CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the CCWG - Accountability 2nd Draft Proposal on Work Stream 1 Recommendations[1]

At the outset, CCG appreciates the efforts taken by the CCWG in incorporating significant changes in this draft of the Accountability proposal.

We reserve our comments on the issue of jurisdiction for later, as we recognize that this is a highly contentious issue that could detract from the progress made so far.

In answer to the questions raised:

1. DO YOU AGREE THAT THE CCWG - ACCOUNTABILITY PROPOSAL ENHANCES ICANN'S ACCOUNTABILITY?

In the Affirmation of Commitments, ICANN committed to ensuring accountability, transparency and the interests of global Internet users.[2] We commend the fact that steps enhancing ICANN accountability are reflected in this proposal. However, since we see strong accountability measures as essential in the absence of any government oversight, we are using this note to suggest ways in which ICANN Accountability may be improved further, building on some of the measures already discussed in the CCWG

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[1] These comments have been authored by **Aarti Bhavana** with inputs from **Gangesh Varma** & **Puneeth Nagaraj**.

[2] Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers 9.1 available at https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en.

Accountability proposal. This part of our comments begins with highlighting the significance of accountability for ICANN. It then discusses transparency, consultation, and review and redress, which we see as component parts of accountability. After outlining our expectations in these terms, we conclude this part with our suggestions.

a. Significance of Accountability

It is necessary for an organization to be able to answer the fundamental question of who is accountable to whom and for what?[3] The answer to this question is complex for a private institution providing a public service, such as ICANN.[4] If we accept Robert Behn's articulation of who public managers should be accountable to, we would find that they need to be accountable to 'everyone'.[5]

In the past, ICANN has identified three types of accountability that apply to itself: public sphere accountability, corporate and legal accountability, and participating community accountability.[6] These have been included in the CCWG proposal, and must be kept in mind when dealing with Work Stream 2 issues.

In a multistakeholder model, where collaboration is essential for effectiveness, a clear accountability framework is necessary to review the action of various actors.[7] It ensures that the decision makers are exercising their powers in a fair and legitimate manner, in the interest of the public. According to International Institute for Sustainable Development

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[3] Tom Fitzpatrick, *Horizontal Management: Trends in Governance and Accountability*, Canadian Centre for Management Development Ottawa: Treasury Board of Canada, 2000, p. 6 available at http://publications.gc.ca/collections/Collection/SC94-112-2000E.pdf.

[4] JV Denhardt and RB Denhardt, THE NEW PUBLIC SERVICE (2007), p. 135.

[5] Robert Behn, RETHINKING DEMOCRATIC ACCOUNTABILITY (2001), p. 120.

[6] ICANN Accountability & Transparency Frameworks and Principles (2008) available at https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf.

[7] RW Grant and RO Keohane, *Accountability and Abuses of Power in World Politics* IILJ Working Paper 2004/7, Global Administrative Law Series, p. 1 available at http://www.iilj.org/global_adlaw/documents/GrantKeohanePaper.pdf.

for the Canadian Internet Registration Authority,[8] there are two kinds of accountability models applicable in the context of Internet Governance: delegation model or upward accountability and participation model or downward accountability. The upward accountability model does not fit in a post-transition world where the NTIA oversight is removed. In keeping with the participative multistakeholder model, ICANN needs to follow a 'downward accountability' model, where accountability is evaluated by those affected by the power-holders, i.e. stakeholders.

The CCWG proposal has been drafted bearing in mind these four dimensions of accountability: Transparency, Consultation, Review and Redressal.[9] These dimensions align with general accountability norms. For example, Avri Doria highlighted Oversight, Transparency and Methods of redress as the common elements of accountability.[10]

b. **Transparency**

Transparency is essential as it operationalizes the other means of accountability.[11] As per the OECD, it 'refers to the amount, scope, quality, accuracy and timeliness of information which is accessible to relevant stakeholders.'[12] Transparency is absolutely essential for ICANN, as it facilitates participation of the various stakeholders by allowing

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[8] Accountability and Transparency in Internet Governance, Issue Paper, International Institute for Sustainable Development for the Canadian Internet Registration Authority, (2006) available at http://forum.icann.org/lists/principles-comments/pdfGTBeUoIu4m.pdf.

