

**CCWG-Accountability WS2  
Jurisdiction Sub-group  
Recommendations  
November 2017**

## **Contents**

Executive Summary	3
Background	9
Overview of the Work of the Sub-group	11
Recommendations	14
Annex A – Questionnaire and Responses	30
Annex B – Questions to and Responses from ICANN Legal	107
Annex C – Litigation Summaries	115
Annex D – Proposed Issues List	166
Annex E – Dissenting Statement from Brazil	170
Annex F – 27 October 2017 Transcript of Plenary Discussion on Jurisdiction	178

## Executive Summary

The CCWG-Accountability's final report for Work Stream 1 (WS1), Recommendation 12, proposed that a number of topics that were not essential for the transition and that could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting. Annex 12 of the final report included the following requirement:

*Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:*

- *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.*

*A specific Sub-group of the CCWG-Accountability will be formed to undertake this work.*

The jurisdiction sub-group was created in June 2016 and held its first meeting on 25 August 2016. The Jurisdiction sub-group based its work on Annex 12 of the CCWG-Accountability final report. This proved somewhat challenging, as there are ambiguities in this text that led to some lack of clarity regarding both the scope and goals of the Sub-group.

The sub-group proceeded to:

- 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.
- Prepare several working documents. These included one exploring the question: "What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms?"
- Publish a questionnaire to allow the community to submit jurisdiction related issues for consideration by the sub-group.

- Develop a series of jurisdiction related questions for ICANN Legal which were formally answered.
- Undertake a comprehensive review of the litigations in which ICANN has been a party.

Based on this work the sub-group developed a master list of “proposed issues”. From this list, the sub-group prioritized, in the time remaining, the issues relating to OFAC Sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contract. After careful consideration of these issues the sub-group reached consensus on recommendations for each of these.

Note: The report was approved by consensus as defined in the CCWG-Accountability charter and not by full consensus. The Government of Brazil, which did not support approving the report, has prepared a dissenting opinion which is supported by several other participants and can be found in Annex E of this report. In addition to this the report includes a transcription of the discussions held at the 27 October 2017 CCWG-Accountability-WS2 plenary which focused on jurisdiction issues and can be found in Annex F of this report.

In summary, the recommendations are:

### **Recommendations Relating to OFAC Sanctions**

The Sub-group considered issues relating government sanctions, particularly U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC). OFAC is 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.

- **ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses**

For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license. Currently, “ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.”<sup>1</sup> This uncertainty could discourage residents of sanctioned countries from applying for accreditation.

The Sub-group recommends that the above sentence should be amended to 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

---

<sup>1</sup> Terms and Conditions for Registrar Accreditation Application, Section 4.  
<https://www.icann.org/resources/pages/application-2012-02-25-en>

licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

- **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 AGB (Applicant Guidebook) states: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license."

The Sub-group recommends that ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant is otherwise qualified (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-US Registrars**

It appears that some non-U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants, based on a mistaken assumption that they must do so simply because they have a contract with ICANN. Non-U.S. registrars may also appear to apply OFAC sanctions, if they "cut and paste" registrant agreements from U.S based registrars. While ICANN cannot provide legal advice to registrars, it can bring awareness of these issues to 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.

- **General Licenses**

OFAC "general licenses" cover particular classes of persons and types of transactions. ICANN could pursue general licenses to cover transactions integral to ICANN's role in managing the DNS and contracts for Internet resources, such as registries and registrars entering into RAs and RAAs, Privacy/Proxy Accreditation, support for ICANN funded travelers, etc. This would enable individual transactions to proceed without the need for specific licenses.

A general 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 may be a significant undertaking.

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 relating to Choice of Law and Choice of Venue Provisions in ICANN Agreements**

This Sub-group considered how the absence of a choice of law provision in the base Registry Agreement (RA), the absence of a choice of law provision in the standard Registrar Accreditation Agreement (RAA), and the contents of the choice of venue provision in RA’s could impact ICANN’s accountability. These are standard-form contracts that are not typically negotiated; changes are now determined through an amendment procedure (see, e.g., Art. 7.6 of the RA).

