ROUNDTABLE ON ICANN ACCOUNTABILITY

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REPORT OF PROCEEDINGS

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The Centre for Communication Governance at National Law University Delhi hosted an ICANN Accountability Roundtable on March 13, 2015 in New Delhi in collaboration with the Department of Electronics and Information Technology, Government of India, and the National Internet Exchange of India. The Roundtable, comprising two sessions – the first on the IANA transition and related accountability concerns, and the post-noon discussion on accountability of ICANN in general – was held at the India International Centre. This report offers a brief summary of discussions from the event. Names and affiliations of participants, barring those who briefed stakeholders for the record, have been withheld since the roundtable followed Chatham House rules of engagement.

SESSION I: NTIA IANA FUNCTIONS' STEWARDSHIP TRANSITION AND RELATED ACCOUNTABILITY CONCERNS

The layout of roundtable discussions was in line with the mandate of the Cross Community Working Group that is currently debating measures to enhance ICANN accountability. The CCWG is expected to submit a draft report for public comment by the end of April, at the latest. The first session focused on CCWG Work Stream 1: policies to ensure the IANA transition process and outcome -- from NTIA's oversight to a multistakeholder entity -- is rendered accountable to the larger internet community.

The discussion began with an overview of the process itself, with Samiran Gupta, ICANN Country Head for India, providing a status update on the work of the three nodal working groups drafting transition – the Cross-Community Working Group on Naming-Related Protocols, the Consolidated Regional Internet Registry Team working on Protocol Parameters and the CCWG-Accountability. Samiran's update was followed by an extended interaction between the roundtable participants and Milton Mueller. Prof. Mueller is a member of the IANA Stewardship Coordination Group which will forward the final proposal to the NTIA as and when the draft proposals are ready.

Samiran Gupta explained how policy questions around ICANN accountability became central to the IANA transition after the NTIA's announcement of March 2014. He highlighted that the ICANN Board does not have a veto power over the recommendations of the Cross-Community Working Groups on names and numbers. Mr. Gupta encouraged stakeholders to access updated information on the IANA stewardship micro-site in the coming weeks.

Milton Mueller began with an update on the ICG's working methods, on account of the sensitive timeline for the IANA transition. He addressed three major questions.

1. Whether it is indeed possible to effect the IANA transition by September 30, 2015.

2. What is the ICG debating with regard to the draft proposals that are sent in by the CWG names?

3. In the ICANN meetings that follow, what he expected -- as an ICG member – would be issues flagged by various stakeholders?

Prof. Mueller informed the roundtable discussants that the ICG had received two proposals out of the three. One of them was from the protocols community and the other from the numbers community. The Names Committee is the most politically contentious and the ICG is still awaiting their proposal.

When looking over the Numbers and Protocols proposals, a small question the ICG had was about their compatibility and had to do with the separability of the IANA function from ICANN. ICANN is performing the IANA function under a contract with the NTIA and the protocols community (IETF) has had an MoU since 2000 with ICANN. That MoU essentially states "you will continue to do this function for us and we will negotiate a service level agreement with you and if you [ICANN] don't perform those functions to our [IETF's] satisfaction then we can move the provider of this function to someone else".

So, the Numbers community [as elucidated in the CRISP proposal], explained Prof. Mueller, decided that they wanted to have the same ability to contract with ICANN for the IANA functions. The CRISP proposal goes a step further and suggests that the IANA domain which hosts the representation of the IANA registries online and the trademark IANA -- both registered with ICANN – should be separate from ICANN. In the event the numbers community wants to switch providers, this will avoid a dispute over the IANA.ORG domain or the trademark IANA.

The Numbers community specifically proposed that the domains and the trademark be given to the IETF trust and taken away from ICANN. That issue was discussed in the Protocols proposals but not settled, suggested Prof. Mueller, and therefore the ICG was worried whether the proposal of the Numbers community was compatible. The ICG asked if the

protocols community had any objections to the proposal of the Number people. The IETF responded saying it would be okay for the IETF trust to hold the trademark and domain for IANA instead of ICANN. In sum, it means the two proposals are compatible, said Prof. Mueller.

Now, the ICG is waiting for the Names community to give their proposal. The Stewardship Coordination Group hopes they give their proposal by the time for the Buenos Aires ICANN 53 to be held in mid-June 2015, said Prof. Mueller. "If we get a viable Names proposal by then, we can come fairly close to meeting the original goal of submitting our proposal to the NTIA and them completing the transition by end of September 2015".

Prof. Mueller explained the discussion and debate currently underway in the names community – "the CWG is having an interesting discussion on whether they should make the IANA function separate from ICANN also, the way that the Numbers and Protocols community has done. The competing proposal is whether they should try and keep it internal to ICANN as it is now and simply rely on the general CCWG accountability process to take care of any problems associated with the IANA functions."

Prof. Mueller's briefing on the IANA transition draft proposals was followed by a Q&A and general discussion with roundtable participants.

QUESTIONS & ANSWERS [AS EDITED TRANSCRIPT]

Q: What has been ICG's interaction with the CCWG on accountability – where do you think it is headed vis-à-vis the IANA Transition because Work Stream 2 seems to have an open timeline compared to the rest?

