



COMMENT ON

NEW gTLD AUCTION PROCEEDS DISCUSSION PAPER

We appreciate the efforts to encourage broad participation in this matter and our comments are as follows:

The choice of a Cross-Community Working Group to facilitate the discussion on auction proceeds is preferred for its participatory operation and representative character as evidenced through the work of the ICG and the CCWG Accountability. However, it may be cautioned that without careful planning, structuring and phasing the use of a CCWG can be an expensive and long drawn process contrary to the desired lean mechanism. Recommendations made herein are bearing in mind

Our detailed inputs are structured on the key issues identified by the drafting team, based on the discussions and developments to date. They are as follows:

- 1. Framework Development:** A thorough and detailed framework is without doubt essential. We appreciate the focus on developing a set of principles that should underpin any framework that is utilised. Considering the focus of the framework would involve considerable financial planning and management of the new gTLD auction proceeds, it is important to have clear, transparent and accountable financial oversight measures. At this stage of discussions where the foundations of the framework is being developed it is imperative that the model adopted be grounded in strong principles of accountability.

In this regard, there are many accountability guidelines that are useful for this purpose. The accountability discussions on CCWG-Accountability stream also hold relevance to this work stream. This section briefly underscores the meaning of accountability, then examines the various guidelines on accountability measures and finally makes policy recommendations on how ICANN can use these approaches during the gTLD auction proceeds.

1.1 Components of Accountability

Accountability in an organization refers to the readiness or preparedness of an organization to give an explanation and a justification to relevant stakeholders for its judgments, intentions, acts, and omissions.¹ However, to understand the approaches to financial accountability, we need to answer two broad questions that address accountability in an organization like ICANN. First, we need to understand who ICANN is (or should be accountable to). Second, we need to understand what ICANN is accountable for.

To answer the first question, we refer to our comments on the CCWG Accountability public comment process on the 2nd Draft Proposal. There are two approaches to Accountability- “Upward Accountability” and Downward Accountability”. Upward Accountability is used in a delegation model where the authority delegating the powers evaluates the functioning of the delegated body. Downward Accountability on the other hand is used in participatory models where accountability is evaluated by those affected by the decision making.² Given the intention of the Board to have a broad participation in discussions on the gTLD proceeds,³ it can be surmised that this is a participatory model which should be evaluated on the basis of downward accountability.

On the question of what constitutes accountability, it is generally agreed that there are four components to accountability. Namely, Transparency, Justification, Compliance and Enforcement. Each of these components are explained below:

1. Transparency- the collection of information and making it available for public scrutiny,
2. Justification- providing clear reasoning for actions ,
3. Compliance- monitoring and evaluation of procedures and outcomes, and reporting on the findings transparently, and

¹ Andreas Rasche, “Toward a Model to Compare and Analyze Accountability Standards – The Case of the UN Global Compact” 16 Corp Soc Responsib Environ Mgmt (2009) at 193.

² 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>.

³ gTLD Webinar, dated 8th October, 2015. See annexure for notes from webinar.

4. Enforcement- imposing sanctions for shortfalls in compliance, justification or transparency.⁴

Thus accountability in the gTLD auctions should be downward and incorporate the four components outlined above. We now turn to Guidelines on financial accountability that are useful for our present discussion.

1.2 Financial Accountability Guidelines

In practice questions of financial accountability are raised in response to failures rather than being seen as a component of governance. Thus, financial accountability measures are usually coercive and punitive involving disclosure, a reliance on legislative or regulatory oversight, and backed up by threats of sanctions for non-compliance such as fines, imprisonment.¹¹

However our approach, in identifying the issue at the very beginning is to infuse ideas of financial accountability into the framework developed to decide on the utilization of the new gTLD auction proceeds. In this we find two instruments particularly useful. First, we turn to the International Law Association's Report on the Accountability of International Organizations. Given ICANN's international character and multistakeholder constitution, we believe this report is a relevant tool for the gTLD process. This is more so because one of the six "Principles of Good Governance" discussed by the report is sound financial management.¹² The report identifies six processes that need to be put in place for sound financial management, of which four are relevant to our present discussion. The first is to ensure as wide a participation as possible in the budgetary or in this case the proceeds allocation process. Second is to allocate the budget (proceeds) in such a way so as to facilitate internal and external audit and accountability.¹³ Third, the organ vested with allocation powers should not in good faith allocate funds that are unnecessary or expensive. Fourth, performance reports, final and interim should be made available to the stakeholders at regular intervals.¹⁴

These four processes can be directly applied to the gTLD proceeds discussion. There is already a wide, participatory process in progress on the allocation of these funds. The CCWG, if

¹¹ Id, at p. 9.