The Sub-group understands that it cannot require ICANN to make amendments to the RA or the RAA. Rather, this Recommendation suggests possible changes to the RA and RAA for study and consideration by ICANN the Organization, the GNSO and the contracted parties.

The RA and RAA do not contain choice of law provisions. The governing law is thus undetermined, until determined by a judge or arbitrator or by agreement of the parties.

- **Choice of Law and Venue Provisions in the Registry Agreement**

The Sub-group identified several alternative approaches for the RA, which could also apply to the RAA:

1. **Menu Approach.** The Sub-group supports a “Menu” approach, where the governing law would be chosen before the contract is executed from a “menu” of possible governing laws. The menu needs to be defined; this could best left to ICANN and the registries. The Sub-group discussed a number of possible menus, which 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.

The Sub-group has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The Sub-group has also not determined how options will be chosen from the menu, e.g., the registry could simply choose from the menu, or it could be negotiated with ICANN?

2. **“California” (or “fixed law”) Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.
3. **Carve-out Approach.** A third possible option would be a “Carve-Out” approach, whereby 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 by the law of the registry’s jurisdiction by law chosen using the “Menu” approach.
4. **Bespoke Approach.** In the “Bespoke” approach, the governing law of the entire agreement is the governing law of the Registry Operator.
5. **Status Quo Approach.** A fifth possible approach is to retain the status quo, i.e., have no “governing law” clause in the RAA.

- **Choice of law provision in registrar accreditation agreements**

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

- **Choice of venue provisions in registry agreements**

Under the RA, disputes are resolved by “binding arbitration,” pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat<sup>2</sup> of the arbitration.

When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California. The registry which enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

### **Further Discussion of Jurisdiction Related Concerns**

There were a number of concerns raised in the Subgroup where the Subgroup had substantive discussions, but did not get to a point of conclusion. As an example, there

---

<sup>2</sup> The “seat” of an arbitration is the legal jurisdiction to which the proceeding is tied.

were discussions of limited, partial, relative or tailored immunity for ICANN that did not come to conclusion.

These concerns were put on the table by different stakeholders, and for these stakeholders, these are legitimate concerns. As these concerns were not discussed to the end, there should be a path forward for these concerns beyond the CCWG-Accountability, which was tasked to look into a limited number of issues within a limited period of time and with a limited budget.

Therefore, the Subgroup suggests that a further other multistakeholder process of some kind should be considered to allow for further consideration, and potentially resolution, of these concerns. We believe that this Report, with its annexes, can be a very useful tool for further debates which will surely take place – whether in another cross-constituency effort or in a future ATRT Review, or in some other ICANN context. The appropriate forum for such discussions is beyond the mandate of the CCWG; however, we encourage the community to build on the work of the Subgroup and prior work in this area.



## Background

The CCWG-Accountability's final report for Work Stream 1 (WS1), Recommendation 12, proposed that a number of topics that were not essential for the transition and that could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting. Annex 12 of the final report included the following requirement:

### ***Jurisdiction***

*Jurisdiction directly influences the way ICANN's accountability processes are operationalized. The fact that ICANN is incorporated under the laws of the U.S. state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.*

*The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight<sup>3</sup> of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.*

*ICANN's Bylaws (Article XVIII) also state that its principal office is in California.*

*The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":*

- *Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.*
- *Jurisdiction of places of physical presence.*
- *Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.*
- *Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP*

---

<sup>3</sup> 1 8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

*outcomes and other accountability and transparency issues, including the Affirmation of Commitments.*

- *Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.*
- *Meeting NTIA requirements.*

*At this point in the CCWG-Accountability's work, the main issues that need within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated:*

- *Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:*
  - *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.*

*A specific Sub-group of the CCWG-Accountability will be formed to undertake this work.*

## Overview of the Work of the Sub-group

The Jurisdiction Sub-group based its work on Annex 12 of the CCWG-Accountability final report. This proved somewhat challenging, as there are ambiguities in this text that led to some lack of clarity regarding both the scope and goals of the Sub-group.

