

## **India's Comments on CCWG-Accountability 3<sup>rd</sup> Draft Proposal on Work Stream 1 Recommendations**

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India appreciates the work of Cross Community Working Group on Enhancing ICANN Accountability (“CCWG”) for its efforts in preparing the 3<sup>rd</sup> Draft Proposal on Work Stream 1 Recommendations dated 30 November 2015. The proposal to create an Empowered Community in form of “Sole Designator” by additions to the ICANN Bylaws is fundamental for enhancing ICANN accountability.

2. The proposal for establishing “Sole Designator” for empowering the community through accountability process and right to inspect in principle, is certainly a better proposal with respect to the ICANN accountability. With respect to community empowerment, it is well known that 2<sup>nd</sup> Proposal relating to “Sole Membership” model had lots of issues. The ‘Community Mechanism as Sole Designator’ model that is reflected in the present CCWG Draft manages to avoid some of the negatives of the earlier proposals while retaining some the positives. Still, it seems that ICANN Board has certain reservations on implementing this model as recommended by the CCWG. There is thus a need to debate these issues in the wider ICANN community.

3. The Sole Designator model and some additional empowerment proposed to the 7 communities may help in holding ICANN accountable in respect of the policies, budget, appointments and practically all functions including changing the bye-laws, ICANN decision-making. The Independent Review Process by Sole Designator through engagement escalation and enforcement mechanism is a step in the right direction. However, it should be ensured that the powers proposed to be vested with the 7 communities and those with Sole Designator, for strengthening ICANN’s Independent Review Process, should not conflict with the IANA Function Review Process (IFR). The functions of these reviews should be

independent and should complement rather than becoming a hindrance to the functioning of the ICANN and its activities.

4. The proposal is only a broader concept and much will depend on the nitty-gritty/details which need to be worked out carefully. The 7 communities and all the stakeholders should be involved in a comprehensive manner in working out the details of the functioning for Sole Designator and the Independent Review Process.

5. The proposals for community consultation process for making changes in ICANN Bylaws and splitting the ICANN Bylaws into “Fundamental Bylaws” and “Standard Bylaws” are significant, since it would help protect the operating ethos of ICANN from modification.

6. Stress Test-18 covers a critical aspect of the ICANN Board’s functioning: its relationship with governments vis-à-vis the Governmental Advisory Committee (GAC). Currently, ICANN Bylaws Article XI, Section 2 reads:

*j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.***

The special requirement placed on the ICANN Board and the GAC to find a mutually acceptable solution is in recognition of the fact that governments play a crucial role on matters regarding public policy. It is thus important for the ICANN Board to give due weightage to GAC advice in its decision-making. In this regard, following points are important:

(i) It is noted that Government is an important stakeholder in the multistakeholder structure of internet governance, with the leading role in cyber security matters relating to national security and public safety.

Hence, GAC’s recommendation on internet-related public policy issues is fundamental to the multi-stakeholder governance of critical internet resources. It is thus important to enhance the GAC’s operational autonomy in respect of public policy issues including cyber security matters relating to national security and public safety.

- (ii) The CCWG has suggested that the ICANN Board need only respond to that advice by the GAC which is supported by “full consensus”. The issue of “full consensus” in the GAC must be clearly defined. GAC should strive to reach a formal consensus, but if needed the decision should be taken by applying majority rule.

7. Regarding human rights, the CCWG-Accountability recommends including a Bylaw for reaffirming ICANN’s Commitment to respect Internationally Recognized Human Rights in carrying out its Mission. However, it is not clear what is meant by “ICANN will respect internationally recognized human rights”. It may be noted that ICANN being a non-profit corporation under the California law, does not bear any human rights obligations under international law. This point is clear from the para 221 page 41 of the draft proposal: “The proposed Draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.” Hence, Recommendation #6 needs to be further examined.

