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

Parminder Jeet Singh

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.

Part 1 – about what the Sub-Group was mandated to do but did not do

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 the 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 subject that a very large number of members consider as the main reason that jurisdiction-related mandate was given to work stream 2 of CCWG-Accountability, and therefore should have been the central issue 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

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

arrived through a process of consensus-building. Consensus-building is not what happened in the year and a quater of the life of this Sub-Group, the evidence of which is there publicly available in the Sub-Group's elist and call records.

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 a whole 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 the 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

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

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 towards making recommendations. 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 in its statement.

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 ordered 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 some others. When the "decision" went to the face-to-face meeting of CCWG at Johannesburg, it faced further criticism, like for instance 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 often adopted by the Sub-Group Chair, but to no avail.)

Now, in other circumstances, 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 groups, perspectives- and arguments-wise). Let me provide just one illustrative example: In the

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

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 earlier 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 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 an issue that was discussed. Apparently, it seeks to paint the group that was seeking exploration of customised immunity as being rather 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 again 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 was 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. For it, 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 the 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 have discussed. But then all at of a sudden the report was declared to be complete and closed, without a 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] Some of 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.

Part 2 – Dissent regarding draft recommendations submitted on the group's behalf

On the OFAC related recommendations:

I agree that ICANN should be given a general licence by the US government (OFAC, Treasury, etc) to exempt ICANN's global governance functions from OFAC's remit. Such a recommendation should be directed at all the concerned parties, the mentioned US government parties, and those within ICANN.

However, the manner that in which this recommendation is phrased in very inappropriate and inadequate. The "statement of Brazil" on the draft recommendations of the Sub-Group quotes the Sub-Group Chair to have said, "we [the subgroup on jurisdiction and, by extension, the CCWG] are in the business of making policy recommendation and not implementation recommendations". Precisely so. And therefore we should just have recommended at a policy level that: "A general licence of exception from OFAC must be granted to ICANN in relation to its global governance activities of managing the global DNS." Period.

However, the draft recommendation on OFAC general licence is extremely unsure, unclear and somewhat apologetic. This, it appears, has to do with the element of second guessing the ICANN Board's and US government's views and interests that has been a constant feature of the work of this Sub-Group, which is, to the say the least, very irritating, and actually completely disrespectful of the legitimacy and authority of the ICANN community, or global multistakeholder community, in whose name the CCWG and the Sub-Group functions.

As is also relevant to the issue of recommendation on "choice of law" issue (discussed below), we find that the CCWG and Sub-Group Chairs have remained constantly unclear on the basic issue of what is the role and authority of CCWG and the Sub-Group, and to whom it can give recommendations and of what nature. It seems to have been suggested variously that we really cannot make recommendations about issues that are under authority of other bodies. (A very strange discussion took place on the e-list on whether CCWG can make any recommendations at all about ccTLD contracts.)

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.

This is beyond understanding and belief. Nothing is really under CCWG's authority, as it is after all a temporary recommending body. Almost everything that it recommends, to the extent that it is of any substantial value, will be something under the authority of an existing body. This is somewhat axiomatic. And if it *a priori* decides not to make any recommendation on anything currently under some other body's authority, it can never make any worthwhile recommendation at all.

In recommending setting up of PTI, a community accountability mechanism etc, did CWG-Stewardship and CCWG - Accountability Work Stream I not make recommendations about issues which were squarely under the current authority of other bodies (NTIA, ICANN board etc). Doing so is the job of such WGs that are mandated to make recommendations on institutional reform. One cannot see how it could be any other way. I have not followed the work of other Sub-Groups of CCWG -2, but I am sure their recommendations would certainly impinge on issues under the current authority of one body of the other.

The question then is why are novel interpretations being given by the Chairs to what the jurisdiction Sub-Group can recommend or not. In the first phase, of setting up PTI, community accountability mechanism, etc., we did not hear things like "first study and explore, if only everything looks fine, see if this could perhaps be done...!!" kind of stuff. We saw straightforward recommendations based on what in the view of community representatives were the right polices and institutional forms to be adopted for the global governance functions of ICANN, within general limits of plausibility.

The recommendations from the Sub-Group and CCWG have to be similarly straightforward; in this instance that ICANN should ask for a general licence of exception from OFAC for its legitimate and due global governance activities and the US government should grant it.

On "choice of law" related recommendations:

It is most surprising to see the report observe that: "It is the understanding of this Subgroup that it cannot and would not require ICANN to make amendments to the RA or the RAA through this Recommendation". In the light of the above discussion, one is completely unable to see why the Sub-Group cannot recommend ICANN to change its contracts? It of course can. As it can recommend to ICANN to alter its other organisational forms, behaviour, activities, etc, the nature of its contracts being just one among these. This is what CCWG has been set up for. Whether ICANN Board agrees to it, wants to re-negotiate it with CCWG, etc, is a completely different matter.

Both sets of draft recommendations by the Sub-Group are therefore based a very wrong notion of Sub-Group's and CCWG's mandate and powers, and are thus vitiated.

