to create new fora for exercising Internet citizenship and to provide additional support for existing alternatives.  Of course, creating and empowering these alternative structures have their own complications and controversial elements, which are outside of the scope of this memorandum.  Actions in this direction need to be carefully undertaken.

## *References*

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