[9] Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1) available at https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en, ¶ 123.

[10] Avri Doria, 'ICANN Globalization, Accountability, and Transparency', BEYOND NETMUNDIAL, W. Drake and M. Price (eds.), available at http://www.global.asc.upenn.edu/publications/beyond-netmundial-the-roadmap-for-institutional-improvements-to-the-global-internet-governance-ecosystem/.

[11] Accountability and Transparency in Internet Governance, Issue Paper International Institute for Sustainable Development for the Canadian Internet Registration Authority, (2006) available at http://forum.icann.org/lists/principles-comments/pdfGTBeUoIu4m.pdf.

[12] Implementation Guide to Ensure Accountability and Transparency in State Ownership, available at http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/40096845.pdf.

them to understand the functioning of the organization, constantly evaluate decision-making processes and submit their input through comments.[13]

CCWG must keep in mind these three types of transparency: Active, passive and participatory transparency.[14] These ensure that ICANN proactively makes information available, satisfactorily replies to requests for information, and develops an open and accessible platform for public participation. They must be available at every stage, so the each step of functioning is open and visible to the public, which is a crucial step in ensuring ICANN is accountable to the stakeholders.

c. Consultation

Transparency of decision-making is important from the point of view of consultation. With input solicited from various stakeholders, it is necessary that there is transparency of utilization of the input. As suggested earlier, there must be transparency at every stage of functioning, and this includes decision-making as well. The transcripts from meetings must, in adequate detail, capture the reasons behind a particular decision being taken.[15] This needs to extend to the participating SO/ACs and Community Forum as well.

In order to fulfill the requirement of Transparency and Consultation, the exact role of SO/ACs, in light of the CMSM, must be clarified. This is discussed in greater detail below. However, from an accountability perspective, it is important that we understand how the process of input gathering is to take place. In order to facilitate transparency, it is also important that we know which organisations are going to participate in the CMSM. Not all SOs and ACs have decided whether they want to participate in the model

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[13] Accountability and Transparency in Internet Governance, Issue Paper International Institute for Sustainable Development for the Canadian Internet Registration Authority, (2006) available at http://forum.icann.org/lists/principles-comments/pdfGTBeUoIu4m.pdf.

[14] Accountability and Transparency at ICANN: An Independent Review, The Berkman Centre for Internet and Society, (2010) p. 15 available at https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf.

[15] See Accountability and Transparency at ICANN: An Independent Review, The Berkman Centre for Internet and Society, (2010) p. 41 available at https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf.

or not. There must be a time limit within which this decision must be communicated to the public, as it is essential to know which bodies are being vested with this power.

d. Review and Redress

External oversight, i.e. review, is an integral aspect of accountability. ICANN currently provides three mechanisms for review, and provide redress where needed: Reconsideration, Independent Review Process and Ombudsman.[16] Further comments on this can be found in answer to question 3.

e. Our Suggestions

It is essential that there is a system of checks and balances over SOs and ACs. The proposal recommends regular review as a part of Work Stream 1, with the more substantial changes slated for Work Stream 2. However, we submit that it is essential to spend some more time in evaluating accountability criteria for SO and AC at this stage, given the significant powers sought to be vested with them. Work Stream 2 will be finalized only in July 2016, at the earliest. Anticipating further delays, it is necessary that there be an accountability mechanism in place before participating SO and AC are given voting rights over community powers.

In brief, we recommend that the role of SO/AC be clarified in light of the new powers sought to be vested in them via the Sole Member. Further, there must be a disclosed deadline within which the public is informed about which SO/AC will be participating in the CMSM. Finally, the SO-AC accountability framework must be decided before the CMSM is established.

We believe that while the present proposal does enhance ICANN accountability, more needs to be done, as has been highlighted above, and detailed in our answer to the third question.

2. ARE THERE ELEMENTS OF THIS PROPOSAL THAT WOULD PREVENT YOU FROM APPROVING ITS TRANSMISSION TO CHARTERING ORGANIZATIONS?

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[16] Accountability Mechanisms, ICANN, available at https://www.icann.org/resources/pages/mechanisms-2014-03-20-en.