(Milton Mueller) MM: The way the process is structured, the ICG does not have much of say on what is accountability and what is not. We have to rely on consensus within the operational communities. For example, if the names community gives us a proposal stating this is how much accountability we want for the IANA functions, we have to accept that. All we can do is judge whether it meets the NTIA criteria or not. We simply have a passive role of verifying that the proposal meets the established criteria: the ICG cannot tell them "we do not like this, you have to go back and do it a different way".

Q: What has been ICG's interaction with the NTIA so far? It is remarkable that at ICANN 52 the NTIA was actively involved in discussions in CCWG on Names and Accountability issues.

MM: First I will talk about how we interact with the CCWG on accountability and then our interactions with the NTIA. The important thing to understand is that there are two different aspects of what ICANN is currently doing. One is that it has a massive policy making and enforcement apparatus for domain name policy and that apparatus includes the gNSO, the ccNSO, the At-Large, and the Governmental Advisory Committee — all of those groups are involved in deciding what the policy is going to be and the IANA function is just about implementing the policy. So, the IANA has a very technical and narrow function of implementing whatever policy decisions are made insofar as they involve changes to the domain name root and that is all that it does.

What the CCWG accountability is doing to a large extent is, therefore, not about IANA but about making the ICANN policy process more accountable and responsive to the communities it is supposed to reflect. In terms of ICG's communications to the CCWG, we care about only one thing and that is that certain accountability processes have to be put in place before the NTIA will authorise the transition. Those measures could delay the schedule and they have to be suitably implemented to the community as part of Work Stream 1 before we can submit a final proposal to the NTIA.

As for communication with NTIA — the first element of communication was that we learnt, to our surprise, that we could not submit the proposal directly to the NTIA but through ICANN due to some federal contracting rules. We were concerned as we did not want ICANN to make any modifications to the proposal or make any changes to it, and so ICANN has been cooperative and acknowledged that they would receive a proposal from us and they would not alter it in any way. Everybody should know what ICANN thinks about this proposal well in advance of its final stages, through public comment. And what we as the ICG care most about is: does this proposal meet the NTIA criteria, whether it is workable, and does it have broad support amongst the broadest set of stakeholders within the community? ICANN corporate is a stakeholder in this and the NTIA has recognised them as one but NTIA has also made it clear that no single stakeholder has veto and so the NTIA has to look at the entire community to see how much support the final proposal has.

Q: What will be the role of VeriSign after the transition has taken place?

MM: In some ways we are blocked from completely revising the role of VeriSign because the NTIA has said that we are only dealing with the stewardship transition of the IANA functions and not with NTIA oversight over the root-zone management. Of course, the NTIA (and everyone else) knows the NTIA's contract with VeriSign gives it final approval authority over any root-zone changes made by VeriSign and VeriSign is responsible for finally implementing the root-zone changes. Whatever plan we come up for the proposal really has to assume that the NTIA is going to follow up and alter its contract with VeriSign in a way that puts the new arrangement in charge of the way in which the root zone is modified and not give VeriSign or the NTIA any more control over the final change in the root-zone file but there has to be a step two after they have a plan. So that is a very interesting aspect of the transition.

Another interesting aspect of the VeriSign relationship is that VeriSign is legally immunised from anti-trust or any other pressure by the fact that the NTIA or the US Government is finally authorizing the changes to the root-zone and once that goes away, VeriSign will have reason to be concerned as to whether it will be considered liable for any problems or technical failures or policy issues related to changes in the root-zone file if they are still making those changes on behalf of the broader community. The odd thing is that this concern is not being directly considered by the IANA transition Working Groups. But it is in the background and a factor in our planning in what the transition arrangements are.

Q: What has been the role of governments, formally or informally, with the ICG now that we know they have had one opportunity to comment on the Names Proposal draft? And if they haven't given any formal comments during the Public Comment phase, have they approached the ICG individually and sounded out some issues?

MM: The first thing to remember is that the ICG contains of the 5 GAC members, the GAC has appointed five people to the ICG. You've got direct GAC representation in the ICG and they have been very constructive and have been asking good questions on the accountability in the two proposals that we have received, and getting the IETF to clarify certain aspects of the proposal they gave to us. That's the main way we interact with the GAC and the government through their direct representation. The next thing will happen is that the GAC or any individual Government will be able to submit comments on the final proposal that we

assemble of the three operational working groups. So, we will be looking at either one or two rounds of comments from Governments, either individually or collectively.

Q: NTIA has clearly said there should not be any dissenting opinion on the proposal and we already have a few dissents, how can we resolve these issues in the final proposals and also, ICANN basically decides on "rough consensus", so what is this "rough consensus"?

MM: The NTIA Assistant Secretary Larry Strickling made statements that he did not want dissenting views and what he meant was that he did not want to see a group or faction forming and submitting a different proposal. It would be unrealistic for him to expect that everyone in the world would agree with the final proposal 100%, there would have to be "rough consensus" rather than full consensus. Rough consensus is a term of art in the IETF and it was a decision-making criterion, which basically says that the preponderance of opinion is going in one group and that there may be dissenters but if their ideas have been heard and weighed and nobody is convinced, then one can say that we have rough consensus rather than full consensus.

