Dissenting opinion with regard to
CCWG-Accountability WS2 Jurisdiction Subgroup Draft Recommendations,
October 2017
Part 1

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I submit my dissenting opinion in two parts, part one is about what the sub-group did not do, and part two is with regard to the recommendations that it does make. This is part one.

I fully support Brazil's statement on the report submitted by jurisdiction sub-group's Chair, Greg Shatan, to CCWG.

In this dissenting opinion, the whole of Brazil's statement may be considered to be reproduced *in toto*, since I do not want to repeat what has already been described and recommended so well in Brazil's statement.

I would, however, like to add to it as follows.

I agree with Brazil that this report is not a consensus document, not only because there were dissenting views, but even more so because these views were not given enough consideration by Sub-Group's Chair[1], and group's processes as guided by the Chair.

Giving due consideration to all views and making the best effort to reach consensus on all issues that members consider important is basic to defining consensus, whatever be the final outcome.[2] Not only this was not done, the failure to do so was with regard to a matter that a very large number of members considered as the main reason that jurisdiction-related mandate was given to work stream 2 of CCWG, and therefore should have been the central subject discussed and decided upon by the jurisdiction (whether it finally resulted in a consensual outcome or not).

Further, and this is being said with great sadness but full responsibility, the Sub-Group's Chair throughout actively pushed away discussion on this main subject of the jurisdiction mandate, and did not allow it to take place in a due manner. (Again this is irrespective of whether we could have finally got a consensus outcome on it or not.)

It was painful to see repeated interventions by the Chair to discourage discussion on this important subject, much less actually make space for it and enable it, given that a lot of members were very interested in it, and considered it as the central issue for our recommendations. We may or may not have actually agreed to make any recommendation on this subject. But such discouragement, and consequent non-discussion of what many considered as the central mandate of the group, renders the recommendations of the group completely one-sided, and improper to be considered as having arrived through a process of consensus-building. Consensus-building is not what happened in the two years of the life of this sub-group, the evidence of which is there publicly available in the sub-group's elist and call records.

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1 I am conscious that the Sub-Group's Chair likes to be called Rapporteur rather than Chair, but when I read the definition of Rapporteur, I am unable to use this term with regard to the role that got actually played. https://en.wikipedia.org/wiki/Rapporteur "A rapporteur is a person who is appointed by an organization to report on the proceedings of its meetings".

2 IETF has a document to the effect that "supporting percentage is less important for determining "rough consensus" than ensuring opposing views are addressed". https://en.wikipedia.org/wiki/Rough_consensus#cite_note-3

There is not space here to related all such evidence, although it may be useful to gather and present it at some time to show how ICANN's decision-making process failed completely with regard to an extremely important subject. One may just mention in the passing how since early stages many members brought up possibilities to ensure that US jurisdiction was unable to improperly interfere with ICANN's global governance functions, even without necessarily changing ICANN's place of incorporation, but such discussions were repeatedly discouraged by the Chair. This was done by saying that we must first discuss problems and not solutions, which would come later. (See for instance the list discussions close to the time of ICANN's Hyderabad meeting in Nov 2016, which discussion the Sub-Group chair dismissed as: "This discussion has ranged well beyond the current stage of our work and potentially beyond the scope of this subgroup; we need to refocus."[3])

This – problems first, solutions later – was a strange distinction to make because when anyone proposed US's unilateral jurisdiction as a problem, the dismissive response was that this problem will stay whatever be ICANN's jurisdictional status. And then if some of us proposed possibilities whereby this would not be so, we were told, to the effect, that "no we cannot discuss solutions yet – it is too early!". Meanwhile, we did not see much discussion of either problems or solutions on the private law or private disputes side of the jurisdiction issue, which "the other group" insisted was the real mandate of the group.

This stalemate or charade went for more than a year, more or less right up to June 2017, with little meaningful work done by the group, when suddenly in a tele-meeting of the sub-group, CCWG Chair appeared, proposed and decided that:

> We have concluded that the Jurisdiction sub-group will take California jurisdiction as a base line for all its recommendations, and that the sub-team not pursue recommendations to change ICANN's jurisdiction of incorporation, location of headquarters ***or seek immunity for ICANN.*** With this decision we are recognizing that there is ***no possibility that there would be consensus for an immunity based concept*** or a change of place of incorporation. (Emphasis added.)