There are certain aspects of the proposal that we find problematic, which need to be resolved:

a. Lack of clarity regarding the Sole Membership Model

According to the California Corporations Code, a member is '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 or [...] has the right to vote on changes to the articles or bylaws'.[17] Further, it is possible for two or more persons to have an indivisible interest in a single membership, as long as this is provided for in the bylaws of the organization.[18] While the merits of a membership model align with the powers sought to be vested with the Community, the proposed *Single* Member Model seems ambiguous and complicated for reasons elaborated below.

The proposal suggests that ICANN be converted into a Membership Organization with just one Member: a California unincorporated non-profit association (legal person).[19] This member relies on SO/ACs to participate, as the cumulative vote of these Chartering Organizations becomes the action of the member. However, it is clearly stated that while these organizations *participate* in the member, they do not form a *part* of it. This model leaves a critical issue ambiguous - it is not clear who exactly forms a part of this 'Sole Member'. This association has no officers, directors or assets, which in turn raises the question: who exactly forms this Sole Member? And if the SO/ACs have an indivisible interest in the Sole Member (as per § 5312), shouldn't they form the Member? While ICANN blog posts leading up to the proposal[20] state that the CMSM will be composed of these SO/ACs, the proposal itself is quite clear in stating that the organizations merely participate in the Member. The proposed structure raises doubt about the exact status of the Chartering Organizations, and clarification is needed in this regard.

It appears that concern over Capture in the SO/AC Membership Model seems to be the

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[17] California Corporations Code, §5056(a).

[18] California Corporations Code, §§5312(a), 5612.

[19] List of Questions, CCWG-ACCOUNTABILITY Webinars on Second Draft Proposal, available at https://community.icann.org/pages/viewpage.action?pageId=54695403.

[20] Volume 8: An Update on IANA Stewardship Discussions, available at https://www.icann.org/news/blog/volume-8-an-update-on-iana-stewardship-discussions.

driving force behind the Sole Membership Model Proposal. However, we are concerned especially because even the legal assessment from Sidley Austin LLP and Adler & Colvin on 23rd April advised against the Single-member model on the ground that it would create complexity without adding any real advantage, since it has the same legal viability as a multiple-member model.[21] This seems to be the only legal assessment where the legal counsels have offered an opinion based on a comparison of the available models. In a presentation made by Sidley Austin LLP and Adler & Colvin on 7th July, the sole member model was not mentioned.[22] However, upon a request made during the presentation, the counsels amended it to include a legal analysis of CMSM as well.[23]

It is therefore unclear why the Single-member model was chosen and it would help to receive more information about why this choice was made.

b. **Membership voting structure**

As discussed above, certain SO/ACs participate in the Member by voting. The proposed voting structure gives an equal number of votes (5) to ASO, ccNSO, GNSO and ALAC, with GAC, SSAC and RSSAC[24] having the option to join in as well. At the outset, we

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[21] Sidley Austin LLP and Adler & Colvin, Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart, available at https://community.icann.org/download/attachments/52890082/update%20Legal%20Assessment%20-%20Executive%20Summary,%20Summary%20Chart%20and%20Revised%20Governan....pdf?version=1&modificationDate=1430442481000&api=v2.

[22] Sidley Austin LLP and Adler & Colvin, Empowered SO/AC Membership & Designator Models for Community Empowerment, Description, Comparison and Legal Analysis, available at https://community.icann.org/display/acctcrosscomm/Responses+to+CCWG-Accountability+Requests.

[23] Sidley Austin LLP and Adler & Colvin, Empowered SO/AC Membership & Designator Models for Community Empowerment (And "Community Mechanism As Sole Member" Variation), Description, Comparison and Legal Analysis [Revised], available at https://community.icann.org/display/acctcrosscomm/Responses+to+CCWG-Accountability+Requests.

[24] The proposed allocation gives SSAC and RSSAC 2 votes each.

suggest that the exact role played by SO/ACs in the CMSM needs to be clarified, as it is missing from the current Proposal.

The ICANN bylaws (Article XI)[25] clearly establish the role of Advisory Committees as recommendatory in nature. By giving them voting rights, their powers become dual-recommendatory and voting, which significantly changes the power structure within ICANN. Therefore, the issue of whether ACs should be given voting rights (equal or any) needs to be examined in greater detail.

Even if it is decided that some/all ACs retain a purely advisory role, the bylaws must mandate that the recommendations be given within a defined reasonable period of time to avoid decisions being held hostage to delayed input from these organizations.

