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Centre for Communication Governance

Pre-Event Briefing Document for ICANN 55

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By Aarti Bhavana and Gangesh Varma



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INTRODUCTION

The 55th International Public Meeting of the Internet Corporation for Assigned Names and Numbers (ICANN) will be held at Marrakech from 5 - 10 March, 2016. This will be the first meeting implementing the New Meeting Strategy.

ICANN is undergoing a transition process which started in March, 2014, after the NTIA announced its intention to transition its oversight of key Internet domain name functions to the global multistakeholder community. Following the announcement, ICANN developed two parallel processes: the IANA Stewardship Transition Process and Enhancing ICANN Accountability. The IANA Stewardship Transition Process was led by the IANA Stewardship Transition Group (ICG) and the Enhancing ICANN Accountability process was led by the Cross-Community Working Group on Accountability (CCWG-Accountability).

The ICG developed a consolidated proposal from the Names, Numbers, and Parameters Communities. The names portion of the ICG proposal is incomplete without the accountability mechanisms provided in the CCWG-Accountability proposal.

With the finalised proposal, the Marrakech meeting will be significant as the CCWG-Accountability plans to secure the chartering organisations' approval over the supplemental report on Work Stream 1 Recommendations.¹ While there is room for approval by any Supporting Organization(SO)/Advisory Committee (AC), the Meeting will be the site of finalization of the Transition Proposal. Following this, the ICANN Board will submit the Proposal to the National Telecommunications and Information Administration (NTIA). This culmination of the transition process that began in 2014 is a milestone not only in ICANN's history but also in the internet governance sphere.

This document was prepared to highlight few key themes that may be of interest to Indian stakeholders. For a more detailed account of the development of the CCWG Accountability Proposal read our blog series: [On the Road to Marrakech](#).

¹ The Supplemental Report is available at <https://community.icann.org/pages/viewpage.action?pageId=58723723>.

CCWG-ACCOUNTABILITY: AN UPDATE

Overview of developments since Dublin

The Cross-Community Working Group's mandate to increase ICANN's accountability has been divided into two streams: Work Stream 1 deals with accountability-enhancing mechanisms that must be in place before the IANA Transition, while Work Stream 2 focuses on those mechanisms which may be implemented at a later stage, after the transition.

Over the past several months, the group has been working on finalising its recommendations for Work Stream 1, while also securing certain commitments for Work Stream 2. Certain core aspects of the second draft proposal were met with objections from the Board, leading to substantial changes in the third draft proposal published by this group. The third draft saw a departure from the Sole Member model in favour of the Sole Designator model, and a change in the decision-making process, from voting to consensus. Aspects of the third draft proposal were also objected to, leading to further changes in the recommendations put forward by the CCWG-Accountability. The next section discusses the key debates that took place over the 3rd draft proposal.

The most contentious recommendations

1. Role of Governments in ICANN

GAC as a Decisional Participant (Recommendation #1):

A significant issue raised in the public comments was the role of the Advisory Committees as decisional participants, GAC in particular. While GAC itself has not confirmed one way or the other whether it will participate in the Empowered Community, the CCWG members and participants have been [discussing](#) whether it should even be allowed the choice.

Those in favour argue that the CCWG-Accountability is creating a new structure, and GAC should be allowed to participate in it, if it so chooses. Concerns have also been raised over the

effect of removing GAC from the decisional participants, as current thresholds for the exercise of community powers were calculated on the assumption that there would be five decisional participants. Without GAC, this would be reduced to four, which could threaten the entire model.

Those against giving GAC a decisional role argue that allowing it to be a decisional participant would mean that GAC would have a decision-making role, something it does not have at present, and one [never envisaged](#) for this Committee. Further, this would change the structure of ICANN, making it a government-led body, which is in violation of [NTIA criteria](#).

Ultimately it was decided that GAC will be allowed to be a decisional participant if it so chooses, despite the opposition by some.