⁴ See for a discussion, Alnoor Ebrahim, "The Many Faces of Non-Profit Accountability", Harvard Business School Working Paper 10-069 (2010), at p. 4.

¹² International Law Association, “Accountability of International Organizations”, Final Report, Berlin Conference (2004) at p. 11.

¹³ Id. This has four components:

- “a) the budget should be presented in such a way as to demonstrate that each budgetary item has been duly authorised; b) operational expenditure should be separately identified and accounted for;*
- c) the role of extra-budgetary resources, including the resources utilised by agencies and quasi-autonomous bodies, should be made clear;*
- d) the same presentation and budget methodology should be utilised for both regular budgetary and extra-budgetary resources”.*

¹⁴ Id.

constituted⁵ or any other executive body should take note and keep in mind the above three points on reporting, allocation and auditing.

The other guideline that is useful for the gTLD discussion is the OECD Principles of Corporate Governance. Though ICANN performs international and largely public functions, its legal character is that of a corporation. For this reason, we believe guidelines on corporate governance are very relevant to its internal processes. In these Principles, we Section 5 on Disclosure and Transparency as it relates to financial matters is very relevant to the gTLD process. In Section 5, the following sub-sections and their allied processes can be put in place with regard to the gTLD auction proceeds:

- 5B- Applying high quality standards of accounting and financial reporting- here the OECD recommends the use of established international standards of accounting and reporting.⁶
- 5C-Regular audits by independent, competent auditors using high quality auditing standards-the OECD recommends using established Principles like the Core Principles of the International Forum of Independent Audit Regulators and the IOSCO Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor’s Independence.⁷
- 5E-Channels for disseminating information should provide for equal, timely and costefficient access to relevant information by users- here the focus is not just on disseminating information, but on doing it in an efficient manner and making it accessible to stakeholders.⁸

⁵ gTLD Webinar, dated 8th October, 2015. See annexure for notes from webinar.

⁶ OECD, “Principles of Corporate Governance”, 2015 at p. 47.

⁷ Id.

⁸ Id, at p. 49.

When distilled for the utilization of auction proceeds process, the OECD Principles require establishing robust accounting, independent auditing, and accessible and efficient reporting mechanisms.

1.3 Recommendations for framework development

As established earlier, ICANN and specifically the gTLD auction proceeds are accountable downwards i.e. to the community or parties affected. The four components of accountability when linked to international guidelines on financial oversight, mean that ICANN should implement policies as represented in the following table:

Sl No.	Accountability Component	Policy Recommendation
1	Transparency	(i) Wide Participation in allocation process (ILA) (ii) High reporting standards and dissemination of information (OECD)
2	Justification	(i) Internal and external audit (ILA) (ii) High quality, independent audit based on international standards (OECD)
3	Compliance	(i) Allocation of funds in good faith (ILA) (ii) Reporting at regular intervals
4	Enforcement	Sanctions as per California Corporate/criminal code ⁹

2. Intelligence Gathering /Expert Involvement:

Currently the focus on intelligence gathering and expert involvement have been limited to inputs from ccTLD Registry Operators and other such organizations on dealing with surplus proceeds. While this is needed in understanding the landscape in which fund utilization takes

⁹ The issue of enforcement has not been dealt with in this discussion. Since ICANN is a California Not for Profit Corporation, sanctions as outlined in California law would apply.

place, it does not facilitate in creating robust framework for facilitating the discussion, and does not address the need for fiscal and legal expertise.

2.1 Fiscal and Legal Expertise: Keeping in mind the nature of the discussion it is important to consult with other international organizations and experienced actors on fiscal and legal aspects involved. Gathering information on applicable accountability and transparency frameworks as discussed earlier in this document should also be considered. This expert involvement would also be necessary for assessing the viability of the proposals of the CCWG.