The group initially discussed the topics of “confirming and assessing the gap analysis” and of changing ICANN’s headquarters or jurisdiction of incorporation. The Sub-group then worked to refine the Multiple Layers of Jurisdiction, based on the discussion in Annex 12 of the WS1 Final Report. It was hoped that identifying specific layers (or types) of “jurisdiction” would help avoid the ambiguity of referring to each of these as “jurisdiction,” as was often the case in informal discussions. The following were identified as “layers of jurisdiction”:

1. Jurisdiction of incorporation.
2. Jurisdiction of Headquarters Location.
3. Jurisdiction of other places of physical presence.
4. Jurisdiction for the Law used in Interpretation of Contracts, etc. (Choice of Law), including contracts with contracted parties, contracts with other third parties, and actions of the Empowered Community.
5. Jurisdiction for the physical location of litigation of disputes (Venue).
6. Relationships with national jurisdictions for particular domestic issues.
7. Meeting NTIA requirements.

While the Sub-group did not come to agreement on whether each of these layers of ICANN’s jurisdiction should be addressed by the Sub-group, there was broad agreement that these were the categories or “layers” of jurisdiction.

The Sub-group then prepared several working documents, including one exploring the following question: "What is the influence of ICANN’s existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN’s policies and accountability mechanisms?"; and another discussing a hypothetical case involving litigation challenging ICANN's actions (or inactions) involving actual operation of its policies (e.g., delegation of a gTLD; acceptance of certain terms of registry operation) as violations of law. The Sub-group did not reach consensus on these documents, which may be found along with other working documents of the Sub-group in the “Supplement of Working Documents.”<sup>4</sup>

---

<sup>4</sup> This will be a compendium of documents worked on by the group but not finished. It will be clearly noted that these documents are not consensus documents and do not represent findings by the Sub-group.

The Sub-group then agreed it would be worthwhile to develop and publish a Questionnaire to give the broader community an opportunity to provide factual information that could help inform the Sub-group. The Questionnaire<sup>5</sup> is set forth below:

- 1) *Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way? If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*
- 2) *Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in? If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*
- 3) *Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.*
- 4)
  - a) *Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction? If so, please provide documentation.*
  - b) *Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.*

The Questionnaire was published on February 9, 2017 and the response period closed on April 17, 2017. The Sub-group received 21 responses to the Questionnaire, which are in **Annex A** and also may also be found at

<https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire>. Members of the Sub-group reviewed and evaluated questionnaire responses and presented them to the Sub-group.

The Sub-group also developed a series of Questions for ICANN Legal, which may be found at <https://community.icann.org/download/attachments/59643282/JurisdictionQuestiontoICANNLegalv2.doc%20%281%29.docx?version=1&modificationDate=1487972569000&api=v2>. The Questions were sent to ICANN Legal on March 2, 2017 and responses were received on April 10, 2017. The Questions and ICANN Legal's responses are attached as **Annex B**. These responses were discussed in the Sub-group and with ICANN Legal.

---

<sup>5</sup> The Questionnaire and links to responses may be found at <https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire>.

The Sub-group also undertook a comprehensive review of the litigations in which ICANN has been a party, a list of which may be found at <https://www.icann.org/resources/pages/governance/litigation-en>. Members of the Sub-group reviewed many of these litigations, using a “summary sheet” completed by the reviewer of each case. The cases that were reviewed were presented to the Sub-group by the reviewer and then discussed by the Sub-group. The litigation summaries are collected in **Annex C**.

Based on this work the sub-group developed a master list of “proposed issues” (**Annex D**). From this list, the sub-group 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. After careful consideration of these issues the sub-group reached consensus on recommendations for each of these.

Note: The report was approved by consensus as defined in the CCWG-Accountability charter and not by full consensus. The Government of Brazil, which did not support approving the report, has prepared a dissenting opinion which is supported by several other participants and can be found in Annex E of this report. In addition to this the report includes a transcription of the discussions held at the 27 October 2017 CCWG-Accountability-WS2 plenary which focused on jurisdiction issues and can be found in Annex F of this report.

## Recommendations

### Recommendations regarding OFAC and related sanctions issues

#### Background

The Sub-group has considered several related issues under the common topic of the effect of government sanctions on ICANN's operations and accountability. In particular, these issues have been raised in relation to U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC).