Comment: The nomenclature of the CCWG's mandate is to enhance "ICANN accountability": it goes beyond the IANA functions in that they are also talking about policy-making etc. As I understand, it is a twin track of the IANA transition, but since the IANA function is currently being undertaken by ICANN and the whole process is to determine precisely who would be the future IANA operator, I am a little afraid and apprehensive that the whole process lends itself to suggest that ICANN would be the future IANA custodian and hence responsible. I suggest that the Nomenclature of the Track could be "Accountability of the IANA operator and concerned authorities." That way it is about ICANN or some other entity, which may have a policy function. This apprehension is created amongst other community members and stakeholders due to the nomenclature - just a submission and not a question.

MM: The IANA transition work stream is exclusively about the accountability of the IANA functions operator and not about the accountability of the ICANN policy-making process. But to avoid trying to do too much all at once, and for the sake of stability, everybody believes that in the short term, ICANN should perform the IANA function operator's task. And those who believe in separability, believe we should create an institutionalised way of separating the IANA function operator from ICANN, we should create an on-going process

of review and contracting similar to what the IETF has and what the Numbers people are proposing, so that the IANA function operator can be independent of ICANN. This idea is contentious which is why we have an impasse and such little progress in the Names Community because they are trying to work around these issues.

If you want to be clear with the description of the process, you should separate your discussion of ICANN's policy-making process accountability and the accountability of the IANA functions operator. One of the reasons they get mixed up is that some people believe that IANA is a way of keeping ICANN under control; If ICANN wants to continue as operator of the IANA function, it must meet standards of accountability in other areas such as policy making processes. If ICANN adheres to that, the IANA function is given to it as a reward. So it is a kind of a bargain, which is implicit in the process. And again, some of us like that bargain and some of us don't.

Comment: Another submission is that if the nomenclature of the track is changed to "Accountability of the IANA function operator and other concerned authorities", it would take in its purview not only ICANN but also other regional and local operators. So if domain names are a part of the IANA function and in a regional level, another player is performing the same task, the same principles would get extended to that player too; it should be a broader track name.

MM: When you get into the delegation of country code top-level domains, it is a very sensitive issue. People don't want the IANA operator to be the policy maker; they want those policies to be determined by a combination of the national level and global levels.

Comment: IANA as an authority that published protocols' histories is only a technical function: in reference to what you said earlier, Milton, that the IANA function is a reward to the ICANN - nothing is a reward if it is a boring technical function, the true reward is that the authority which comes in being will be the final publisher in protocol registries. This is associated with actual changes in the root-zone, which now resides with VeriSign and that is a connected issue and this key to protocol publishing and change in the root zone has been the lever of oversight. This is the lever of oversight, which was used by the US and any oversight body needs a lever.

Now what is being transitioned is an issue, we had the US government's oversight and it is accepted in many documents that there was an oversight and now this oversight is being

transitioned. Here there seems to be a brushing aside of what "oversight" connotes: which brings us to the larger question that accountability has a lower level political relationship to oversight. To add to the comment by a discussant, if indeed you say that IANA is not a form of exercising accountability, why do we keep on saying that IANA transition has accountability ramifications? This makes it clear that whoever holds the IANA function has a certain kind of authority which is connected to accountability. As another discussant said, implicitly the language is such that it is going to ICANN and hence its accountability needs to be enhanced. The implicit things are not being talked about and there is silence on such key parameters - this is a broad question, just want your comments.

MM: It is being talked about and it is a core issue. We talk about the IANA function being technical because if you make a policy and it dictates that you need to change the root-zone in a certain way, it actually needs to be implemented in a certain way. Some people look at the IANA function as a way to circumvent and intervene in the policy making process, especially some governments, which I don't want to name. This position is that if ICANN makes a policy we don't like, then we can veto it by not allowing IANA to implement that policy. And that is the position that the United States has been in the last 16 years. And that is the process we want to get rid of. We want the policy making process to be a fair and multi-stakeholder process, everybody has a voice, achieve as much consensus as possible and one need not fight the entire battle again at the IANA level and say whether IANA is able to implement it. In fact the US Congress was planning on making a law, which would establish an oversight body above ICANN and would review all its policy matters and have veto powers over the matter before it went to IANA to be implemented. It is a regressive method, as it is a way of some groups to circumvent the policy decisions that has already been made by the group as a whole. What we want to do is institutionalise the policy that ICANN makes according to fair rules and a bounded scope, which would get implemented impartially and neutrally by whoever is the IANA operator. In order to make the IANA accountable, you have to be able to change the IANA function operator in order to prevent them from usurping the power, which is supposed to be resident in the community, which makes the policy.

Another minor point: you spoke about the Protocol parameter and root-zone almost as if they were the same thing, but they are in fact completely different IANA functions done by different people. The IETF has made it clear that they could switch to another operator easily in the case of protocols but changing a DNS root zone operator would be more difficult.

Q: First, a general comment on the at-large community (ALAC). ALAC has two ways of representing people on the board. One is that we appoint a NomCoM (Nomination Committee) member. We have 5 members from different regions that are part of the NomCoM group and a big part in identifying the eight members of the Board staggering over a three-year term. This is one way in which the end-user community helps in selecting the Board members. The other way is that ALAC has a direct representative of the end users on the Board, one seat. It is interesting that the ALAC has a woman from the south at the moment representing the end users. The ALAC is fragmented and don't necessarily see everything the same way but we do have processes which allow us to distribute the thoughts of different constituencies. ALAC is very weak as far as India is concerned. Our at-large petition is restricted to five petitions or so and there is enough room to participate to more. That aside,

1. Is it true to say that ICG is the ultimate owner of the proposal, not the GAC, not the board? Does ICG have the final say on the proposal?

