

**CCWG-Accountability 2nd Draft Proposal on Work Stream 1
Recommendations
Comments from Brazil**

1. The Government of Brazil would like to thank the CCWG-Accountability for the elaboration of a comprehensive set of recommendations for ICANN's accountability processes.

General Comments

2. While providing its comments to the aforementioned draft proposal, the Brazilian Government recalls, once again, the "NETmundial Multistakeholder Statement", which states that "it is expected that the process of globalization of ICANN speeds up leading to a truly international and global organization serving the public interest with clearly implementable and verifiable accountability and transparency mechanisms that satisfy requirements from both internal stakeholders and the global community" (Roadmap, Chapter II, § 6).

3. Brazil further recalls the position document "Comments of the Brazilian Government on the "Cross Community Working Group (CCWG) Accountability Initial Draft Proposal for Public Comment" dated 3 June 2015, particularly regarding the notion that the ultimate goal of the IANA Transition could only be achieved "if the legal status of the corporation would also be included in the package of items to be addressed in the transition proposal. Brazil considers that enhancing the legitimacy of ICANN before all its stakeholders, including governments, requires the adoption of a 'founding charter' agreed upon by **all stakeholders** in replacement of the present pre-determined status of ICANN as a private company incorporated under the law of the state of California".

4. Accordingly, we have defended throughout the process that, unless the issue regarding the "legal status" of the corporation is adequately addressed, any attempt to reform its practices and to establish new governance or accountability mechanisms will be limited, at the end of the day, by the fact that any proposed changes will have to adapt to the current existing legal status, which did not result from the collective will of the global multistakeholder community but was rather unilaterally imposed.

5. In regard to the draft proposal submitted by the CCWG- Accountability, Brazil perceives the current IANA stewardship transition and the accountability review processes as important steps towards the fulfillment of the NETMundial's vision. They fall short, however, of addressing in a satisfactory way important related features, in particular regarding the "fundamental" issues related to legal status and governance, well beyond the "jurisdiction" issue as it is being framed in the CCWG proposal. We therefore endorse the notion that the effort towards rethinking the ICANN model should continue beyond the present first phase and we call for inclusion, among the topics to be further discussed, of those aspects related to governance and the definition of the entity's legal status. We recall, by the way, that at the beginning of the exercise, many participants, including ICANN officials, stated that nothing should be "off-limits". Nonetheless, in the course of time, we have witnessed that the focus and ambition of discussion was substantially narrowed down – which is fine as far as the first phase is concerned but would leave us with the impression of unfinished business in case "stream 2" discussions would continue to be framed within such strict boundaries.

6. It is important, however, to reaffirm the commitment to ensure that any effort in the "post-transition" period will continue to be guided by the same parameters (or "conditions") that have guided us so far, namely: (i) support for and enhancement of the multistakeholder model; (ii) maintenance of the security, stability and resilience of the Internet DNS; (iii) meeting of the needs and expectations of the global customers and partners of the IANA services; (iv) maintenance of the openness of the Internet; and (v) rejection of any government-led or intergovernmental solution. The Brazilian government reaffirms its commitment in that regard and invites for its views to be considered in that light and not be otherwise construed as being contrary to the basic assumptions that have guided us throughout the process initiated by the NTIA announcement.

7. For the reasons stated above, Brazil supports the recommendation put forward by the CCWG in paragraph 252, which does not consider appropriate that Article XVIII, Section 1, of ICANN's bylaws, be granted the status of a "fundamental bylaw". Any decision in that regard should be taken after (**and not before**) the exercise we consider is still necessary towards a more comprehensive reflection on aspects related to jurisdiction, governance and legal status.

Commitment 5

8. With regard to the proposed ICANN commitments, Brazil reiterates its understanding that references to the leadership of the private sector ("led by the private sector"), in the absence of any reference to the role of governments, seem inadequate and contradictory to the spirit of multistakeholderism that should govern the corporation. We would like therefore to align ourselves with the comments made by both Spain and Argentina in that regard.