[GAC Consensus Advice \(Recommendation #11\):](#)

This is arguably the most contested recommendation in Work Stream 1. The Governmental Advisory Committee (GAC) has a special advisory status in ICANN, which manifests in how the Board of Directors considers GAC advice. According to Article XI of the bylaws, if the Board takes a decision inconsistent with any GAC advice, it must state in writing the reasons for doing so, and then work with GAC to find a mutually acceptable solution. Stress Test 18 considers a scenario where the GAC changes its decision making process from consensus to majority voting. In such a scenario, the Board would be obligated to find a mutually acceptable solution even if the GAC advice achieved only a majority of votes. To mitigate these concerns, CCWG-Accountability recommended certain changes in the previous proposal, which have since been thoroughly debated and modified for the third proposal.

In the 3rd draft, it was recommended that Article XI be modified to require trying to find a mutually acceptable solution only for advice supported by a full GAC consensus, and describes consensus to mean general agreement in the absence of formal objection, be included in Article XI. The Board can agree, through a 2/3rds majority, to not to follow this advice. This does not modify GAC's ability to give advice at any time.

However, this proposal was met with some resistance and after weeks of deliberations and brainstorming, this recommendation has been modified again: the threshold required for the Board to not follow GAC consensus advice has been reduced from 2/3rds to 60% of the Board.

Additionally, Recommendations #1 and #2 have also been modified to the effect of giving GAC a purely advisory role in situations where the Empowered Community is discussing launching an IRP to challenge Board's implementation of GAC advice.

2. Mission Statement

Changing The CCWG Accountability through Recommendation 5, proposed changes to the ICANN bylaws to ensure that the ICANN Bylaws reflect the measures proposed in the recommendations of the CCWG Accountability under Work Stream 1.

ICANN's [bylaws](#) currently include its mission statement, a statement of core values and a non-discriminatory treatment provision. The comments from the community indicated that bylaws as it stands would need to be strengthened and enhanced. This was a necessary step to improve ICANN's accountability to the global internet community and its stakeholders, a [criteria](#) set by the NTIA and a requirement of the [ICG proposal](#).

Based on the comments and inputs from the community, the CCWG Accountability found that these existing provisions in the bylaws are weak and could lead to excessive discretion by decision makers within ICANN. It also noted that the current bylaws do not reflect the key elements of the Affirmation of Commitments. The CCWG Accountability recommended that ICANN's mission statement be clarified to define its limited scope. It further observed that these changes once made to the bylaws should not be easily amended by the Board. Thus, the CCWG Accountability through Recommendation 5 proposed to modify ICANN's mission statement, and to divide the Core Values into Commitments and Core Values. This Recommendation addresses numerous changes and each of these was extensively discussed and debated. Some of the key discussions on changes were around the following themes:

On Competition and Consumer Trust:

There was considerable interest in including consumer trust as part of the core values which can be illustrated through the comments of the [ALAC](#) (at pg.4) and the [USCIB](#) (at pg.5). The concept in the ICANN universe has its origins in the preamble of the AoC as a description of ICANN's role and as a review commitment with respect to expansion of TLDs. Given this context of a limited application in its origin, the [key consideration](#) was whether this could be

expanded into a generalised consumer trust obligation on ICANN. In order to understand the intention of the drafters of the AoC, the group sought clarifications from the NTIA. In response, it clarified that the reference to consumer trust in the AoC was limited to the expansion of new gTLDs. It was finally decided (see [transcripts](#) of call [#78](#). Discussions from pg. 54-61) that the language of the 3rd Draft proposal will be retained, where core values will not refer to consumer trust but it will be included as part of the AoC reviews.

On GAC Advice and Scope of ICANN's agreements with contracted parties – Public Interest Commitments and Contract Provisions:

Comments from some governments and the GAC focussed on the effect that changes made under this recommendation will have on the Board's ability to accept and implement GAC advice on aspects that affect public policy. To address the concern of GAC members, the Commitments as envisaged under the Proposal [provides](#) that ICANN shall employ open, transparent and bottom-up, multistakeholder policy development processes "while duly taking into account the public policy advice of governments and public authorities" (Section 2.5 of Commitments).