The Charter of the CCWG can call for the appointment of experts that the group may consult from time to time.

2.2 Intelligence Gathering: The charter of the CCWG may consider the appointment of relevant experts and task the CCWG with intelligence gathering on not only utilities for proceeds but also on methods to create a democratic, transparent and accountable framework to decide such utilization of auction proceeds.

3. ICANN Board Involvement:

In context of 53rd ICANN meeting in Buenos Aires and the subsequent discussion paper on new gTLDs Auction Proceeds, the issue of ICANN board involvement has attracted significant focus. Broadly, there are two questions raised about the nature of role and extent of involvement of the Board in relation to its participation in the development of Proposed Charter for a Cross-Community Working Group and its consideration, and subsequent acceptance, of the Charter as well as operation of CCWG.

There are two independent but overlapping orbits of obligation that will determine the question of participation and consideration of CCWG, or any proposed task force, by ICANN board. The primary orbit of obligation is established by the legally enforceable fiduciary obligations under the applicable municipal and private international law. A secondary obligation maybe said to arise if the Board decides to design and subject itself to a selfregulatory set of rules in relation to development of proposed charter for a cross-community working group.

Since the primary aim of the CCWG would be to channel funds from the auction proceeds to appropriate destinations, the framework developed may limit the role of the Board

appropriately to the extent that that is jointly determined by the CCWG and the Board. This may include a pre-determined criteria against that shall be set out in the Charter. This criteria should be in accordance with the purposes set out in the new gTLD applicant guide book.

4. Conflict of Interest:

In addition to ICANN's Conflict of Interest Policy and other corporate governance documents adopted¹⁰, the framework developed must factor additional safeguards to prevent conflict of interest issues arising in the work of the CCWG. The nature of a CCWG needs to be kept in mind and accordingly a clear code of conduct to avoid conflict of interest must be developed.

The issue of conflict of interest has gained traction in light of contemporary developments in relation to global, multinational organisations such as the World Bank.¹¹ In addition, global organisations, such as the World Health Organisation, are working towards the development of frameworks in relation to their engagement with non-state actors. Examining multiple perspectives on conflict of interest can aid in understanding the concept in the role a non-state actor like the ICANN that works in the public sphere and owes an obligation to the global internet community.

In this context we may consider the following information from various international organizations and institutions:

4.1 Demarcating conflict of interest: The World Health Organization identified the following objectives in demarcating conflict of interest that can be applied to ICANN and the proposed CCWG¹²:

¹⁰ See Revised ICANN Board Conflicts of Interest Policy and other Governance Documents available at <https://www.icann.org/news/announcement-2-2012-05-15-en>

¹¹ I.Talley, *World Bank Probes \$1 Billion China Loan*, WALL STREET JOURNAL (3rd FEBRUARY, 2015) available at <http://www.wsj.com/articles/world-bank-probes-1-billion-china-loan-1423012000>; *International Coalition Exposes World Bank Conflict of Interest, Calls for Reform*, CORPORATE ACCOUNTABILITY INTERNATIONAL; *Conflict of Interest? World's Bank Role in Global Climate Fund Causes Outcry*, BRETTONWOODS PROJECT (14th June, 2011) available at <http://www.brettonwoodsproject.org/2011/06/art-568570/>.

¹² ¶4, Agenda Item 17, Framework of Engagement with Non-State Actors, Sixty-Four Session, Regional Committee for Africa, World Health Organisation (6th November, 2014) AFR/RC/64/12A.

- Avoid compromise of the integrity of organization
- Provide for flexible due diligence.
- Assist in managing risks to the organization.
- Distinguishing between real and perceived conflict of interests.
- Distinguish between individual and institutional conflict of interest.
- Engagement with actors who do not share interests with ICANN or whose interests undermine the core objectives and goal of ICANN.
- Distinguish between direct and indirect interests while determining conflict of interests.

In the context of the proposed CCWG we may note that there is bound to be participants from communities that benefit from the utilization of auction proceeds. This however need not preclude participation in discussion, in fact, the very nature of the CCWG is to provide representation of various stakeholders and their interests.