I request CCWG to first make a determination on the point of whether the Sub-Group and CCWG can make such recommendations or not, as discussed here, and then return the draft recommendations to the Sub-Group with that determination (which I am sure would be that, in principle, there is nothing to prevent the Sub-Group from make such recommendations which impinge on authority of existing bodies inside or outside ICANN.)

Now, moving to the actual recommendations on "choice of law":

Unfortunately, after hitting upon a good idea of recommending a "menu approach" for choice of law for ICANN contacts, the Sub-Group finally does not make that recommendation clearly enough. Instead, observing that it cannot ask ICANN to make its contracts one way or the other, it lists this option among many others. Among these options, one is to maintain the status quo (!?),

and another, most interestingly, to actually regress to a situation where ICANN forces a single "choice of law" on everyone, that of the US federal law and the laws of the State of California.

As all these are listed as options that ICANN may chose from, I am not sure about the status of each of these options. Is each of them having the consensus agreement of all, meaning if ICANN chooses to take one option among these and apply it, would ICANN be able to say that after all the Sub-Group and CCWG recommended this as a possible option to take.[6] Meaning that is it likely that we see in a few months ICANN announce that from now on all contracts will necessarily be subject only to the US federal law and the laws of State of California, and none else, and no further "choice of law" is available (as currently it is). And ICANN justify this announcement as being based on one option recommended by consensus by the CCWG! Is this the progress that we have made.

Here again the Sub-Group seems to have developed cold feet about making the appropriate recommendation about "choice of law" clearly seeking a "menu approach", which would have been considered some movement forward. But this has not been done.

Finally, I will comment on this part of the draft recommendations report:

> Based on this work the subgroup developed a master list of "proposed issues" (Annex E). From this list, the subgroup prioritized, in the time remaining, the issues relating to OFAC Sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contracts.

The Chair had indeed given a deadline in August 2017 for submitting issues and a clear "solution" with regard to each. A few of us did so, with a clear statement of the issue, and the corresponding solution. If the issue were to be agreed by the group to be a real problem, the corresponding solution would then, in our understanding, have formed a draft recommendation to be discussed and agreed upon by the Sub-Group. These issues were by general agreement clubbed under eight topics, which we assumed would all be discussed one by one. Against each topic was a proposed solution, clearly in the language of a draft recommendation, or easy to adopt towards one. For instance, in row 5, the following was entered:

> The only solution here is a general immunity under the US International Organizations Immunities Act, with proper customization and exceptions for ICANN to be able to perform its organizational activities from within the US. The chief exception I understand would be the application of California non-profit law.

For no particular reason, under items one and two on this list were the OFAC issue and "choice of law" issue, which we found nothing to object to, as we waited for all of them to be considered.[7] We are not conscious of when these two were exclusively prioritised, at the expense of the other six issues, as the above excerpt from the report suggests.

As also suggested in the excerpt, is it just that we simply ran out of time to discuss all the eight issues that got listed after more than a year's work put into framing them, and folded up by discussing and making recommendations on two arbitrarily chosen issues? Post development of the

---

6 If on the contrary these options are just possibilities discussed in the group and none can be considered to have consensus support, why should not the Sub-Group report also similarly list the different possibilities about overcoming constraints of US jurisdiction on ICANN global governance functions through concepts like "customised immunity" etc that got discussed in the group.

7 The list is at https://community.icann.org/download/attachments/59643282/Master%20List%20of%20Proposed%20Issues%20Submitted%20by%20Subgroup%20Participants.docx?version=1&modificationDate=1504732159000&api=v2

issues-solutions list, it took just a few weeks to make recommendations on these two issues. Another few weeks would have finalised our work in relation to all the topics that the Sub-Group listed for consideration. This is more than indecent haste, it smacks of deliberate abdication of the Sub-Group's full mandate!

CCWG therefore should return the draft recommendations report to the Sub-Group with an extended deadline of three months for the group to consider all the eight issues listed on the final list of issues-solutions developed by the Sub-Group.

****

I dedicate this document to the memory of friend, inspiration and mentor, Michael Gurstein[8], the news of whose death I received as I was writing it. If there was one thing that Michael taught me, it was to "speak truth to power", looking it in the eye (and not give a damn). When I am in doubt whether I should really say or express something, which involves stepping on powerful toes, I often think of what Michael will do in that situation, if not actually consult him (which regrettably I would not be able to ever physically do now). And I wrote this document too with thoughts of him in my mind. I did stop and think that this document may be seen as "controversial" and possibly "negative", and therefore whether I should associate it with the memory of someone not with us. But then everything I know of Michael reassured me that this is the way he would have liked it to be. This is taking his work forward. The key job of civil society is indeed to "speak truth to power", defined that civil society is in opposition to organised power of both state and market (and their new networked and enmeshed forms about which Michael often held forth).

8 https://en.wikipedia.org/wiki/Michael_Gurstein . The entry requires considerable updating, especially with respect to his work of the last many years.