2. Is rough consensus necessary and sufficient condition for the acceptance of the proposal from the side of the Government because it is very hard to do that but when one submits the proposal is it likely to be rejected? Do we know the process of the acceptance of the proposal? Is there any transparency in that?

3. Is the proposal open to submission of multiple structure or alternatives or will it have just one monolithic structure that is representative?

MM: On representation of end users: within the GNSO, there are two stakeholder groups, which represent the user side who we call the 'non-contracting parties' and which is then further subdivided into the Commercial Stakeholder group and the Non-Commercial Stakeholder group. The non-commercial stakeholder group includes many of the same entities that are found in the At-large community including people who can join as individuals.

The history of ALAC is very interesting. In the early stages of ICANN's development, we wanted individual membership and global democracy for the election of Board. That is what the at-large represented and people were called the at large representatives of ICANN. As

frequently it happens with new and emerging political organisations, when people controlling it don't like the results of an election, they abolish elections and this is what happened to ICANN from 20002-2003 they created the at-large systems as we know them now which consisted of at-large organisations which you can join as a group and regions elect 3 or 5 people to the At-large advisory council. So, the ALAC is 15 people. The ALAC has a tendency in my opinion, to be clients or a defender of ICANN because ICANN boosts them up and gives them privileges that makes them dependent on ICANN for their very existence. We have seen particularly in this process that it was the At-large which was resisting the external solution for the Names Community. I am not sure how much consensus they had on that with the broader Internet users. Within the ALAC we saw many members resisting any changes that would have taken away the IANA function from ICANN's permanent control.

Moving to your questions—

First question—I am not sure what the term "ultimate owner" means. My understanding is that the operational communities actually build the proposal in their particular area and all the ICG does is assemble those parts in a whole and does some checking whether they are compatible; whether they meet the NTIA criteria; and whether they have adequate accountability mechanisms especially regarding the IANA transition. We are the final stage of what is supposed to be a bottom-up process.

Second question--- the problem with the rough consensus definition is that it does not have any precise numerical definition to it, so the standard is you have majority rule. Nobody knows what the actual definition of a rough consensus is. You usually have a consensus call by the Working Group Chair and the nature of the consensus call depends on the objectivity and impartiality of the Chair of the Working group. So will the US government be fair in deciding what is rough consensus? The US is a very political entity and will have a lot of pressure from the Congress as well as their allies from around the world, so they have to be somewhat fair. They can't be arbitrary but at the same time there is going to be a lot of leeway in terms of what they deem to be an acceptable proposal.

Third question—the proposal we are going to get out of this is not going to be monolithic. The ICG when it decided to break the process into three parts helped to ensure that the proposal as a whole and the IANA function in the proposal would not be monolithic.

Q: (*Comment on the role of the Asia-Pacific Community*) In general the Asia Pacific view is what someone told me and it sums up the overall thing in ASEAN, not including India. Internet is a football game and the US does not play the game. As long as it is fair we can play the game. As long as it is going fair, with the referee calling it fair, it is okay.

In Singapore, I've had interesting discussions on internet governance and the IANA transition. The feeling of urgency is more acute in larger countries such as Indonesia where they are concerned. The concerns are not as significant as India and China. Though the Chinese view is that China wants to catch up to the US in every sphere. Be it technology, space, missiles etc. So this generation will not challenge but the grandchildren of this generation will take the US on. As a whole, no major concerns for the Asia-Pacific region.

Q:

1. Apart from the Public Comment period, does the ICG interact with other stakeholders and the ICANN constituencies?

2. In your capacity as an ICG member, do you see any resistance to government intervention on specific issues regarding the IANA transition, either within the ICG or among the other stakeholders?

MM: Second question first, one of the interesting issues around the IANA transition has to do with sovereignty and sovereignty claims in this process. For e.g., there is a debate now whether CWG's principles for developing a Names Proposal takes in the concept of following national sovereignty or whether sovereignty is limited in some ways by need for global coordination and the root as a shared resource -- you can't have pure sovereignty claims over it as it is a shared resource. It is good to have governments involved in such a discussion, as we need to have their concerns and views on the matter and so people have been encouraging of governmental involvement within the ICG.

In the GAC appointment of members to the ICG there were initially two government representatives, which was then pushed to five. A concern was raised that governments need to be sure this is not a voting body but having more members would just mean that there are more diverse voices. So far, the arrangement worked out very well for us. In the CWG, the

working group has made the GAC one of the chartering organisations. So the GAC essentially has veto powers when it comes to the definition of consensus as adopted in the CWGs. That is a significant role for the GAC in the process.

As for the first question: The ICG meetings have been tied to ICANN meetings so we can meet a large group of people who go to the latter. But keeping with our bottom up coordinating role, we don't want to turn the ICG into something that is driving the process and that we are reaching down and establishing connections to the constituencies and stakeholders directly. We want the stakeholders to be participating in the work of the operational communities. So it is the task of the communities to get more people involved in their process. The names community has the most number of people but as always, it is difficult to make decisions whereas the Numbers and Protocols communities have fewer specialist members.