OFAC is 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.<sup>6</sup> Where a nation is subject to sanctions, the sanctions may extend to its citizens, regardless of their personal character or activities. OFAC has been delegated responsibility by the Secretary of the Treasury for developing, promulgating, and administering U.S. sanctions programs. Many of these sanctions are based on United Nations and other international mandates; therefore, they are multilateral in scope, and involve close cooperation with allied governments. Other sanctions are specific to the national security interests of the United States.

OFAC acts under executive and legislative authority to impose controls on transactions and to freeze assets under U.S. jurisdiction.

OFAC also enforces apparent violations of its regulations, based on its Economic Sanctions Enforcement Guidelines.<sup>7</sup> Enforcement may result in civil penalties up to \$250,000 per violation or twice the amount of a transaction, whichever is greater.

#### Persons Subject to Compliance Obligations

According to the OFAC website, "U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned

---

<sup>6</sup> Target individuals and entities may include foreign countries, regimes, terrorists, international narcotics traffickers and those engaged in certain activities such as the proliferation of weapons of mass destruction or transnational organized crime.

<sup>7</sup> See OFAC Final Rule, "Economic Sanctions Enforcement Guidelines," November 9, 2009. The Guidelines outline various factors used by OFAC in taking enforcement decisions, which may include how compliance programs within an institution are working to comply with OFAC regulations. [https://www.treasury.gov/resource-center/sanctions/Documents/fr74\\_57593.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf).

or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply.”<sup>8</sup>

### **Covered Persons**

OFAC maintains a list of specially designated nationals (SDNs) that U.S. persons cannot transact with. These are individuals who are singled out for sanctions. However, where a sanction applies to a country, citizens of that country who are not SDNs often cannot freely transact with U.S. persons, without regard to their personal character or activities.

### **Prohibited Transactions**

Under OFAC, certain transactions may be prohibited. Such transactions cannot be consummated unless there is either a specific license or a general license permitting the transaction.

### **OFAC Licenses**

OFAC has the authority, through a licensing process, to permit certain transactions that would otherwise be prohibited under its regulations. OFAC can issue a license to engage in an otherwise prohibited transaction when it determines that the transaction does not undermine the U.S. policy objectives of the particular sanctions program, or is otherwise justified by U.S. national security or foreign policy objectives. OFAC can also promulgate general licenses, which authorize categories of transactions, without the need for case-by-case authorization from OFAC. General licenses are actually regulations, which must be adopted and then can be found in the regulations for each sanctions program<sup>9</sup> and may be accessed from OFAC’s Web site. The regulation covering a general license will set forth the relevant criteria of the general license, including the classes of person and category or categories of transactions covered by the general license.

Specific licenses are applied for by one of the parties to the transaction and issued on a case-by-case basis. A specific license is a written document issued by OFAC authorizing a particular transaction or set of transactions generally limited to a specified time period. To receive a specific license, the person or entity who would like to undertake the transaction must submit an application to OFAC. If the transaction conforms to OFAC's internal licensing policies and U.S. foreign policy objectives, the license generally is issued.

---

<sup>8</sup> [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_general.aspx#basic](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

<sup>9</sup> 31 CFR, Chapter V (Regulations). [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=db8ee7ba44af7af5a01907d23d67dae4&c=ecfr&tpl=/ecfrbrowse/Title31/31cfrv3\\_02.tpl#500](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=db8ee7ba44af7af5a01907d23d67dae4&c=ecfr&tpl=/ecfrbrowse/Title31/31cfrv3_02.tpl#500)

## Issues and Recommendations

### ICANN and U.S. Sanctions

There is a tension between ICANN'S goal of administering the Internet as a neutral global resource and the imposition of sanctions by the U.S. on other countries.<sup>10</sup> Sanctions laws and policies, when applied to domain name registrars and registries, can hamper access to the domain name system by innocent users and businesses, simply based on their nationality. For these persons to transact with ICANN, they or ICANN will need to apply for an OFAC license.

### ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses

Currently, the Terms and Conditions for the Registrar Accreditation Application state that "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."<sup>11</sup>

This is not an encouraging policy for potential registrars from sanctioned countries, even though ICANN has informed the Sub-group that it has sought such licenses in the past and has been successful in doing so. If ICANN chose to exercise its discretion and not seek a license in any given case, this would have the effect of hampering ICANN'S ability to provide services, inconsistent with the spirit if not the letter of ICANN'S Mission. ICANN likely could not be held accountable for this decision under the current contract, because the contractual language gives ICANN unfettered discretion to decline to seek a license, without any indication of the criteria ICANN would use to make that determination.