It would make sense for GAC and ALAC to join the Community Mechanism since they represent stakeholders and their participation is necessary for the multistakeholder model. However, the situation is different when it comes to RSSAC and SSAC. As Milton Mueller points out,[26] the chair and members of the RSSAC and SSAC are appointed entirely by the Board,[27] which calls into question the independence with which the Board can be held accountable to them. Further, these ACs function only to provide technical advice, and its members are represented on other communities, therefore they should not be given voting rights in the Community Mechanism.

The role of the GAC in the new model poses a different set of problems. The Bylaws provide that if the Board decides to take an action contrary to GAC advice, it must try to find a mutually acceptable solution. If no such solution can be found, it must provide, in writing, the reasons for not following GAC's advice.[28] Thus, even in the present

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[25] Article XI, ICANN Bylaws, available at https://www.icann.org/resources/pages/governance/bylaws-en#XI.

[26] Milton Mueller, *Power Shift: The CCWG'S ICANN Membership Proposal*, available at http://www.internetgovernance.org/2015/06/04/power-shift-the-ccwgs-icann-membership-proposal/.

[27] Article XI, ICANN Bylaws, available at https://www.icann.org/resources/pages/governance/bylaws-en#XI.

[28] Article XI, Section 2(1)(j), (k), ICANN Bylaws, available at https://www.icann.org/resources/pages/governance/bylaws-en#XI.

structure, GAC has a privileged advisory status. This Committee is now being given the option to join the Community Mechanism with 5 votes. Members of GAC acknowledge that it is 'first among equals' and do not wish to let go of that status.[29] However, as pointed out above, ACs cannot have both voting and advisory rights. This is of particular significance for GAC, because of this privileged advisory role. Should it choose to opt into the community mechanism, it must not be allowed to retain its advisory position. It is our submission that as it is unfair for GAC to retain a privileged status in a multistakeholder model, the bylaws should be amended to give GAC the same advisory status as the other ACs, thereby creating a level playing field.

Finally, the minority statement by Edward Morris[30] raised a pertinent concern about overlapping members. Entities who are members of multiple voting SO/ACs will have multiple voting rights, which is unfair and undemocratic. Therefore, as suggested by Morris, if an entity is a member of multiple SO/ACs, they must choose and be allowed to vote in only <u>one</u> SO/AC.

c. **Community Veto**

The proposal makes several references to a community veto of Board decisions. However, it is important to note that members only have the right to *prospectively* approve or veto certain board actions, not do so retrospectively unless there is a specific requirement for further approval.[31] We agree with Sidley Austin LLP that if the bylaws

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[29] GAC Meeting, ICANN 53 Meeting, transcripts available at https://buenosaires53.icann.org/en/schedule/sun-gac-morning/transcript-gac-morning-21jun15-en, https://buenosaires53.icann.org/en/schedule/tue-gac-afternoon/transcript-gac-afternoon-23jun15-en and https://buenosaires53.icann.org/en/schedule/wed-gac-morning/transcript-gac-morning-24jun15-en.

[30] Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1) available at https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en ¶¶ 1533-1535.

[31] Sidley Austin LLP Preliminary Response to Legal Sub-team Questions Identified in Memorandum Ref CCWG/SA/001, Initial Discussion Draft 1 (March 27, 2015), p. 4, available at http://mm.icann.org/pipermail/ccwg-accountability5/attachments/20150327/5ab17cd5/SidleyPreliminaryDraftResponsestoCCWGLegalSub-teamQuestionnaire-0001.PDF.

are amended to the effect of requiring this further approval, care must be take to balance accountability requirements with efficiency.[32]

3. DOES THIS PROPOSAL MEET THE REQUIREMENTS SET FORWARD BY THE CWG-STEWARDSHIP?

Our comments on the individual CWG Stewardship requirements are as follows:

i. ICANN Budget

We appreciate the separation of the ICANN and the PTI-IANA budgets. This measure, as noted by CCWG, would provide additional protection to the IANA budget, which would be independent of the ICANN budget. While we understand that most of the details of the ICANN Budget and community oversight will be developed in Work Stream 2, we believe (and agree with the CCWG) that these proposals should be developed bearing in mind the overarching notion of transparency.