Q: Is the rigorous transition timeline that the US government is keen on following also affecting the kind of proposals that are put on the table? Since ICANN 52, some proposals are just not in currency anymore, and it could be because they require discussion, which go well beyond the timeline of September 2015. The discussion seems to be restricted to an ICANN-centric, internal solution rather than going into larger issues of jurisdiction, which some people are very concerned about.

MM: There is definitely an attempt to use the timeline to make certain proposals look better than the others. And indeed the US Commerce Department Assistant Secretary speaking during ICANN 52 on implementation concerns was, in effect, trying to tilt the process towards an internal solution. But the NTIA is concerned about making the transition as easy as possible for them, and they see more complicated institutional arrangements as being more difficult for them to sell. This is in a way odd because some Republicans are demanding an external solution that provides more accountability.

So it is more because NTIA and ICANN are cozy together - they had expectations about how this transition would look and they get nervous about new ideas as it creates more uncertainty; and uncertainty creates risks. And in some ways, the timeline is not as big an issue as some people see it. They can extend the contract by certain time period. So if we don't meet the September 2015 deadline, they could extend the contract for 3-4 months and

the work could be done then. What they are worried about is that if it extends beyond the Presidential Elections of 2016, it is a whole new administration to convince.

Q:

1. On the issue of jurisdiction of ICANN and it being subject to the US state laws of California, how much is that concern being discussed in this process? Should ICANN be subject to international law, via treaties signed between different countries?

2. Is there a discussion around restructuring the ICANN Board of Directors and its accountability to the stakeholder community?

MM: The original reason why ICANN was created under state law was so that it would be governed through private contract rather than public laws or legislation. It may be better in some theoretical sense to have a global treaty - some years ago, my group IGP actually proposed a framework convention - but the problem we learnt of was that governments just don't agree on the basic values and principles of how this should be governed. What the nature of the regime should be etc., and that would make a treaty process meaningless as major governments would not be a part of it or very compromised in terms of what it allowed and did not allow.

Based on my experience with the GAC, several governments want to impose values and policies on the domain system that don't understand or respect the operational, technical and economical realities of the internet. So it is better to stick with private parties.

I've been surprised within the Names CWG how little support there has been for changing jurisdiction. I actually proposed as part of a survey question, the Swiss jurisdiction, somebody said non-US jurisdiction and within the working group, there was simply no enthusiasm amongst the registries, other stakeholder groups, the CCGs. I was surprised by the little response there was to raising the jurisdictional issues.

Q: What are some of your concerns or expectations that you would like to see from Indian stakeholders before the IANA transition, whether from government or other communities within India? What is it the ICG looking for since engagement from the country has not been intensive?

MM: India is a sleeping giant. They have so much to offer in terms of having a massive presence in IT worldwide, outsourcing, software industry and the technical engineering fields and we think that it is time for India to become a more significant player and commensurate with its business and technical capabilities on the global stage. And this requires not thinking in traditional terms around the role of states -- how say, India v. China v. US v. Russia plays out -- but how businesses and internet users in India are thinking. Look at things from a transnational perspective, at the human rights issues that are involved and the commercial and business implications of various kinds of regulatory structures. India should take a global outlook on the potential of its cultural and business influence. We are eagerly waiting for that to happen as we have active individuals in the dialogue. Their contributions have been very significant, and offer new perspective other than the typical western voice.

Before the forenoon session concluded there was a brief exchange between discussants on the transition process. One participant raised the concern that Indian stakeholders are at a limitation with the ICANN track – "The rules are set, if you want to be a part of it, good or else, there is no other space." That Indian communities are not giving alternative solutions but are limited by the existing structures was also a concern that was flagged. Even at the Internet Governance Forum, representation by government and civil society was poor, observed another participant. Discussions also focused on the need or desirability of political oversight, around which, one participant said, there has been little debate in India. There was also a robust debate among discussants on whether the IANA transition would be better served by external or internal oversight mechanisms to enhance accountability. Differing views were presented on this count.

Another important strand of discussion focused on the role of the "community" and what it means to be acting in the "public" interest. One participant suggested that the IANA transition process has not been able to envision a definition of accountability because the base parameters of what a "community" is and what is "public" have not been defined properly. "Do we see accountability in terms of public or community, as they are different stakeholders?" asked the participant. Another discussant highlighted the need to understand the import terms not scientifically, but from the lens of social science. Another participant echoed this view, suggesting it would be impractical to have proper scientific representation of every sector, country, and class of people on a global level.

SESSION II: ACCOUNTABILITY AND TRANSPARENCY AT ICANN

The conference resumed after an hour-long break for lunch, with a detailed discussion on the forms of oversight required to enhance ICANN accountability. One participant suggested that oversight is required only when there is a problem of balance or that of fairness or where the competency of the institutions in charge of functions is in question. "Historically, IANA functions had been performed by ICANN. I agree that there are problems in this functioning and some finer problems in Internet governance. However, I believe that the existing model of multi-stakeholders has been a successful one. It is very hopeful and is capable of becoming more and more perfect (sic)." ICANN, according to this participant, is a mature body of multi-stakeholder interests. By and large, it has been performing its functions well. Therefore, the participant concluded, we must be open to the idea that a framework without oversight could exist and in such a framework we could ensure a mechanism to ensure balance and global fairness.

