



**CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW
UNIVERSITY, DELHI**

**Comments on CCWG-Accountability Work Stream 2 - Draft
Recommendations to improve ICANN's Transparency**

The Centre for Communication Governance at National Law University, Delhi (CCG) thanks ICANN for the opportunity to submit this comment. We also appreciate the efforts of the transparency sub-group in Work Stream 2 for their efforts in producing draft document on improving ICANN's Transparency.

We recently published a report on Indian participation in international internet governance institutions over the last 5 years (2011-15).¹ The Berkman Klein Centre for Internet and Society in their 2010 Review of ICANN's accountability and transparency noted that there is a deficit in active, passive and participatory transparency.² It has also been argued that accountability measures normally seen in private corporations, standards bodies and government agencies are absent in the case of ICANN.³ As part of our report, stakeholders have also stated that many

¹ Puneeth Nagaraj and Aarti Bhavana, "MultiStakeholderism in Action: Analysing Indian Engagement at Global Internet Governance Institutions (2011-15)", Centre for Communication Governance October 2016, available at <tinyurl.com/ccgmsreport> (last accessed 11th April, 2017).

² *The Berkman Centre for Internet and Society, "Accountability and Transparency at ICANN: An Independent Review"*, (2010) p. 15 available at <<https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf>> (last accessed on 11th April, 2017).

³ Milton Mueller, "ICANN, Inc.: Accountability and participation in the governance of critical Internet resources" Internet Governance Project, Paper IGP09-002, available at <<http://internetgovernance.org/pdf/ICANNInc.pdf>> at p. 2 (last accessed 11th April, 2017).

important discussions take place behind closed-doors, ignoring public input.⁴ This contrasts with the notion that ICANN operates through an open, bottom-up multistakeholder fashion.⁵

Our submission responds to specific recommendations made in the draft report and identifies areas that were not covered by the report.

Transparency of Board Deliberations and Contracts

The ICANN Board of Directors has in the past been criticised by the Berkman Centre among others for conducting closed door deliberations.⁶ This is problematic as ICANN's bylaws do not contain clear rules for the conduct of Board meetings.⁷ We agree with the recommendations made in this section with respect to the DIDP exception not applying to the minutes, factual information and deliberations of the Board.⁸

However, it has been pointed out that there are other ways in which the Board can operate in a non-transparent way. Mueller for instance argues that the critical details of many policies are usually contained in the Board's contracts with private parties, and are not subject to the bottom up policy process or transparency requirements.⁹ This is noted in Recommendation 11 in section II which recommends the removal of contracts from DIDP exception.¹⁰ Since contractual terms affect policy issues within ICANN, we recommend that this recommendation

⁴ See Monika Ermhert, *Is ICANN Policymaking Around Its Bottom-Up Multistakeholder Process?*, Intellectual Property Watch (12th April 2013), available at <<http://www.ip-watch.org/2013/04/12/is-icann-policymaking-around-its-bottom-up-multistakeholder-process/>> (last accessed 11th April, 2017); Damien Cake in an interview with John Gilmore, *It's Time for ICANN to go*, Salon Magazine (3rd July, 2002) available at <https://www.salon.com/2002/07/02/gilmore_2/> (last accessed 11th April, 2017).

⁵ See, "Welcome to ICANN", available at <<https://www.icann.org/resources/pages/welcome-2012-02-25-en>> (last accessed 11th April, 2017).

⁶ See for instance, *House subcommittee to hear criticism of ICANN*, NSI (22nd January, 2002) available at <<http://www.cnet.com/news/house-subcommittee-to-hear-criticism-of-icann-nsi/>>; and public comments submitted by IP Justice to ICANN Accountability and Transparency Review Team (20th July, 2010), available at <<https://forum.icann.org/lists/atrt-public-input/msg00014.html>> (last accessed 11th April, 2017). This issue has also been addressed by The Berkman Centre for Internet and Society, "Accountability and Transparency at ICANN: An Independent Review", (2010) p. 15 available at <<https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf>> (last accessed on 15th August, 2016).

⁷ Article VI, ICANN Bylaws, available at <<https://www.icann.org/resources/pages/governance/bylaws-en#VI>>, (last accessed 11th April, 2017). See also.

⁸ CCWG-Accountability Work Stream 2, "Draft Recommendations to improve ICANN's Transparency", available at <<https://www.icann.org/en/system/files/files/ccwg-accountability-ws2-draft-recs-improve-transparency-21feb17-en.pdf>> (last accessed 11th April, 2017) at p. 22.

⁹ Milton Mueller, "ICANN, Inc.: Accountability and participation in the governance of critical Internet resources" Internet Governance Project, Paper IGP09-002, available at <<http://internetgovernance.org/pdf/ICANNInc.pdf>> (last accessed 11th April, 2017) at p. 2.

¹⁰ CCWG-Accountability Work Stream 2, "Draft Recommendations to improve ICANN's Transparency", available at <<https://www.icann.org/en/system/files/files/ccwg-accountability-ws2-draft-recs-improve-transparency-21feb17-en.pdf>> (last accessed 11th April, 2017), at p. 20.

be changed to a proactive responsibility to disclose contracts entered into by the board or by ICANN.

ICANN Policy Processes

Respondents interviewed as part of our report highlighted specific areas where ICANN needs to be more transparent. The At Large Advisory Committee (ALAC) for instance, has come in for much criticism from Indian stakeholders for resisting accountability measures.¹¹ ALAC not taking on board transparency recommendations has been singled out for criticism.¹² In the past, we have noted that the allocation of funds from gTLD auctions functioned without an overarching framework of transparency and accountability-based criticisms.¹³ Other Indian stakeholders have also questioned the functioning of such a system without oversight or any framework of accountability.¹⁴

The gTLD auction proceeds and the ALAC review were two areas that were highlighted by Indian stakeholders. With this in mind, we recommend that the sub-group look at other similar processes and document areas where ICANN's transparency can be improved.

¹¹ Intervention by an Indian stakeholder on the At-Large Worldwide mailing list (last accessed 11th April, 2017), on file with the authors.

¹² *Id.*

¹³ Public comment submission by Centre for Communication Governance on the New gTLD Auction Proceeds Discussion Paper, available at <<http://forum.icann.org/lists/comments-new-gtld-auction-proceeds-08sep15/pdfdpj9HDDbXo.pdf>> (last accessed 11th April, 2017).

¹⁴ Public comment submission by Government of India on the New gTLD Auction Proceeds Discussion Paper, available at <<https://forum.icann.org/lists/comments-new-gtld-auction-proceeds-08sep15/pdfXVALj8hwRn.pdf>> (last accessed 11th April, 2017).