9. In that same context, we would suggest furthermore the following alternative text for paragraph 206: "Employ open, transparent and bottom-up, multistakeholder policy development processes, ~~led by the private sector, including business stakeholders, civil society, the technical community, and academia~~ that (i) seeks input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;"

Independent Review Process

10. With respect to the Independent Review Process – IRP (Chapter 5), Brazil reiterates the importance that decisions made by the IRP should be binding on the ICANN organization and effectively independent from national courts so that they could not be overruled by national courts where ICANN is legally established. The autonomy of the IRP would be seriously undermined if this condition cannot be met as any proposed accountability mechanism would be ineffective if ICANN's jurisdiction is ultimately able to restrict its power. We note with great interest the comments made by the French authorities in that regard.

11. Furthermore, we consider it will be essential to clearly define steps with firm deadlines in the context of the work of the future Cross Community Working Group to be established with the mandate to detail the structure and procedures of the IRP.

12. We share the concern expressed by Spain, on the other hand, regarding the fact that the proposed provisions would prevent governments as well as other entities from participating in an IRP and therefore call for appropriate adjustments in that regard.

Community Empowerment Mechanism

13. Brazil endorses the consensus GAC document regarding GAC's involvement in the Community Mechanism.

14. Brazil strongly supports the proposal to develop a mechanism to empower the ICANN multistakeholder community (Chapter 6). The implementation of the "empowered community" concept as one of the building blocks of ICANN's accountability is essential to ensure the necessary checks and balances vis-à-vis the corporation's decisions.

15. To that end, it will be important to ensure the participation of all relevant stakeholders independently of their status under the current ICANN structure, as the corporation's oversight should be transitioned to the global multistakeholder community and not to a limited number of stakeholder groups. We therefore support the proposal regarding the voting distribution in the proposed mechanism, which – it must be recalled – intends to perform a substantial differentiated role vis-à-vis the Board's functions, and therefore should not automatically mirror the procedures for setting up the Board.

Diversity

16. Similarly to the IRP, geographic, cultural and gender balance should constitute key principles in the formation of the "Community Mechanism". Gender balance is another important element that should guide the selection of stakeholder representatives. We support comments made by Argentina in that regard.

Stress Test 18

17. Brazil endorses the comments made by France, Spain and Argentina.

18. We are concerned with the fact that discussion around that issue has been surrounded by a number of misperceptions. Firstly, in our view it is a clear mistake to associate Stress Test 18 to the intent to avoid the risk of capture by governments. As per the transition proposal at hand, governments would retain a purely advisory role to the Board, including in regard to public policy issues. In other words, governments advice – even if issued by consensus - is not binding today and it is poised to remain so in the post-transition period.

19. The Brazilian government has consistently expressed its view, by the way, that the way GAC's advisory role is currently exercised is insufficient to factor in the perspective of governments in a relevant way within ICANN's Board decision-making process. We have nonetheless indicated the willingness of not challenging this in the context of the elaboration of the transition proposal but rather to explore ways, in full respect of the multistakeholder format, through which governments roles and responsibilities in regard to public policy issues might be fully exercised in the post-transition period.

20. We think, on the other hand, it is clearly the responsibility of all those who take part in the present exercise in an informed way – in spite of differences of opinion in regard to the need for ST 18 or not – to duly transmit to those who are not direct participants the real nature of the discussion surrounding ST 18, in order to not add, in an artificial way, another layer of complexity to an effort which is already in itself extremely delicate.

21. Second, the rationale used as justification for ST 18 is offensive and conveys a deep mistrust of the way governments collectively operate ("A majority of governments could thereby approve GAC advice that restricted free online expression, for example"). This is unacceptable to the Government of Brazil as ST 18 ignores, in essence, the fact that governments – as the representatives of their respective peoples –, collectively, were responsible for the development of the existing international Human Rights "regime", including, among other benchmark international instruments, the Human Rights Declaration and, more recently, the resolution stating that the same rights offline must also be respected online (which Brazil takes pride in having being the initiator, together with Germany).

22. In the third place, ST 18 also ignores the fact that even though consensus might seem the most forceful and effective way to express government's opinion (and by the same token the opinion of any particular group), it is not the only method (and certainly not the most common) employed by governments to make decisions. In some cases, intergovernmental decisions are made in the context of strong opposition of one single government (or a very small group of governments) which does not, in any way, affect the legitimacy and "representativeness" of such decisions.

