

Annex 4.2 – Jurisdiction Sub-Group – Minority Statement – CCWG- Accountability WS2 – March 2018



DISSENTING STATEMENT OF BRAZIL
ON THE DRAFT REPORT ON JURISDICTION SUBMITTED TO THE CCWG PLENARY ON 11
OCTOBER 2017

Brasília, 24 October 2017

Brazil expresses its opposition to the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017.

The draft report falls short of the objectives envisaged for Work Stream 2 – in particular the need to ensure that ICANN is accountable towards all stakeholders –, by not tackling the issue of ICANN's subjection to US jurisdiction, as well as leaving untouched the unsatisfactory situation where US authorities (legislature, tribunals, enforcement agencies, regulatory bodies, etc.) can possibly interfere with the activities ICANN performs in the global public interest.

Brazil cannot accept this state of affairs – where Governments are not placed on an equal footing vis-à-vis the country of incorporation as regards their ability to participate in ICANN's management of Internet's global resources –, which is not in line with the rules and principles embodied in the Tunis Agenda for the Information Society nor with the fundamental tenets of the multi-stakeholder approach, which we uphold and support.

Brazil hereby submits the document annexed below, which forms an integral part of the present statement, and which indicates the points Brazil considers should have been reflected in the draft report.

ANNEX

1. Introduction

Brazil recalls the principle endorsed by the subgroup on jurisdiction on how it would proceed in discussing and proposing recommendations for ICANN, namely that "we [the

subgroup on jurisdiction and, by extension, the CCWG] should be looking at what are the outcomes we're looking for and less trying to be very specific about how to implement it."¹ As summarised by the rapporteur of the subgroup on jurisdiction, "we [the subgroup on jurisdiction and, by extension, the CCWG] are in the business of making policy recommendations and not implementation recommendations."²

At the CCWG plenary meeting at ICANN 59, the concept of immunity from US jurisdiction (partial immunity, restrictive immunity, immunity with exceptions) featured prominently as an indispensable condition for the CCWG as a whole to accept the proposal that it would not pursue recommendations to change ICANN's jurisdiction of incorporation or headquarters location. Subsequently, at the subgroup level, some convergence of views could be discerned to the effect that immunity from US jurisdiction would be needed to remedy "the concern that US organs can possibly interfere with ICANN's [core functions in the management of the DNS]".³

We understand that there was room for consensus around the need to recommend that ICANN seek to obtain immunity from US jurisdiction in ways that enhance ICANN's accountability towards all stakeholders. Thus the subgroup could have recommended that ICANN take steps to ensure that US organs cannot exercise jurisdiction over ICANN in ways that interfere with the policy development and policy implementation activities ICANN performs in the global public interest, while making sure that ICANN remains accountable for all its actions, including accountability under US laws and tribunals for such activities that do not directly interfere with the management of Internet's global resources.

We share the concerns expressed by some members of the subgroup on "how to design immunity [so that ICANN becomes free from the possibility that US organs may interfere with its core functions] in a way that does not immunise ICANN from liability for arbitrary and unlawful actions."⁴ To address these concerns, we believe that the subgroup could have expressly called upon ICANN to maintain and further develop

¹ The principle was spelled out by Mr. Bernard Turcotte at meeting #43 (23 August 2017) of the subgroup on jurisdiction and guided the subsequent work of the subgroup.

² Statement by Mr. Greg Shatan at meeting #43 (23 August 2017) of the subgroup on jurisdiction. See also statement by Mr. Bernard Turcotte at the same meeting: "Every time we get into detail of implementation, we are, A, causing more work for ourselves. B, sometimes doing that work without the full context. So ... let's describe what we're looking for. What's our objective? And, you know, let's be clear. I mean, if this thing makes it through the entire process and is approved, ICANN is going to be bound to look into this and say what it can and can't do."

³ See the statement by Mr. Nigel Robert on his email of 23 August 2017 (15:44:08 UTC), available at <http://mm.icann.org/pipermail/ws2-jurisdiction/2017-August/001471.html>: "The concern that US organs can possibly interfere with ICANN's ccTLD management is reasonable."