Besides, oversight as is currently carried by the US government was actually supposed to be only a temporary measure, argued one discussant. "It was never the intention to have a permanent oversight over the multiple stakeholders. It was only a temporary measure to supervise the transfer of functions and powers to the multi-stakeholder community."

There were several responses to this intervention. Another discussant highlighted the fact that there are multiple internal issues that ICANN has been faced with. Negotiations between the US Government and ICANN over contract renewal have not been easy and the fact that the US Government had once threatened not to renew the contract calls for greater accountability, he said. Hence, it might not be entirely accurate to say that ICANN functions very smoothly and error-free. It is not such a simple question to answer.

Another discussant raised the role of the "community" in oversight mechanisms. "We need to distinguish between two kinds of communities – one is the Internet stakeholder community whereas the other is the sociological/anthropological community. We need to create these distinctions; otherwise, if we only start with the latter, then we may miss some important links with our work", especially for developing countries, he said.

Oversight is a very important function and it must be carried out, because an evaluation of what is fair and what is not is contingent on oversight, another participant argued.

"To show its importance, we must take the example of Sun Pharma, which is an Indian company. It took up a gTLD and conducted business on generic drugs. In 2007, a consignment was being shipped from India to Brazil. While on the high seas, their pharmaceuticals were seized by the US Government because a lower court in the US had decided that the consignment violated intellectual property laws in the United States. There is no answer to fix this problem. Another instance is that of Crimea. Citizens of Crimea cannot own a gTLD, because the Office of the Foreign Assets Control has imposed sanctions on them. In Sudan and Iran as well, a citizen cannot own a gTLD. Citizens there have equal rights like us. They also just want to do business. If there are no answers to these problems, then how can one say that ICANN is functioning well? Without protection from international law and having exemptions from domestic law, how can you design a good model? The oversight can be non-governmental and have a judicial element to it," he concluded.

Another suggestion was to keep in mind the distinction between the oversight of government companies and private companies. "The oversight required for private companies need not be governmental; it can just be private and internal," said one participant.

ICANN currently itself has a multi-stakeholder nature as well as an external oversight mechanism, a discussant observed. "The mechanism in no way detracts from the multi-stakeholder nature. I cannot accept a mechanism wherein only internal oversight would be carried out. So, in the new proposal, external oversight is necessary but the difficult question to ask is how it would play out and by whom it would be done. This is not a simple question to answer."

In purely legal terms, suggested one participant "ICANN is accountable only to themselves. It is only their board of directors that control and drive decision-making. As per company laws, they are not accountable to anybody else. They are, indirectly, answerable to the US Government because of the contract between them on IANA functions."

The discussants were joined remotely by Prof. Hong Xue (*Professor of Law, Beijing University; Member, ICANN President's Advisory Council on Domain Names*) and subsequently, Mathieu Weill, co-chair of the Cross-Community Working Group on Enhancing ICANN Accountability.

(Hong Xue) HX: It is very interesting that India and China are talking about these issues on the same day! However, I am in no position to speak on behalf of the Chinese government and actually do not know what their stance is. At the same time, I can tell you that I had a community dialogue with the ICANN Senior Advisor and the President, especially with regard to the stability and security of the IANA functions. Another issue that has been strongly raised is that of new registries entering the ICANN community, which is already such a complicated place, and is made even more so by the preponderance of American stakeholders. Internet users in China and India form a huge share of the total users. Also, stakeholders in these two countries are being affected a lot through the IANA transition. So, ICANN needs to incorporate discussions on these Internet communities despite the language differences and lack of proximity from the USA and Europe. Not being able to speak to English is a big problem for the Chinese. It is also a culture change for them.

Some people believe that, in the long run, shifting to another entity, as an external mechanism, would be more beneficial. At the same time, another group of people worry that doing so might endanger the stability and security of the functions, which need to be carried out. There is a lot of discussion on how the two processes of IANA transition and ICANN accountability measures would be coordinated to ensure that both take effect at around the same time. Another issue that has been flagged back in China is that a lot of discussion is taking place on the intricate details of the new framework. However, we must not miss out the general picture of the current ICANN accountability mechanism. Instead of jumping to brand new frameworks or systems, we should focus on what is being practiced now, why it needs to be changed, and what improvements we can bring to it. In this process, we should involve more stakeholders. Some stakeholders have also proposed ICANN to move to Geneva so that it can be governed by international jurisdiction, rather than California.

There are already some recommendations that ICANN should establish a supervisory board above the current board of directors. Another proposal is to reform ICANN into a membership organization. What is interesting is how any of these proposals will be implemented. Some States have called for an international treaty to be created and ratified to ensure proper governance, if not on all areas of Internet governance, then at least on the major security areas such as espionage, national surveillance, privacy and personal data protection.

If you look at the documents on the IANA transition from the NTIA, it comes across that for them this reform is the last step of privatization. So, we might actually have to consider how possible it actually would be to create any form of inter-governmental set-up. I do not have any legal solution.