The Board in its comments highlighted that while it would support the recommendations on core values and commitments, it would support modifying the Mission statement only with emphasis on clear and concise language. The Board's concerns with the Mission statement were twofold. One, ICANN's operational and policy role and second, contractual enforcement. The Board argued that the Mission Statement did not adequately reflect the operational role of ICANN, and focussed only on its policy development role. On the issue of contractual enforcement, the Board contended that the "grandfathering approach" and discussions relating to it resulted in text proposals that lacked clarity. While conceding that ICANN is not a regulator and should not regulate content, many comments also pointed out that the issues identified in the Registrar and Registry Agreements (the "picket-fence") must be considered within the scope of ICANN's Mission. This was reflected in the final proposal as part of the 'note to drafters'. As noted in Annex 05, the language proposed in this recommendation are conceptual in nature at this stage. The final language revising the Articles of Incorporation and Bylaws will be drafted by the ICANN Legal Team and external legal counsel.

Many comments expressed concern that the restrictive scope of ICANN's Mission should not affect ICANN's ability to negotiate, enter into and enforce agreements including public interest commitments (PICs) with contracted parties. In order to address concerns regarding Public Interest Commitments and other contract provisions in RAAs, etc. the CCWG clarified with a note on a 'grandfathering approach' to drafters. It also clarifies that grandfathered terms and conditions (including PICs) can be renewed until the expiration date of any such contract following ICANN's approval of new/substitute form of Registry Agreement or RAA.

Global public interest was also among the many contested topics during the discussions. Addressing the myriad concerns that were raised, the CCWG proposal specifically provides that ensuring that a bottom-up, multistakeholder policy development process is used to ascertain the global public interest is one of ICANN's core values.

3. Human Rights

There has been a significant debate surrounding the inclusion of a human rights bylaw in Work Stream 1. In the absence of the NTIA oversight, there will be no backstop for human rights obligations unless ICANN made such a commitment. This commitment is essential to satisfy the NTIA criteria of maintaining the openness of the Internet. It was also felt necessary to include this commitment in Work Stream 1, as an assurance that the work would continue in Work Stream 2.

The 3rd draft proposal recommended reaffirming ICANN's commitment to human rights through two bylaws: one, a draft Bylaw which would clarify ICANN's obligation to respect internationally recognized human rights, and the other, an interim bylaw that would commit to the development of a framework of interpretation for the implementation of the draft bylaw. However, this sparked a debate with the ICANN Board.

The [Board stated](#) that while it is 'committed to upholding human rights', it disagreed with the staged approach proposed in the 3rd draft proposal. It feared that the [proposed language](#) could be used to expand ICANN's obligations and increase the risk of unintended

consequences such as initiating the Independent Review Process (IRP) or litigation on human rights grounds. Leaving issues open until the approval of the Framework of Interpretation (FOI) could result in courts and binding IRP decisions creating precedent for what ICANN's human rights commitments are. What came as surprise in the Board's comments was the reference to evaluate this recommendation on grounds of Global Public Interest,² if its objections were not addressed.

The Board suggested holding off on a human rights bylaw until the FOI was approved. It also recommended developing a Human Rights Statement with the community, in a top-down manner.³ Crucial details such as whether a human rights commitment should be included in the bylaws or elsewhere would be discussed in Work Stream 2.

In response to the Board's objections, it was decided that 3rd draft proposal language will be modified to make the bylaw dormant until Framework of Interpretation is approved. This would address the Board's concerns over IRP and litigation risks as well, since the bylaw would not be effective until the framework of interpretation was adopted. There was consensus in the CCWG-Accountability for the compromise option. After objecting to it at first, the Board proposed bylaw language similar to the text agreed by the Working Group. The dormant bylaw will be added in Work Stream 1, while the Framework of Interpretation will be developed and approved in Work Stream 2.

² In its [Resolution](#) in October 2014, the Board committed to following certain principles when considering CCWG-Accountability recommendations. One such principle was over Global Public Interest: if, by agreement of 2/3rds of the Board, it was decided that a particular recommendation was not in the global public interest, the Board would initiate a special dialogue with the CCWG over its concerns.

³ The Cross-Community Working Party on ICANN's Corporate Social Responsibility to protect Human Rights ([CCWP-HR](#)) submitted its inputs for this human rights statement, in the hopes that it will be developed through a bottom-up multistakeholder process.

The path ahead: Work Stream 2

1. Work Plan

This recommendation is of particular importance, as it sets the stage for Work Stream 2, calming concerns about lack of incentive to implement accountability proposals post the transition. The work plan at present, aims to organise the work into subgroups by the next meeting (ICANN55), conduct 2 public comments periods and deliver the finalised and endorsed proposals to the Board by the ICANN59 meeting in June 2017.