⁴ Ibid.

independent accountability mechanisms to ensure that ICANN can be held liable, especially for its activities that would be covered by immunity from US jurisdiction.

Furthermore, we agree that ICANN's immunity from US jurisdiction should be partial, and therefore that there should be exceptions to it, which should enable, for example, that ICANN's internal governance functions which do not directly interfere with the management of Internet's global resources (such as employment disputes within ICANN, health and safety regulations, etc.) remain subject to the normal operation of the laws and tribunals of the country of incorporation.

2. Ensuring ICANN is accountable to *all* stakeholders

The NETMundial multistakeholder statement has urged 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."

In this connection, the Charter of Work Stream 2 expressly relies on the NETmundial multistakeholder statement in order to define ICANN's accountability goals.⁵ Currently, ICANN's accountability mechanisms do not meet all stakeholders' expectations, for ICANN is more accountable to the country of incorporation and its citizens, namely the United States, than to others.

We would have hoped that the draft report on jurisdiction would have recommended measures aimed at increasing ICANN's accountability as defined in the NETmundial multistakeholder statement, i.e. accountability towards all stakeholders, by recommending that steps be taken to ensure that no single country, individually, can possibly interfere with the policy development and policy implementation activities ICANN performs in the global public interest, while making sure that ICANN remains accountable for all of its actions.

⁵ "During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context is defined, according to the NETmundial multistakeholder statement, as the existence of mechanisms for independent checks and balances as well as for review and redress. The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations." Work Stream 2 Charter, section II, problem statement.

3. ICANN currently is more accountable to US jurisdiction than it is to others

The authorities of a country where an entity is based have a superior (and in many respects exclusive) claim to jurisdiction over the activities of that entity. For example, the territorial State is the one with exclusive enforcement jurisdiction, so that only the local enforcement agencies have the necessary authority to compel people in the country to comply with national laws and court rulings.⁶

That the United States is in a unique position to impose or enforce its own laws and regulations and domestic policies over ICANN, in ways that affect the Internet worldwide, is borne out by the fact that, in the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017, the US OFAC sanctions regime has been singled out as a major problem for ensuring ICANN's impartial operations towards all stakeholders. The sanctions regime of no other country has been so singled out, nor could they be so, as sensibly interfering with the activities ICANN performs in the global public interest. Notice that ICANN is subject to the OFAC sanctions regime because (i) OFAC applies to US nationals (individuals or entities) and (ii) ICANN is incorporated under US laws, i.e. a legal entity possessing US nationality.

OFAC is just one example of a regime under US laws that applies to ICANN in a manner that can interfere with the functions and activities ICANN performs in the global public interest. As these functions and activities acquire greater importance in practically every sector of a country's life, it is not unreasonable to assume that other US organs or regulatory bodies in each and every sector may exercise their powers of jurisdiction over ICANN in ways that influence ICANN's policy actions with consequences for the Internet in other countries.

⁶ In the case of ICANN, if the argument is made that any country in the world could pass legislation or judgments to interfere with ICANN's core functions which are performed in US territory, the enforcement of any such legislation or judgment would still need go through action of US enforcement agencies. In other words, US organs would have to consent to them, and US organs themselves would have to carry out or enforce the required action at the request of other countries' organs. For example, in the absence of treaties agreed on by the United States, US courts would have first to recognise foreign judgments against ICANN, in *exequatur* proceedings, for them to be enforceable within the US, and their execution would have to be carried out through US organs.