23. We can understand that some participants may consider governments collectively as untrustful partners. Although we strongly disagree with that notion, we recognize the right of those who think so to freely express their views. A different thing would be to make a decision related to the post-transition period and therefore establish a new bylaw founded on that assumption. This might prove to be a redline for a number of governments which, as in the case of Brazil, would be otherwise supportive of the process as a whole.

24. What ST 18 would actually seek would be to impose on GAC a decision-making process that would give a "de facto" veto power for any individual government (or very small group of governments) that may, even in cases where massive majority of governments would favor any given course of action (that might, by the way, involve the interests of a particular national company), be able to block the possibility of triggering the requirement that the Board must enter into negotiations to find a mutually acceptable solution to any conflict between possible Board action and GAC advice.

25. It is striking that no similar ST is proposed in regard to other stakeholders, maybe out of the realization it would be laughable to expect that any particular group would have unanimity on a given issue. Besides, this appears to be, in the end, an **artificial** problem. The GAC has consistently sought – in some cases strenuously – to develop consensus advice and nothing suggests there is a trend in a different direction.

26. In the light of the stated above, Brazil firmly rejects ST 18 and fails to see why approval of the IANA stewardship transition proposal should be held hostage of a decision in that regard. It is important, on the hand, to uphold the principle that each SO and AC should retain its autonomy in deciding about its internal operating procedures, without being, in principle, constrained by any external rule that might impose an obligation to frame its decision-making mechanism in any particular way.

27. On the other hand, it might be appropriate – from the perspective of the workload of the ICANN Board having to hypothetically deal with a great number of divisive advice – to discuss possible minimum "thresholds" that would trigger such a potentially burdensome scenario. We may recall that, internationally, in some fundamental issues, a qualified majority is required for decisions, and that nationally, in most cases, even constitutional rules may

be changed by a very qualified majority – but, in any scenario, **consensus is not required.**

28. Brazil remains committed to the GAC’s ongoing effort to achieve a consensus position on that subject matter. A promising course of action, in our view, might be, while retaining the existing bylaw, focus discussion on the possibility of establishing, at an operational level, procedures (possibly based on the concept of "thresholds") in case less-than-consensus advice would be received by the Board.

Stream 2 Issues

29. Although Brazil would prefer, for the reasons stated previously, that the issue regarding legal status/jurisdiction be part of the initial transition proposal, we agree the discussion on those topics should not keep the transition hostage but rather should be further investigated in the context of work stream 2. In that sense, we consider that, although any working group tasked for this should continue to be guided by the parameters (or "conditions") we have all accepted from the start, no single topic should be considered "off-limits".

30. In regard to jurisdiction, it should be noted that although Brazil shares the concern about the influence that ICANN’s existing jurisdiction may have on the actual operation of policies and accountability mechanisms being proposed, our main concern, from a governmental perspective, refers to the process for the settlement of disputes within the ICANN model. This discussion involves the choice of venue and of the applicable laws but not necessarily the location where ICANN is incorporated.

31. Brazil would like to reiterate, finally, its commitment to contribute to the elaboration and implementation of a transition proposal that will not only meet the parameters (or “conditions”) established at the outset, but also improve the corporation’s governance and address issues related to legal status and jurisdiction. In our view, the commitment to accomplish the short-term goal should not lead us to lose sight of the vision conveyed by NETmundial, which remains, for us, a very precise ultimate goal to be pursued.

32. It is important to stress we are not imposing any conditions nor saying that, in the end, a transition that would not incorporate any given future would

be unacceptable to us. We are not prejudging the outcome of discussion on those topics as we fully respect the multistakeholder format, but we call for discussion around those issues to be firmly incorporated in stream 2, with the commitment to pursue discussions in a timeframe to be agreed upon with the same energy that has been employed in the present stage. As we move from one context in which the overall framework was unilaterally pre-determined to one in which the global multistakeholder community is invited to contribute to the development of a new model, it is of paramount importance, in our view, to make sure that every relevant issue is duly discussed.