This was a monumental decision to be made by the CCWG Chair, which went to the very core of jurisdiction mandate, almost redefining it. This mandate has a long history and complex justifications (involving many promises etc), all of which were ignored. And the decision was made suddenly and summarily, without building a process towards it, which was the least that was required for such an important decision.

It was also strange that when all along the group had been told that we remain at the "issues stage" and have not moved to the "solutions stage", whereby actual possible jurisdictional remedies were constantly discouraged to be discussed, the chair decided suddenly, with almost no notice, that a set of possible "solutions" were not to be discussed henceforth. Thereby, effectively, as per the rules applied to the group's working, possible jurisdiction related remedies were not to discussed before that point of time of CCWG Chair's decision (since they belonged to "solutions category" and not to "issues category"), and they could not be discussed after that point, due to chair's new, unexpected, diktat. It is very evident, therefore, that, the process was closely managed in a manner that immunity related discussions were kept out of the sub-group's formal discussions at all times. They were never actually accorded an "official" opportunity to be discussed. Every time seemed to be the wrong time to discuss them – which, as said, was for many the single most important issue that the Sub-Group should have discussed and sought consensus for a recommendation on. This is the main flaw in the Sub-Group's process which makes its outcome illegitimate without consideration of Brazil's proposal as now posted.

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3 Email to sub-group elist dated 28th Nov 2016

Do note that, in the CCWG Chair's referred decision in June 2017, the issue of possible partial/customised immunity from US jurisdiction was unceremoniously clubbed with change of ICANN's incorporation/ location, as one thing, which was no longer to be discussed. The fact was completely ignored that a number of members had been strongly, and repeatedly, arguing on the group's elist, for many months, that jurisdictional immunity is a very different matter than change of ICANN's incorporation/ location, and providing detailed arguments about how it is so. It shows how tone-deaf the Chairs – of the CCWG and the Sub-Group – had been, if not deliberately inconsiderate, to this principal argument of many members, in clubbing the two issues together in their new diktat, and present them as one.

After the above decision of CCWG Chair during a tele-meeting, there was a lot of criticism of it on the jurisdiction sub-group's e-list – certainly more criticism than support. Such criticism also came from many of those who were not active in arguing the possible jurisdictional remedy of customised immunity, and some may even have been against it. This includes Avri Doria, whose earlier statement was wrongly relied upon by CCWG Chair to issue the mentioned diktat (this fact got subsequently clarified on the elist), Milton Mueller, Raphael Beauregard Lacroix, Seun Ojedeji, and others. When the "decision" went to the face-to-face meeting of CCWG at Johannesburg, it faced further criticism, like from Tijani Bin Jemaa, and serious issues like breach of trust in managing the process got raised. Once again there was more criticism than support, but, strangely enough, the decision stood. Throughout the process, one never saw the slightest sympathy or justice for the viewpoints of those whose propositions were, I would now say it, considered outside a "certain set of possibilities that were a priori acceptable among ICANN's close insiders".

There was another formidable structural feature of the Sub- Group's working that we had to constantly struggle against. The Chairs would consider all those who remained silent as being in support of the propositions that they had advanced (as was apparently done for the mentioned "decision" of the CCWG Chair). However, if anyone else advanced a proposition, silence was considered as going entirely against that proposition. (There were repeated objections to this procedure repeatedly adopted by the Sub-Group Chair, but to no avail.)

Now, it could perhaps have been possible to consider submissions by Sub-Group's Chair to be at a rather different level than those by other members, but the problem was that the Chair was among the most active proponents of specific views and positions that were pro status quo (against those that sought some real change, and moving forward). Yes, this is an ascription of partisanship to the Chair's conduct, which, with all due respect, I unfortunately have to make here. Such partisanship has frequently been directly spoken of in the Sub-Group's proceedings by many members[4], and if I were the Chair I would have been really concerned at such level of push-back with regard to the Chair's conduct (all members are seasoned policy actors, and know not to make such an allegation lightly), but it seemed to have no effect on how the proceedings went on.

