

Brasília, 3 June 2015

**Comments of the Brazilian Government on the
“Cross Community Working Group (CCWG) Accountability Initial Draft
Proposal for Public Comment”**

1. The Government of Brazil commends the CCWG-Accountability for the elaboration of a comprehensive set of recommendations for ICANN's accountability processes.
2. Brazil expects that the CCWG-Accountability's final proposal will take into account comments and suggestions made during the present public consultation period to the extent those comments and suggestions might address additional concerns that may assist in the goal of enhancing ICANN's accountability mechanisms.
3. While providing its comments to the aforementioned draft proposal, the Brazilian Government recalls 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)¹.
4. Brazil further recalls the position document “Comments of the Brazilian government on the 'Enhancing ICANN Accountability and Governance Process’” from 27th September 2014, which states that “it might defeat the purpose for which the accountability process was established if it were to be guided by a purely technical perspective without the necessary political endorsement. Brazil believes it is crucial to make sure the this process is structured in a way that all stakeholders feel fully involved – including governments - in order to ensure that the final outcome of the exercise is also considered legitimate by all participants”.
5. In that context, Brazil wishes to reaffirm its concern – already expressed in previous phases of discussion – regarding the fact that the (welcome) initiative of the U.S. government has provided the global community with an unparalleled opportunity to reflect on which steps should be taken to ensure

¹ <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>

that the post-2015 ICANN would be an organization with unchallenged legitimacy. That goal could only be achieved, in our view, 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.

6. It must be made clear that (i) the government of Brazil, in line with the model for Internet governance adopted domestically, is not advocating that ICANN should be governed by an intergovernmental agreement – as we strongly defend this “founding charter” should be negotiated and agreed upon by the global multistakeholder community, including, but not limited to, governments; and (ii) Brazil’s main concern is not correctly captured, on the other hand, by the notion that ICANN should move out of the U.S. (a goal which, besides being unrealistic, would not rightly address our concerns). What we have defended throughout the process is 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 an existing legal status. From the Brazilian perspective the existing structure clearly imposes limits to the participation of governmental representatives, as it is unlikely that a representative of a foreign government will be authorized (by its own government) to formally accept a position in a body pertaining to a U.S. corporation. Unless we accept that governments should not be involved, in any way, in the decision-making process within ICANN the issue regarding the corporation’s “legal status” should constitute, in our view, an indispensable element for any post-transition scenario. In the spirit of the Tunis Agenda and the NETmundial’s related provisions, Brazil certainly believes governments have a role and responsibility in regard to issues addressed by ICANN, in particular regarding their perspective on how public interest should be considered in the corporate’s initiatives and decisions – an obligation which, by the way, ICANN is committed to uphold.

7. 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 internationalization of ICANN. In the post-transition period, the corporation should become a truly international entity which is accountable not only to a

limited group of stakeholders in specific regions, but rather to the worldwide multistakeholder community.

8. As also expressed in the position document from September 2014², Brazil supports accountability mechanisms that provide a clear separation of powers within the ICANN structure. In this regard, the four building blocks proposed by the CCWG-Accountability – 'Principles', 'Empowered Community', 'Board' and 'Independent Review Mechanisms' – might address, in principle, this concern.

9. With regards to 'Principles', Brazil fully supports the suggestion of incorporating ICANN's specific mission into its bylaws (p.19 -20)³. Moreover, we support that the global multistakeholder community should be provided with accountability mechanisms to ensure that the corporation acts strictly in accordance with its mission.

10. When it comes to incorporating the provisions of ICANN's Affirmation of Commitments (AoC)⁴ into its bylaws (p. 22-27 of the CCWG draft proposal), it is important to consider that the AoC was created in the context of the US Government's oversight of ICANN. Once that relation is ended, due consideration should be given as to whether commitments established in the past should remain valid within the new oversight structure. In other words, the incorporation of the provisions contained in the AoC should reflect the agreement of the global multistakeholder community, including governments, and not be automatically transcribed from the AoC.

11. In this regard, Brazil considers inappropriate that Section 8(b) of the AoC be incorporated to the bylaws⁵ without further reflection, as ICANN should not be constrained to be legally established in a specific country if, in the future, its stakeholders decide that it would be more convenient for the corporation to change its main office to another location.

12. Similarly, the CCWG should consider reviewing Article XVIII, Section 1,

² <http://forum.icann.org/lists/comments-enhancing-accountability-06sep14/docxuTakamsfA4.docx>

³ *Cross Community Working Group (CCWG) Accountability Initial Draft Proposal for Public Comment*, 4 May 2015: <https://community.icann.org/download/attachments/49348770/CCWG-Draft-Proposal-clean.pdf?version=1&modificationDate=1430858640518&api=v2>

⁴ *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation For Assigned Names And Numbers*: <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

⁵ <https://www.icann.org/resources/pages/governance/bylaws-en>

of ICANN's bylaws, which includes an analogous provision. Brazil supports the elimination of that specific requirement, which should by no means be granted the status of a “fundamental bylaw”.