Transparency, according to the International Law Association's Committee on the Accountability of International Organizations, is the central tenet of good governance.[33] Transparency, according to the ILA should extend to both the decision making process and the implementation processes that accompany it.[34] This should be supplemented by access to information to all potentially concerned and/or affected by the decisions made. We submit that these should be the governing ideals of the CCWG when it comes out with a more detailed proposal on the ICANN Budget.

Putting this in practice, it would mean that the Board should open lines of communication with the community mechanism during budget discussions to reduce chances of a veto. We would recommend that any budget proposal in the next work stream be measured against international transparency and accountability standards.

ii. ICANN Board and Community Empowerment Mechanisms

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[32] *ibid.*

[33] International Law Association, Third Report of the Committee on Accountability of International Organisations, (2002) at p. 772.

[34] *ibid.*

The proposal states that before any CMSM power is used, there needs to be a debate and discussion in the Community Forum. This provides a public platform for the whole community to provide inputs before the participating SO and AC make decisions through the Community Mechanism. This is a positive step from an accountability perspective, as it mandates transparency and consultation. The proposal also states that ICANN accountability is necessary to ensure decisions are for the benefit of the public, and not just a set of stakeholders or the institution itself. To achieve that, it is essential that the process is implemented in the open manner, as proposed.

iii.   Appeals Mechanisms

The appeal to the IRP panel's decision to a larger panel is based on inadequately defined standards, and these need to be clearly stated. This would ensure the development of predictable, clear and coherent body of law that can be relied upon. The efficient functioning of the IRP and appeals process is dependent on the development of adequate supporting transparency mechanisms such as the Documentary Information Disclosure Policy (DIDP). However, a review and enhancement of the DIDP is recommended only as part of Work Stream 2. We recommend that the reforms in the IRP be supported with appropriate amendments in the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process that provide clearly stated parameters for operation of the reformed IRP.

iv.   Post-Transition IANA (PTI) Governance

We have two concerns with regard to the PTI. First, and as mentioned in our comments on the ICG Proposal on the IANA transition,[35] the PTI contracting structure is unclear. While the Names Community wants to contract with the PTI, the other two communities have not made their position on this issue clear. This is an important question from a governance perspective as issues of liability, primary responsibility for

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[35] CCG-NLUD Comments to the Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community available at http://ccgdelhi.org/doc/(CCG-%20NLUD)%20Comments%20to%20ICG%20Proposal.pdf.

the IANA functions and agency are based on the nature of the contract between the communities and ICANN/PTI.

Our second concern is about the nature of the relationship between the ICANN and the PTI and the independence of the PTI from the ICANN. The ICG proposal states that PTI will be an "affiliate (subsidiary)" of the ICANN. However, neither the ICG nor the CCWG proposals spell out the structure of this parent-subsidiary relationship and the amount of control the ICANN would have over the PTI. This concern is amplified by the possibility of one or more of the communities contracting with the ICANN directly rather than the PTI. Further, PTI contracts with ICANN to perform its only function of being the IANA Functions Operator (IFO). While it is not problematic for a subsidiary to contract with its parent, for it to be its only function raises questions of independence. This opens ICANN to potential lawsuits from third parties who could 'pierce the corporate veil'.[36] This would serve to undermine the purpose of creating a subsidiary with a distinct legal personality and could make ICANN liable for the actions of PTI.

v. Fundamental bylaws

As stated in the proposal, the relationship between fundamental bylaws and accountability is indirect, in the sense that it helps create a sense of stability in the ICANN structure. We agree with CCWG that only the most critical provisions should be given this protection, to prevent a rigid structure. The proposed procedure does take Consultation into account, as use of any community power (such as changing/adding a fundamental bylaw) first requires a discussion in the Community Forum. As discussed above, this increases ICANN's transparent and consultative nature. Further, this also helps satisfy the principle of ensuring decisions benefit the public and not just a set of stakeholders.

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[36] To pierce the corporate veil is to find that the subsidiary and the parent company have the same legal personality. California law provides that when there is "unity of interest and ownership" and if acts of the subsidiary are treated as acts of the parent, an equitable result will follow. See, *Automotriz del Golfo de Cal. v. Resnick*, 47 Cal. 2d 792.