Mathieu Weill (update as to where the CCWG stands on accountability as of March 2015; what proposals are on the table; and what is the timeline currently envisaged) It is important to discuss these issues as they are very significant and affect a lot of public groups. I am one of the 3 co-chairs for CCWG, of which there are a total 25 members and 100 participants. 7 officially appointed advisors help to widen our perspective on Internet governance, inter-group relationships. We must remember that the entire plan of reform of ICANN is not just based on the problems faced due to the operational aspects of NTIA supervision, but also based out of wanting to change the landscape of ICANN accountability. NTIA had been perceived as a body that would protect/correct any wrong decisions made by ICANN. In that sense, it was seen as a saving body. If the NTIA were now to be moved out of the framework, then it would change the way accountability concerns would be addressed.

Mr. Weill spent the most part of his presentation on the accountability and community empowerment proposals on the table, not just in terms of concrete measures but also on the need to develop "principles". A list of 25 contingencies was provided so that they could later be used for stress testing. Next, he discussed the key components of the CCWG's mandate, which include empowered communities, principles, board of directors, and an independent appeal mechanism.

"Some issues regarding the independent appeal mechanism are the question of their true independence, lack of their binding nature, and that they are sometimes too focused on the process, instead of focusing on principles. Unless these issues are addressed, we would have an inefficient appeal mechanism, which is something none of us would want."

[Q&A ON ICANN ACCOUNTABILITY/ CCWG MEASURES]

(Mathieu Weill) MW: The CCWG has a lot of discussions about various issues related to ICANN and the IANA transition. One of the main issues that have been considered of late is the purpose of accountability. To do this, it is important to ensure that we define our objectives, that is, what it is that we exactly want to achieve from ICANN. Accountability in itself, however, is difficult to define. The CCWG found 4 main objectives and dimensions to

deal with – first, that ICANN complies with its own rules and processes, which is necessary for predictability and stability; second, it complies with applicable legislation in the jurisdictions in which it operates; third, that it achieves certain levels of technical performance; and fourth, ICANN must be accountable to the public for its decisions so as to ensure that such decisions are made for the benefit of the public and not just for certain stakeholders. This is extremely important.

Community empowerment means involving the community and giving it some powers that could influence the decisions of the board by making certain recommendations mandatory instead of only advisory. The CCWG has recently explored the idea of creating a membership structure for ICANN.

The CCWG is looking at all the current decision-making bodies and deciding whether there is a need to review their functioning. They are also reviewing the Affirmation of Commitments, the contract between ICANN and the US Government to check for any problems within it, so that they can identify and address the problems by creating a relevant review and redressal mechanism.

The timeline would be very aggressive. Proposals are expected to be opened up for public comments in April 2015. They are hoping to meet the target of September.

Q: The CCWG has two working groups – Work Stream 1 relates to the IANA transition and Work Stream 2 to the larger question on enhancing ICANN accountability, specifically. By linking the two, are you not in essence presuming that only an internal solution will be realised?

MW: The two working groups are not related. Commitments under the first will have to be made explicitly and committed to before any decision is reached on the second. There is no preferred and presumed solution by the CCWG. We are trying to be as objective about it as possible. At the same time, we believe that there is a high chance of ICANN retaining its position of controlling the IANA functions. The Names Committee is responsible for IANA functions, and hence, CCWG will not interfere in any way.

Q: I am happy with your proposal on community empowerment, especially in the manner in which it gives power over the decisions of the board of directors. It goes some way to address the need for external oversight. What I would like to ask though is that your proposal requires

a structured and concrete framework, what do you mean to propose as structures for facilitating your proposals. My second question is that ICANN performs a publicly significant role, and therefore, its accountability must be wider than that from ICANN-style communities and more public, so, how would you suggest going about it. What kind of structure are we even vaguely talking about?

MW: This is a very thorough and relevant question. Coming to the first, it is said that a new mechanism will be designed for oversight. However, then we might have the problem of who will oversee this overseer. So, the overall design must be such so as to avoid this problem. For example, in a state set-up, the oversight is internal. A balance of powers is maintained internally within the system. Accordingly, ICANN should be accountable to all stakeholders, direct as well as indirect. We should avoid external bodies because they would introduce complications. As for the second question, appeal mechanisms would be available to all people, including wider and indirect stakeholders, whoever they may be. No expertise, dispute or membership would be required under any convention etc. for filing such an appeal. I am not sure if this is the best way of handling the issue. But it is definitely an improvement over status quo.

Q: You emphasized in your presentation that one of the purposes of accountability would be to ensure decisions are for the benefit of the public, not just certain stakeholders. But what do you mean by 'public'? How do you differentiate it from the term "community"? What would be the parameters for doing so, if any?

MW: The definition of stakeholders has already been created by the CCWG. Those involved and affected by the decisions directly are stakeholders. But those who are affected by ICANN decisions indirectly, that is, all people who connect to the Internet, would go ahead and form the idea of "public". For me, it is a very liberal definition. I must admit, though, that currently there are no parameters on which an objective determination can be made as to what is public. Maybe we could expand on this in the future.

Q: I'm hearing about the independent appeal mechanism for the first time. I think that it would be a good idea, in my experience, to have retired judges, Internet experts, senior persons etc. on the panel of adjudication. What do you think?

MW: Currently, no formal proposal for this has been tabled. But proposals are being discussed and one of them is very similar to what you just suggested. Other details for the

same, however, are still being discussed. These include that the judges should not have self-interest or any conflict of interest as also whether hearings in this mechanism should be public or not.