4.2 Types of Conflict of Interest: Conflict of interest may be divided into categories, that is, individual and institutional conflict of interest. Both the categories of interest may arise from commercial, financial or any other nature of interest.¹³

4.2.i. Individual Conflict of Interest

Individual conflict of interest has been dealt with by organisations in relation to Principles or Guidelines of Employment or Staff Rules.¹⁴ The ICANN conflicts of interest policy governs individual conflict of interest in relation to its directors, liaisons, officers and key employees, collectively referred to as ‘Covered Persons’.¹⁵

With reference to the proposed CCWG for new gTLD Auction Proceeds, an individual conflict of interest policy applicable on both, persons working with ICANN for the purpose of ‘Covered Persons’ under the Board Conflict of Interest Policy and persons not included within ‘Covered

¹³ ¶23, Document A67/6; See *Preventing Conflict of Interest*, Law, Justice and Development available at http://globalforumljd.org/docs/committee_docs/note_conflict_of_interest.pdf

¹⁴ See Office of Ethics and Business Conduct, WORLD BANK available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTETHIC/0,,contentMDK:20382808~menuPK:780665~pagePK:64168445~piPK:64168309~theSitePK:593304,00.html>

¹⁵ Section 7.1(viii), Article VII, Conflicts of Interest Policy available on <https://www.icann.org/resources/pages/governance/coien>

Persons', has to be designed. The individual conflict of interest policy needs to provide protection against financial and non-financial, direct and indirect conflicts of interests at the individual level.

4.2.ii. Institutional Conflict of Interest

Institutional Conflict of Interest has been identified by global organizations. One example of identification of institutional conflict of interest can be seen in the International Labour Organisation (ILO)¹⁶

With regard to the use of funds from the auctions proceeds of new gTLD program, it is imperative that the design of principles and management of funds do not face the risk of institutional conflict of interest. To this extent, the framework developed for the proposed CCWG has to take into account potential instances where conflict of interest may arise. The method of issuing a Statement of Interest by each member of the CCWG can be complemented with the efforts discussed above. This model can be further strengthened with preliminary filtering, similar to the Food and Agricultural Organization (FAO) partnerships with the private sector¹⁷ which are in accordance with the Ten Principles of the United Nations Global Compact¹⁸.

5. Participation:

As discussed in the broad preliminary comment supporting the CCWG Accountability and ICG model, we believe the similar model will enable participation from various communities and chartering organizations. This however must be supplemented with outreach efforts and linkages with other efforts.

It may also be noted that the framework model developed and the subsequent proposals developed should keep in mind barriers to participation in the operation of such multistakeholder engagements.

6. Outreach:

¹⁶ Office Procedure of 2009 provides that "the outcome or conclusions that might be reached in any official ILO meeting must remain independent from the influence of any partner". See Office Procedure (IGDS N83-Version 1), 14 July 2009. Geneva: International Labour Office; 2009.

¹⁷ FAO's strategy does not provide for any specific guideline on conflict of interest. However, the issue of conflict of interest is an integral component in the preliminary filtering of potential partners.

¹⁸ See [://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html](http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html)

The framework developed must require the CCWG to compulsorily include methods for outreach, particularly for entities and persons that are unable to be part of the deliberations for various reasons which may be financial, geographical, or others. The inability to participate in the conversation on utilization of auction proceeds should not hinder the potential to receive aid from the proceeds or be represented in the dialogue.

7. Linkage with other efforts:

As stated in earlier parts of this comment, there are various opportunities to link the work involved in this process with other efforts within ICANN. Lessons can be learnt from the working of the CCWG accountability and its measures. Additionally the work of the CCWG for framework of Cross-Community Working Group Principles is also important to the formation and operation of the proposed CCWG on new gTLD auction proceeds. The output and efforts of the CCWP on CSR and Human Rights in ICANN can also be considered in the development and operation of this CCWG.

8. Implementation:

This implementation of the work of the CCWG will largely depend on the nature of the proposals developed. It would therefore be too early to define the scope of the CCWG with regards to implementation. It must be stressed that the development of the framework and charter of the CCWG should be separate from the substantive discussion on the utilization of the auction proceeds.