This uncertainty and lack of transparency may deter potential registrars domiciled in sanctioned countries from pursuing registrar accreditation. This is not a good result. Instead, ICANN should seek to minimize the hurdles for residents of sanctioned countries seeking registrar accreditation. In turn, this should encourage the growth of the Internet in these countries.

---

<sup>10</sup> The Sub-group recognizes that many countries impose sanctions regimes and cooperate in the creation and enforcement of sanctions. As a practical matter, the effect of sanctions other than US sanctions has not been a concern for ICANN operations. Therefore, this report focuses on concerns raised by US sanctions. However, the concerns and recommendations in this report could be considered and applied in the context of other jurisdictions' sanctions regimes if there are effects from those regimes.

<sup>11</sup> <https://www.icann.org/resources/pages/application-2012-02-25-en>.



## **Recommendation**

Currently, the ICANN Terms and Conditions for the Registrar Accreditation Application read as follows:

### **" 4. Application Process.**

Applicant acknowledges that ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the "SDN List"). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. **However, Applicant acknowledges that ICANN is under no obligations to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.**" [Emphasis Added]

The last sentence should be amended to 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 on the SDN List). 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.

### **Approval of gTLD Registries**

In the 2012 round of the New gTLD Program, it proved to be difficult for residents from countries subject to U.S. sanctions to file and make their way through the application process. The AGB (Applicant Guidebook) states, in language highly reminiscent of the RAA: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of

sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.”<sup>12</sup>

It is the Sub-group’s understanding that new gTLD applicants from sanctioned countries who are not on the SDN list found that the process for requesting that ICANN apply for an OFAC license is not transparent, and that response times for ICANN replies felt quite lengthy. In particular, ICANN apparently did not provide any indication that it had applied for an OFAC license. Furthermore, the process is quite lengthy, even if ICANN is proceeding with speed. As a result, applicants may have felt they were in limbo.

### ***Recommendation***

ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant is otherwise qualified (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-US Registrars**

It appears that some registrars might be following the rules of OFAC sanctions in their dealings with registrants and potential registrants, even when they are not based in the U.S and it would appear they are not required to do so. In particular, it seems that some non-US registrars may be applying OFAC restrictions even when they are not obliged to do so, merely based on an assumption that because they have a contract with ICANN, they have to apply OFAC sanctions. If registrars that are not based in the U.S. and do not have OFAC compliance obligations are nonetheless prohibiting registrants in sanctioned countries from using their services based on a mistaken belief that OFAC sanctions apply, that raises concerns with the availability of Internet resources on a global and neutral basis.

There may be other ways that non-U.S. registrars give the impression that these registrars are following OFAC sanctions. For example, the Sub-group was provided examples of two non-US registrars with registrant agreements that stated that persons located in sanctioned countries could not use their services due to OFAC sanctions.<sup>13</sup> Both registrars apparently used a registrant agreement “cut and pasted” from other

---

<sup>12</sup> New gTLD Applicant Guidebook, 1-25.

<sup>13</sup> One was Gesloten.cw

([http://www.gesloten.cw/support/legal.php?requestfor=registraragreement&from=agree\\_page](http://www.gesloten.cw/support/legal.php?requestfor=registraragreement&from=agree_page)), a Curacao (Netherlands Antilles) registrar; the other was Olipso (<https://www.olipso.com/en/domain-registration-agreement>), a Turkish registrar (Atak Domain Hosting).

sources.<sup>14</sup> One of the two registrars (Gesloten) has since revised its registrant agreement significantly, and removed any mention of OFAC restrictions.

OFAC restrictions could have been included in these registrant agreements as a “cut and paste” error or because the registrar believed (rightly or wrongly) that OFAC sanctions applied to it. In either case, the conclusion is the same: registrars should understand which laws apply to their businesses, and they should make sure that their registrant agreements accurately reflect those laws.