13. Still on the topic of AoC and bylaw provisions, Brazil understands that references to the leadership of the private sector (“private sector led”, “rooted in the private sector”) are inadequate and contradict the spirit of multistakeholderism that should govern the corporation. The fact that ICANN is currently incorporated as a “non-profit organization” reinforces this understanding.

14. With respect to the Independent Review Process – IRP (Chapter 4.1 – p.30 of the CCWG draft proposal), Brazil welcomes the suggestion of establishing an appeal's mechanism within the ICANN structure that is capable of settling disputes between parties in a truly independent manner.

15. For the Brazilian Government, decisions made by the IRP should be binding to the ICANN organization and should not be overruled by national courts where ICANN is legally established. It is our understanding that the autonomy of the IRP would be seriously undermined if this condition cannot be met. In other words, and in line with what was expressed before in regard to the corporation’s existing legal status, any proposed accountability mechanism would be ineffective if ICANN's jurisdiction is ultimately able to restrict its power.

16. Still about the IRP, Brazil supports a standing panel of seven independent members and decisional panels comprised of three members. Brazil considers that geographic, cultural and gender diversity is a key element and should be a mandatory criterion in the selection of IRP panelists.

17. Similarly to the Dispute Settlement mechanism of the World Trade Organization (WTO)⁶ – which is regarded as highly efficient and predictable –, ICANN's IRP should be comprised of clearly defined steps with firm deadlines.

18. Brazil welcomes the proposal to create a “mechanism to empower the community” (Chapter 5.1 – p.40 of the CCWG draft proposal). This should indeed be one the main pillars of the new proposed accountability arrangement, as a properly empowered community mechanism is fundamental to balance decision-making power within ICANN. The implementation of the “empowered community” concept as one of the building blocks of ICANN's

⁶ https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

accountability would contribute to increase the perception of legitimacy, on the part of all stakeholders, of the corporation's decisions.

19. To that end, while working out the details of the specific mechanism, 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.

20. Moreover, while evaluating the proper legal status of the stakeholder representatives in the new empowerment mechanism, the CCWG-Accountability final proposal should ensure that effective decision power be granted to the community. It would defeat the purpose of accountability if decisions made by the community could be overruled by the ICANN Board or by national courts (which, again, refers to the issue regarding the corporation's existing "legal status").

21. With respect to the involvement of governments, Brazil considers that the GAC is a legitimate stakeholder group with specific concerns and should, therefore, be part of the proposed community empowerment mechanism. Appropriate arrangements should be adopted in order to ensure that the different groups of stakeholders could participate in such mechanism on an equal footing. However, given the corporation's present "legal status", Brazil considers that unsurmountable difficulties may prevent governments to participate, in a representative manner, in such body. The final decision as to whether government representatives shall have seats in the new mechanism should, in any case, result from the deliberations among governments themselves.

22. Similarly to the IRP, geographic, cultural and gender balance should constitute key principles in the formation of the community empowerment mechanism. Gender balance is another important element that should guide the selection of stakeholder representatives.

23. With regards to stress tests, Brazil considers that the definition of contingencies is an important tool to test the resilience of the proposed accountability structure.

24. However, it is Brazil's viewpoint that Stress Test 18 – "Require consultation and mutually acceptable solution for GAC advice that is backed by consensus" (Chapter 7.2, p.63 of the CCWG draft proposal) – describes a

situation which represents a very improbable risk of capture. That being said, Brazil considers that any decisions that should result from the assessment of ST18 be considered as a Work Stream 2 item.

25. In regard to jurisdiction, although Brazil would prefer, for the reasons stated before, that the issue regarding legal status/jurisdiction should be part of the initial transition proposal, we would strongly support that the evaluation of alternative jurisdictions for ICANN should, at least, be clearly set as “unfinished business” to be necessarily addressed in the context of Work Stream 2, with a clear and predetermined timeline. We are concerned about the influence that ICANN’s existing jurisdiction may have on the actual operation of policies and accountability mechanisms being proposed and therefore consider it is extremely important that the CCWG-Accountability evaluates other places of legal establishment which could potentially offer effective conditions to deploy the accountability requirements defined by the community. Brazil is willing to collaborate with other members and participants of the CCWG-Accountability in order to perform a comprehensive and impartial assessment of different jurisdictional options for ICANN.

26. It is worth repeating, however, that Brazil's concern does not reside in considerations on the physical location of ICANN's headquarters. Brazil's preoccupation lies rather in the fact that corporation’s existing “legal status” reflects a unilateral, pre-determined solution, and not a comprehensive agreement addressing all stakeholders’s interest and concerns, independently of where it is physically situated.

27. With respect to the proposed timeline (Chapter 10.1 – p.91 of the CCWG draft proposal), although the Brazilian government understands the sense of urgency that is guiding the work of the CCWG-Accountability, the quality of the recommendations should have a higher priority than the accomplishment of deadlines. In this regard, the CCWG should take as much time as necessary to evaluate the concerns expressed in the present public consultation period and not rush into conclusions that may neglect useful comments expressed by the community.