

The background of the slide features a stylized globe with a light blue and green color palette. The globe is composed of several interlocking puzzle pieces, suggesting a global or interconnected theme. The text is overlaid on this background.

# ICANN Jurisdiction

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A bit of history:  
Subgroup on Jurisdiction: issues,  
scope and method

# Why work stream 2?

- Work Stream 1 (WS1) Final report, Recommendation 12: number of topic that could not be completed in the WS1, including jurisdiction
- Work Stream 2 Jurisdiction (scope): focus on the settlement of dispute jurisdiction issues

# From WS1 (rec. 12) to WS2: Jurisdictional issues to consider

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue
- Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework
- Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.

Sub-group of the CCWG-Accountability was formed to perform the task on Jurisdiction (June 2016).

# Jurisdiction subgroup: challenges

- Ambiguity of the task set in the WS1 Recommendation 12
- Lack of clarity with regard to scope and goals of the group
- Relocation/immunity debates: highly controversial
- Accountability mechanisms in WS1 were tailored for the ICANN to be incorporated in California

# Tasks/methods of the subgroup

- Discuss the topics of “confirming and assessing the gap analysis” and of changing ICANN’s headquarters or jurisdiction of incorporation
- Work on refining the “Multiple Layers” of jurisdiction
- Several working documents considering the influence of ICANN’s existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue)
- Comprehensive review of the litigations in which ICANN has been a party

# Input from the ICANN community/ICANN Org

- Questionnaire to allow the community to submit jurisdiction related issues for consideration by the sub-group
- Develop a series of questions for ICANN Legal

# Interim result: issues prioritisation

- Master list of proposed issues (based on the analysis, questionnaire responses, etc.)
- Remaining time: short
- Two issues prioritised: OFAC Sanctions and the Choice of Governing Law and Venue Clauses in Certain ICANN Contract.
- The group was able to reach consensus, but not full consensus



# Recommendations regarding OFAC and related sanctions issues

# Background: OFAC and sanctioned nations

- U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC): affecting ICANN's operations and accountability
- OFAC: an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted individuals and entities
- Sanctions imposed on the nation might extend to its citizens, regardless of their personal character or activities

**However:** OFAC has the authority, through a licensing process, to permit certain transactions that would otherwise be prohibited under its regulations.

# OFAC, sanctions and ICANN's operations and accountability

- ICANN'S goal of administering the Internet as a neutral global resource might conflict with the imposition of sanctions by the U.S. on other countries
- Sanctions applied to domain name registrars and registries: potentially hampering access to the domain name system for business and individuals based solely on their nationality
- Persons who want to transact with ICANN (or ICANN itself) need to apply for an OFAC license

# Current Terms and Conditions for the Registrar Accreditation Application:

**“ICANN is under no obligation to seek [a license for a transaction with a non-SDN resident of a sanctioned country] and, in any given case, OFAC could decide not to issue a requested license.”**

(source: <https://www.icann.org/resources/pages/application-2012-02-25-en>)

# Is the status quo acceptable?

## **Group's conclusions about the possibility of ICANN to decline seeking licenses:**

- The policy is not encouraging (even if ICANN formed the subgroup seeking such licenses)
- Potentially hampers ICANN's ability to provide services
- Potentially inconsistent with the spirit of ICANN's mission
- Uncertainty and lack of transparency
- Deterring potential registrars resided in sanctioned countries from pursuing registrar accreditation

# Recommendations related to OFAC: RAA amendments

Amend the sentence in RAA to require require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

# OFAC: Approval of gTLD Registries

- In the 2012 round of the New gTLD program, it was difficult for residents from sanctioned countries to file and make their way through the application process.
- The Applicant Guidebook: “<...> ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.”

# Recommendations related to OFAC: Approval of gTLD Registries

Recommendation: ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.



# Application of OFAC Limitations by Non-U.S. Registrars

- Some non-U.S.-based registrars might be applying OFAC sanctions based on a mistaken assumption that they must do so because they have a contract with ICANN.
- Non-U.S. registrars may apply OFAC sanctions, if they “cut and paste” registrant agreements from U.S.-based registrars.