The key milestones [provided](#) are:

March 2016	Definition of scope of work and organization into Subgroups.
March to June 2016	Drafting of Proposals by the Subgroups, under supervision of CCWG-Accountability.
June to early October 2016	40-day Public Comment Period
October to mid-January 2017	Refinement of Proposals by Subgroups, under supervision of the CCWG-Accountability or other CCWG as appropriate.
Mid-January to March 2017	Second 40-day Public Comment Period.
End of June 2017	Finalize Proposals and deliver to Chartering Organizations. Obtain approval and deliver Proposals to ICANN Board at ICANN59.

This work stream shall be looking at: Jurisdiction, Human Rights, Diversity, Transparency, SO/AC accountability, Staff accountability and enhancing the role of the Ombudsman. The following section focuses on some key issues.

2. Jurisdiction

Jurisdiction directly determines the manner in which ICANN functions, and has been a topic of great interest to Indian stakeholders. By virtue of being incorporated in California, USA, ICANN's corporate structure and accountability mechanisms are entirely contingent on California and federal U.S. law.

The Affirmation of Commitments, signed between ICANN and the U.S. government in 2009, commits ICANN to remain headquartered in USA, a provision considered problematic, especially by non-U.S. stakeholders. However, the NTIA has been very clear that ICANN must remain within the U.S.. Discussing this issue in Work Stream 1 is risky, as it can threaten the IANA transition itself, owing to the strong opinions of the stakeholders.

CCWG-Accountability highlights that jurisdiction is a multi-layered issue, and apart from the place of physical presence, one must also consider:

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.

- Meeting NTIA requirements.

A specific CCWG-Accountability subgroup will be created to handle the issue of jurisdiction in Work Stream 2. It will study the exact influence of California jurisdiction on ICANN policies and accountability mechanisms. However, this will mainly examine dispute settlement jurisdiction, with no guarantee about examining the issue of the location where ICANN is incorporated.

3. Human Rights

As explained above, a bylaw shall be introduced in Work Stream 1 to commit ICANN to respecting internationally recognised human rights. To ensure that this does not expand ICANN's Mission or scope, the CCWG-Accountability will develop a Framework of Interpretation in Work Stream 2 to help with the implementation of this bylaw. It shall consider whether reference should be made to specific Human Rights instruments, and which ones could be used as a guide by ICANN. CCWG-Accountability will also:

- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights.
- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- Consider what effect, if any, this proposed Bylaw would have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

4. Diversity

Diversity has been identified as an indispensable element in enhancing ICANN's accountability. While the draft proposals contained references to enhancing diversity within ICANN, the comments received indicated a need for more specific and concrete steps. The CCWG Accountability noted that following the transition, the Community is designed to be empowered. In this context, it is crucial that measures are taken to ensure the "diversity of views, origins and interests of the global internet community" are sufficiently [represented](#). The issue of diversity is of particular importance to stakeholders from developing countries and economies in transition.

The recommendation to improve diversity is not new to ICANN, and has been previously identified at many instances, such as recommendations of the Accountability and Transparency Review Team ([ATRT](#)) and the [ATRT 2](#). These reviews of accountability and transparency were required as per the Affirmation of Commitments ([AoC](#)). It is also worth noting that ICANN bylaws specify the requirement of diversity. However, the CCWG Accountability reviewed these existing mechanisms for improving diversity and found them to be inadequate. To address the concerns raised by the comments the following recommendations were made:

Including diversity as an important element for the creation of any new structure, in the context of the IANA Transition, these new structures would include the Independent Review Process (for diversity requirements for the Panel) and the ICANN Community Forum.

- Adding Accountability, Transparency and Diversity Reviews of Supporting Organizations and Advisory Committees to structural reviews as part of Work Stream 2. This implies that the ATRT reviews now will be expanded to include 'Diversity' as a criteria for evaluation. One of the significant changes to the recommendation from the third draft proposal after the comments is the decision to include the input from the Public Expert Group (PEG) Advisor to strengthen the diversity requirement.
- A more detailed review to create a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship

program and other ICANN outreach programs). The CCWG Accountability noted that the current documents do not completely address the concerns raised by the wider community on the issue of diversity.