The proceedings of the group, its elist, call records, collaboratively developed documents, etc, are full of evidence how the Sub-Group Chair was one among the most active in providing views and propositions of one rather than the other kind (it is normal for such discussions to get divided across such groups, perspectives- and arguments-wise). Let me provide just one illustrative example: In the final recommendations put forward in the Sub-Group's report, the most substantive one is about OFAC. It may surprise some to know that in a collaborative document, the Sub-Group Chair had commented that the OFAC issue, in his view, was not in the sub-group's mandate. It was not only a strong comment to make, it concerned the very mandate of the group, regarding which the Sub-Group's Chair has special authority. He should not have made such a comment easily. And if indeed this is his view, it is not clear why it was not presented when finally an OFAC recommendation was

4 The evidence of it in the open archives of the Sub-Group's e-list.

taking shape, but perhaps now in a manner that was within a "certain set of possibilities that were a priori acceptable among ICANN's close insiders".

The process was therefore completely loaded against those who considered problems arising from ICANN's US jurisdiction as the central mandate of the sub-group. Instead of fully discussing their proposals, and the corresponding arguments and counter-arguments, an air of illegitimacy was constantly built around them. We have provided some instances of this. The final report from the sub-group says that it discussed the topic of "changing ICANN's headquarters or jurisdiction of incorporation" when the fact is that this issue was hardly ever discussed by the group. No one made any substantial proposal to change ICANN's headquarters, or even jurisdiction of incorporation. What was however repeatedly proposed and discussed by many members, and also indicated in public responses to various questionnaires, is the exploration of "customised immunity" from US jurisdiction for ICANN. But the report does not mention this as issue that was discussed. Apparently, it seeks to paint the group that was seeking exploration of customised immunity as being extremely unreasonable by wrongly projecting the key proposed solution to be to change of ICANN's location or jurisdiction of incorporation. This shows once again how biased the proceedings of the group have been right till the very end.

When the CCWG Chair made that unexpected decision around the Johannesburg meeting, while many remained opposed to it, some finally accepted it, for instance Brazil, but on the clear condition that "customised immunity" will remain an option on the table, and will be discussed towards framing final recommendations. The sub-group chair should have honoured this agreement and made space for discussion of this possible recommendation.

However, in the last many weeks the process was manned in a very partisan manner, with exclusive focus on two recommendations, one on OFAC and other on choice of law. Some of us waited that when these recommendations are finalised, discussion on "customised immunity" will be taken up as a possible recommendation. We did not bring it up in the meetings where the clear agenda was to discuss the mentioned two recommendations because we did not want to look like we were sabotaging the work on these two; indeed we were interested in some good recommendations coming out in these areas. We stood by patiently, expected a sequential approach to be taken, and not butting-in with an "immunity based recommendation" as the other two were still being finalised. No deadline for given to members to submit possible recommendations for the final report. There had been an earlier deadline to submit proposed issues matched to clear solutions, which we had submitted. My submission, and those of some others, brought up "customised immunity" as the proposed solution to some issues that were raised.

We had thought that since a short list of the various issues raised in this round had been developed (there were not too many of them), the corresponding solutions that were submitted were being taken up one by one for discussion, and the turn of solution of "customised immunity" as a possible recommendation will also come. It was in any case the duty of the Sub-Group Chair to take up the "immunity based recommendation" which many had repeatedly said that they would like to be discussed. And then all at once the report was declared to be complete and closed, without discussion on or consideration of the "immunity based recommendation".

One later sees that, here and there, in call records, some muted references to the deadline of 11th Oct to submit the report to CCWG were made (but no deadline for Sub Group members to submit recommendations for consideration in the final report, other than the earlier deadline for issues and solutions against which we had made submissions and awaited a discussion on them).[5] But some of

5 I had earlier specifically requested the Chair to prominently and repeatedly advertise all important deadlines, which is the way to obtain full participation of members. But this was once again not done in this case, and this time it involved the extremely important matter of submitting recommendations for consideration for the final report.

us who were not able to actively participate in the ongoing discussions centred on the mentioned two recommendations were simply not prepared for such a sudden closure without taking up a possible recommendation on “customised immunity”. We believed in good faith that some such discussion will happen before report closure. It will then be up to the group members to agree to a corresponding recommendation or not, following proper consideration of all aspects of it, and genuine efforts to close out differences. No such effort was made. It is in these circumstances that we consider the report submitted as Sub-Group’s draft recommendations to be non-legitimate, and not based on a consensus approach.

The report should therefore be dismissed by CCWG and returned to the jurisdiction Sub-Group, with a new deadline. The jurisdiction sub-group should then take up Brazil’s proposed recommendations in full earnest, not just seeking a quick “yes” or “no”, but in the form of a full discussion on its different aspects, followed by a consensus-building exercise.