# Recommendation: Application of OFAC Limitations by Non-U.S. Registrars

The sub-group recommends that ICANN clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

# OFAC: General licenses

- OFAC “general licenses”: cover particular classes of persons and types of transactions.
- Such a license would need to be developed in conjunction with the U.S. Department of the Treasury, which must amend OFAC regulations to include the new license.
- This regulatory process could be a long and be a significant undertaking.

# OFAC General licenses: final recommendation

The sub-group recommends that ICANN take steps to pursue one or more OFAC “general licenses.” ICANN should first prioritize a study of the costs, benefits, timeline and details of the process. ICANN should then pursue general licenses as soon as possible, unless it discovers significant obstacles. If so, ICANN should report this to the community and seek its advice on how to proceed. If unsuccessful, ICANN needs to find other ways to remove “friction” from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with affected parties.

# Recommendations Regarding Choice of Laws and Choice of Venue Provisions in ICANN Agreements

# Issue: ICANN's jurisdiction-related choices in the gTLD base Registry Agreement (RA) and the Registrar Accreditation Agreement (RAA)

## **3 Jurisdiction-related choices:**

- absence of a choice of law provision in registry agreements
- absence of a choice of law provision in registrar accreditation agreements
- contents of the choice of venue provision in registry agreements

# Background: RA and RAA and jurisdiction choices

- RA and the RAA are standard-form contracts, no negotiations implied (exceptions: intergovernmental organization or a governmental entity).
- Any changes to the base agreements are now determined through an amendment procedure, detailed in each agreement (see, e.g., Art. 7.6 of the RA).
- Jurisdiction subgroup: mandate to propose amendments?

# Recommendations: RA and RAA and jurisdiction choices

- Jurisdiction subgroup **cannot and would not require** ICANN to make amendments to the RA or the RAA through the Recommendations related to choice of laws.
- Recommendations: just **suggesting** possible changes for study and further considerations by ICANN Org, GSNO and contracted parties.



# Current situation: RA and RAA

- RA does not contain a choice of law provision. The governing law is undetermined, until a judge or arbitrator takes a decision on that matter or until the parties to any specific contract agree otherwise.
- RAA does not contain a choice of law provision. The choice of law: the same as RA.
- Choice of venue provision in registry agreements: disputes are to be resolved under “binding arbitration” pursuant to ICC rules. Venue: Los Angeles, California as both the physical place and the seat of the arbitration (to be held under ICC rules).

# Recommendations: choice of law provisions for RA

- **Menu approach**
- **California Approach (fixed law approach)**
- **Carve-out approach**
- **Bespoke approach**
- **Status Quo Approach**

# Suggested approaches (Part 1)

- **“Menu” approach (supported by the group):** the governing law would be chosen before the contract is executed from a “menu” of possible governing laws. Menus could include one country, or a small number of countries, from each ICANN geographic region, plus the status quo (no choice of law) and/or the registry’s jurisdiction of incorporation and/or the countries in which ICANN has physical locations.
- **“California” (or “fixed law”) Approach:** all RAs to include a choice of law clause naming California and U.S. law as the governing law.

## Suggested approaches (Part 2)

- **Carve-Out Approach:** parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., California) and other parts are governed either by the law of the registry's jurisdiction or by a jurisdiction chosen using the "Menu" approach.
- **Bespoke Approach:** the governing law of the entire agreement is the governing law of the Registry Operator.
- **Status Quo Approach:** retain the status quo, (i.e., have no "governing law" clause in the RAA).

# Choice of law for RAA: recommendations

The options for the RAA are the same as for the RA

# Choice of Venue Provisions in Registry Agreements

- **Status quo:** disputes are resolved by “binding arbitration,” pursuant to ICC rules. Venue is Los Angeles, California as both the physical place and the seat of the arbitration.
- **Recommendation:** When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California. The registry that enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

# Suggestion: Further Discussions of Jurisdiction-Related Concerns

- Reason: concerns raised about immunity (limited, partial, relative, or tailored) that didn't come to any conclusion.
- Path forward to address these concerns beyond CCWG-Accountability work
- Suggestion to create another “multistakeholder process of some kind” to allow for further consideration, and potentially resolution, of these concerns.

# Quiz



# Thank you!

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