4. The insufficiency of remedies that do not shield ICANN from US jurisdiction

For as long as ICANN remains a private law entity incorporated under US laws with no jurisdictional immunity for its core global governance functions, it will be subject to US jurisdiction in the ways described above, notably to US exclusive enforcement jurisdiction over activities and people within US territory in ways that can adversely affect the Internet worldwide. Hence, for ICANN to obtain "insulation from the vagaries of U.S. foreign policy or other laws and policies that would circumvent ICANN's accountability to its global MS community",⁷ it is necessary that it be granted immunity from US jurisdiction. This insulation, in turn, cannot be achieved through just the commitment of US enforcement agencies to exempt ICANN from *specific* and *currently known* regimes or measures that interfere with ICANN's activities, as will be the case, for example, if ICANN obtains a general license from OFAC. Apart from many other (non OFAC) existing US laws and regulatory regimes that can potentially impact on ICANN's global governance functions, new and unforeseen laws and policies that interfere with ICANN's activities can at any time be enacted and enforced by the country of incorporation.⁸

5. The need for ICANN's immunity from US jurisdiction

To remedy the state of affairs described above, where the United States is in a unique position to impose or enforce its own laws and regulations and policies over ICANN in ways that affect the Internet in other countries, it is necessary that ICANN obtain immunity from US jurisdiction. There is no obstacle preventing private organisations formed under the laws of one country, as ICANN currently is, to enjoy (be granted) jurisdictional immunities. If immunity is so granted, ICANN would still be an organisation incorporated under the laws of California, subject to California laws and to their corresponding accountability mechanisms with respect to such activities that may be expressly exempted from the immunity regime.

⁷ According to Professor Milton Mueller, who is a participant in the subgroup on Jurisdiction, "[w]hat we need is ... insulation from the vagaries of U.S. foreign policy or other laws and policies that would circumvent ICANN's accountability to its global MS community." (<http://mm.icann.org/pipermail/ws2-jurisdiction/2017-August/001391.html>)

⁸ One historical example of such new legislations enacted by the US which affected the dealings of US nationals (citizens and entities) with foreign countries is the Cuban Liberty and Democratic Solidarity [Libertad] Act of 1996, also known as Helms–Burton Act.

Further, in addition to the necessary exceptions to ICANN's immunity from US jurisdiction, which would thereby remain subject to the existing accountability mechanisms under US laws, all of ICANN's public global activities that will cease to be subject to the unilateral accountability mechanisms of the United States will, instead, be subject to the accountability mechanisms devised by the global multi-stakeholder community.

There are precedents of modern regimes of partial immunity, with a detailed set of exceptions as well as internal accountability mechanisms, applicable to private law entities, although strictly speaking no such precedent would be necessary for a suitable regime of immunity to be crafted.

For example, the ICRC (International Committee of the Red Cross) is a private association formed under the Swiss Civil Code, it draws its legal existence from the Swiss domestic legal order, it is subject to the laws of Switzerland, it is not an intergovernmental organisation. Yet it enjoys immunity from the local laws, subject to few exceptions (the basis for the ICRC's immunity is an agreement with Switzerland as well as Swiss laws). Further, where the ICRC enjoys jurisdictional immunity, it is immunity from adjudication and enforcement, and it can be waived at any time. Accordingly, it is not immunity from liability.

In the US, there would be at least one similar example, namely the International Fertilizer and Development Center (IFDC), whose immunity from US jurisdiction seems to have been obtained through a Presidential decree in 1977 under the US International Organizations Immunities Act. The IFDC would remain a US incorporated non-profit corporation employing relevant US laws for its internal governance functions that do not impinge on its global mandate.

6. Conclusion

Brazil considers that the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017 should have reflected the points identified above, as well as included recommendations to the effect that

- (i) ICANN shall obtain jurisdictional immunities from the United States, for example under the US International Organizations Immunities Act, except for such

ICANN activities that do not directly interfere with the management of Internet's global resources, which exceptions will inter alia enable US adjudication of claims related to ICANN's internal governance functions;

- (ii) ICANN shall maintain and further develop accountability mechanisms not subject to the jurisdiction of any single government, through appropriate bottom-up multi-stakeholder policy development processes, to ensure that ICANN can be held liable especially for its activities that are immune from US jurisdiction.

Due to the draft report's failure to address such concerns which, in our view, occupied centre stage in the process that led to the launching of Work Stream 2, Brazil cannot support the draft report.