ICANN cannot provide legal advice to registrars. Each registrar must make their own legal determination of how and whether OFAC restrictions apply. However, ICANN could provide a clarification to registrars that registrars do not have to follow OFAC sanctions solely based on the existence of their contract with ICANN.

ICANN is not a party to the registrant agreements, so there is nothing that ICANN can do directly. Nonetheless, non-U.S. registrars could also be encouraged to seek advice on applicable law and to accurately reflect the applicable law in their registrant agreements.

### ***Recommendation***

ICANN needs to bring awareness of these issues to registrars. ICANN should 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.

### **General Licenses**

In contrast to specific licenses, a general license covers classes of persons and types of transactions. ICANN could consider seeking one or more general licenses to cover particular classes of persons and types of transactions that are an integral part of ICANN’s role in managing the DNS and in contracting with third parties to provide Internet resources. Broadly speaking, these licenses could apply to registries and registrars entering into RAs and RAAs, respectively, and to other transactions that may be core functions for ICANN (e.g., Privacy/Proxy Accreditation, support for ICANN funded travelers, etc.).

---

<sup>14</sup> For example, both agreements used “Mumbai time” as a standard even though neither is in India, located in that time zone, or has any particular contacts with India.

An OFAC “general license” is actually a regulation. Creation of a general license involves a regulatory process, which is in the purview of the executive branch (more specifically, the U.S. Treasury, of which OFAC is a part). Indeed, 31 CFR § 595.305 defines a general license as “any license or authorization the terms of which are set forth in this part.” In other words, the general license is a part of the OFAC regulations.

As such, one does not merely “apply” for a general license. One must determine the desired parameters of the general license(s) and work with the U.S. Department of the Treasury and provide appropriate reasoning, support, etc. so that the Treasury undertakes the regulatory effort to bring the general license into being.

The Sub-group believes that one or more general licenses could make future transactions with “covered persons” easier to consummate. Individual transactions would no longer require specific licenses, as long as the persons and transaction types were covered by the general license. Thus, the Sub-group believes that one or more general licenses would be highly desirable. However, this may be a significant undertaking in terms of time and expense. As such, it would be prudent for ICANN to ascertain the costs, benefits, timeline and specifics of seeking and securing one or more general licenses for DNS-related transactions. ICANN would also need to determine the specific classes of persons and types of transactions that would be covered by each license. ICANN would then begin the process of seeking these general licenses, unless significant obstacles were uncovered in the preparatory process. If obstacles are revealed, ICANN would need to find ways to overcome them. Failing that, ICANN would need to pursue alternate means to enable transactions involving residents of sanctioned countries to be consummated with a minimum of complication and uncertainty. If ICANN does secure general licenses covering DNS-related transactions, ICANN should make the Internet community aware of this.

### ***Recommendation***

ICANN should take steps to pursue one or more OFAC “general licenses” with the U.S. Department of Treasury in connection with DNS-related transactions. Initially, ICANN should make it a priority to study the costs, benefits, timeline and details of seeking and securing one or more general licenses for DNS-related transactions. ICANN should then pursue one or more OFAC general licenses, unless significant obstacles were discovered in the “study” process. If there are significant obstacles, ICANN should report them to the community and seek its advice on how to proceed. If unsuccessful, ICANN would need to find other ways to accomplish the ultimate goal -- enabling transactions

between ICANN and residents of sanctioned countries to be consummated with a minimum of “friction.”

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

## Background

This Sub-group has considered how ICANN's jurisdiction-related choices, in the gTLD base Registry Agreement (RA) as well as the Registrar Accreditation Agreement (RAA), may have an influence on accountability.

Three such jurisdiction-related choices have retained the attention of the members of this Sub-group, namely the absence of a choice of law provision in registry agreements, the absence of a choice of law provision in registrar accreditation agreements, and the contents of the choice of venue provision in registry agreements.

Both the RA and the RAA are standard-form contracts that do not typically give rise to negotiation between ICANN and the potentially contracted party, with some minor exceptions when the contracted party is an 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).

It is the understanding of this Sub-group that it cannot and would not require ICANN to make amendments to the RA or the RAA through this Recommendation. Not only would that go beyond the stated mandate of the CCWG, but that would also constitute an infringement of the Bylaws (see, e.g., Sec. 1.1(d)(iv) of the Bylaws) and more specifically an infringement of the remit of the GNSO.