- Identifying the possible structures that could follow, promote and support the strengthening of diversity within ICANN
- Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2
- Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions.

5. Transparency

Transparency is critical to any discussion on accountability, as it operationalizes the other means of accountability. Transparency is absolutely [essential](#) for ICANN, as it facilitates participation of the various stakeholders by allowing them to understand the functioning of the organization, constantly evaluate decision making processes and submit their input through comments. As part of Work Stream 2, CCWG-Accountability will review and modify the existing transparency measures to improve ICANN's transparency. In particular, it shall examine:

- Enhancing the Documentary Information Disclosure Policy (DIDP): Similar to Right to Information (RTI) requests, DIDP exists to provide the public with access to its documents by making an information request. However, this request can be denied if it falls under any of the 12 defined conditions for nondisclosure of information. There have been complaints that these conditions are excessively broad. CCWG-Accountability shall review and update ICANN's DIDP within two years, with the aim of justifying denials of requests with a specific harm, and limiting the scope of non-disclosure.
- ICANN's interactions with governments: CCWG-Accountability shall consider recommending that ICANN disclose information about any interaction with

government officials, and also report the amount spent on government engagement activities, like lobbying.

- ICANN's whistleblower policy: CCWG-Accountability shall study the existing whistleblower policy and recommend improvements to it.
- Transparency of Board deliberations: As suggested by some [comments](#), transparency should be extended to every level, including Board deliberations. Information such as meeting transcripts, recordings and publicly archived mailing lists all help the public understand how the Board arrives at its decisions.

Internet Governance Discussions at ICANN 55: CCWG-IG and the GAC Agenda

ICANN is a part of the larger internet governance ecosystem. The Cross Community Working Group on Internet Governance (CCWG-IG) was made to strategize and study ICANN's interface with other institutions and processes in the internet governance ecosystem. While ICANN's Governmental Advisory Committee (GAC) addresses international public policy concerns in the ambit of ICANN's work.

CCWG on Internet Governance:

The [Charter](#) of the CCWG on Internet Governance provides that it has been "established by the participating SO's and AC's to coordinate, facilitate, and increase the participation of the ICANN community in discussions and processes pertaining to Internet Governance". At ICANN55, the CCWG on IG will be hosting a public session which will update the ICANN community on developments in the Internet governance sphere. As per the tentative [agenda](#) this will include a brief update on the WSIS process, and a discussion on other contemporary issues in the internet governance sphere. The Group has also invited representatives from other internet governance processes and institutions such as the Working Group on Enhanced Cooperation, and Internet Governance Forum.

The CCWG-IG submitted inputs to the NETMundial 2014, the CSTD Mapping of International Internet Public Policy Issues Exercise, 2014 and the UNESCO Connecting the Dots Conference, 2015. This group will also be discussing future engagements on different Internet governance fora. The public session of the group at Marrakech will also feature a discussion on fragmentation vs. openness of the Internet.

GAC: ICANN High Level Governmental Meeting

The High Level Governmental Meeting at ICANN is one of the most closely followed sessions. It displays the priorities of governments and sovereign states in the larger internet governance arena. Given the questions and debates surrounding the role of governments at ICANN55, the [agenda](#) of the High Level Governmental Meeting to be held on 7th March, 2016 will be of interest to most stakeholders. Split into four main sessions, the first will be a discussion on the “Outcomes of the IANA Stewardship Transition”. During this session, the Chair of the GAC, Thomas Schneider, along with ICANN CEO, Fadi Chehade and Assistant Secretary at NTIA, Larry Strickling will be speaking on the transition process. The second session will be on “Enhancing ICANN Accountability and Government's' role in the new ICANN framework”. This session will see the participation of the co-Chairs of the CCWG-Accountability, along with President of the ICANN Board, Steve Crocker, and the GAC Chair, Thomas Schneider.

The sessions in the afternoon will be on substantive issues of particular interest to developing countries. The session on New gTLD Program and Public Policy will be discuss the findings of the New gTLD Program Implementation Review Findings and its impact on developing countries and economies in transition. This session will also include case studies and a discussion on public policy implications for the next round of gTLDs. The final session on “The DNS, Developing Countries and Capacity Building: What role for ICANN?” will involve discussions on overcoming barriers to participation and representation in the ICANN in addition to capacity building.