Q: You spoke about the development of principles. Are these to be used for helping judges decide? What did you mean? Alternatively, what would be the basis on which the judge would decide any dispute?

MW: Yes, these are the principles that these judges would be relying upon. They would form a set of core values, such as "transparency". The purpose of ICANN also includes promoting security, stability, and openness of the Internet etc. These together would form a very limited set of principles. We must keep in mind that the definition of public interest keeps changing. Yet, ICANN must contribute by committing itself to certain principles, such as those discussed above.

Q: What would you like to see India do in this whole process?

MW: Most importantly, what is required is engagement. We need to discuss the views and concerns of stakeholders in India. Generally as well, we need more viewpoints; the expectation of more countries, less European and more developing countries need to be discussed. Second, I would like you all to raise your voices and inform people in the government, civil society and institutions etc. about the work being done and how it would impact them as stakeholders.

Q: You said that you are developing a set of principles that would become a standard set of principles in the future for everyone to use. However, at the Net Mundial 2014 in Brazil, 10 fundamental principles were adopted by the ICANN. Isn't there going to be a conflict between these two sets of principles?

Another question that I have is on the purpose of accountability. You spoke about international agreed standards as part of the same. I would like to know more about them and how exactly do you arrive at them?

MW: What we envisage is the creation of a set of golden byelaws. These will help in ICANN governance and the principles elucidated in the Net Mundial 2014 are being embedded into this set being created by the CCWG. These will require to be adapted by all stakeholders so

that they form a fundamental part of ICANN principles in the future. They will eventually help in driving the work of ICANN.

To answer your second question, international conventions are surely behind international agreed standards. Human rights principles and international agreements on trade also form a background for the internationally agreed standards. But human rights principles are the highest priority within these.

Q: What has been your work with regard to transparency? Are there any conditions for non-disclosure by ICANN?

MW: ICANN has been very transparent. Even according to external reports, ICANN has done well on transparency indices. Since transparency is a major goal and ideal, it forms an essential part of accountability. Therefore, it needs to be discussed and it is being discussed. A major change being considered is the Document Information Disclosure Policy (DIDP), wherein there will be a lot of transparency regarding the employees and their work. I am not sure if it will be part of Work Stream I or not, but I think it'll probably be included only in Work Stream 2.

Both Milton and Mathieu focused on soliciting engagement from Indian stakeholders. The concluding segment of the roundtable discussion highlighted ways in which Indian constituencies and communities could offer substantive input to the IANA transition process, as well as moot principles to enhance ICANN's accountability. One participant, nevertheless, felt that changes in accountability should be more elaborate. "Work Stream I accountability measures should be minimal because they are mostly only short-term. Instead, changes should be longer term. They should not just be to appease the US Government or just brought in to hurry any change."

"This has been a good session," said another participant. "It has helped us understand what has been happening in the ICG and CCWG. We all have a very small window in which we must be strategic about the way we act. It is a great opportunity; so, let us bring everything to the table since this chance for change has anyway come after 17 years."

That said, participants also acknowledged that their interventions would come late in the process. "The process is not at an early stage. 60% of the work has been done. So, we must take a realistic view. We must look at what actually can be achieved. We must define our

desired outcome, but then, be pragmatic, because it might not be possible to now achieve our originally desired outcome. Otherwise, we might spend time revisiting all normative debates, which would actually not lead to any action (due to lack of time). For example, with accountability, we must push for external accountability to serve a global purpose in everybody's interest," concluded another discussant. The importance of flagging jurisdictional concerns as well as ways to enhance community empowerment was also discussed.

Importantly, another participant raised the need for making available IANA transition documents in local languages. Samiran Gupta, head of India for ICANN, acknowledged this concern and said the Corporation was working to make content available in Hindi, for a start. "I would just like to say that ICANN has begun translating basic presentations and core literature into local languages. We have recognized that it needs to be done but it has only just begun."

Three other concerns were raised.

1. The binding nature of the process, "in which we need clarity and a framework on the mechanism for the system of appeals"

2. The issue of transparency – one participant called for a change in disclosure policies of ICANN.

3. The mandate and scope of ICANN. "This is important because only recently there was a sudden increase in their budget and mandate in the past 2-3 years. It has started functioning in different areas, without any consensus or dialogue with any stakeholders."

A participant also spoke in support of smaller, local community representation from South Asia in the transition process. "We must remember that any decision taken by ICANN might affect local communities in Nepal. Hence, it becomes important for all of us to know where we stand. We also must address those communities or persons who are unaware of the structures in place. Do you think ICANN would take anything regarding Nepal into account while making a decision? We must be accommodating of all kinds and sizes of societies.

Finally, the need to have "officially convened" channels to implement ICANN's Document Information Disclosure Policy, and to provide information expeditiously, was also raised.

The roundtable came to an end with a brief exchange of remarks between discussants on how Indian stakeholders can strategically position themselves within the IANA transition to voice their community concerns. The problem, discussants acknowledged, was that too few stakeholders were aware of the policy and legal concerns surrounding the IANA transition to make informed interventions. The need to convene regularly and exchange information through discussions and briefings to keep Indian communities posted on the transition and ICANN accountability was widely echoed at the roundtable.