Rather, this Recommendation should be understood as suggesting possible changes to the aforementioned contracts for study and consideration by ICANN the Organization, by the GNSO and by contracted parties. The Sub-group believes that these changes would increase ICANN's accountability. It should be noted that, in formulating these recommendations, the Sub-group did not consult with ICANN's contracted parties or seek outside legal advice.

Through its discussions, the Sub-group has identified three separate issues which appeared to influence ICANN's accountability. These issues are listed below.

## Issues

### 1. Choice of law provision in registry agreements

ICANN's Registry Agreement does not contain a choice of law provision. The governing law for the RA is thus undetermined, until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

## **2. Choice of law provision in registrar accreditation agreements**

ICANN's Registrar Accreditation Agreement does not contain a choice of law provision. As with the RA, the governing law for the RAA is undetermined until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

## **3. Choice of venue provision in registry agreements**

Disputes arising in the context of ICANN's Registry Agreement are to be resolved under "binding arbitration" pursuant to ICC rules. Moreover, the RA contains a choice of venue provision. This provision states that the venue is Los Angeles, California as both the physical place and the seat<sup>15</sup> of the arbitration (to be held under ICC rules).

### **Possible Solutions**

#### **1. Choice of law provision in registry agreements**

##### **A. Menu Approach**

It has emerged from the Sub-group's discussions that there is a common ground whereby increased freedom of choice for the parties to the agreement could help registries in tailoring their agreements to their specific needs and obligations.

Specifically, this would involve a "Menu" approach, whereby the law(s) governing the Registry Agreement is (are) chosen at or before the time when the contract is executed. Such choice would be made according to a "menu" of possible governing laws.

This menu needs to be defined. It could be best to leave it to ICANN, working with the gTLD registries, to define the menu options. The Sub-group discussed a number of possibilities for their consideration:

- The menu could be composed of one country from each ICANN Geographic Region.
- The menu could be composed of a small number of countries from each Region.
- The menu could also include the status quo, i.e., no choice of law.
- The menu could also include the registry's jurisdiction of incorporation as a choice.
- The menu could also include the countries in which ICANN has physical locations.

---

<sup>15</sup> The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

The Sub-group has not determined what the menu items should be, as this is beyond the reach of the Sub-group. However, the Sub-group believes that a balance needs to be struck between the ability to choose (or at least to negotiate for) a particular choice of law, and issues arising from subjecting the standard base Registry Agreement to a multiplicity of different laws. The proper balance is likely struck by having a relatively limited number of choices on the menu.

The method of “choosing” from the menu also needs to be considered. The registry could simply be able to make a choice from the menu, or it could be part of the registry’s negotiations with ICANN.

The Menu approach has the following advantages:

1. It provides the parties, especially the registries, with effective freedom to define the law(s) governing their contracts. This may contribute to avoiding conflicts between provisions established in the contract and the provisions of national or supranational law, since the RA would be interpreted under the same national law that governs the registry (this assumes that the registry operator’s national law is “on the menu”).
2. It may also help registries that are more comfortable with subjecting their agreement in whole or in part to law(s) with which they are more familiar. This could lower the hurdles for those considering applying to operate a registry who are not familiar with US law and thereby make ICANN’s global outreach efforts more efficient.
3. Another possible advantage of the menu option is that parties may then choose a governing law which allows them to be compliant with mandatory extra-contractual legal obligations while not violating the provisions of the contract.

However, there are some disadvantages of the Menu approach.

A first disadvantage is the fact that the chosen law may not be entirely compatible with the contents of the RA. Indeed, the current RA has been drafted with US law in mind and uses a style of drafting which corresponds with the American legal tradition. The result of this would be that some parts of the RA could be interpreted differently than they would under U.S. law, and differently than intended. In the context of litigation, some provisions could even be found invalid or unenforceable, which could result in the court deciding what an enforceable version would be or even deciding that the provision never applied between the parties.

A second disadvantage, which is related to the first, is that some registries could ultimately find themselves with a significantly different RA governing their relation with ICANN by



virtue of mandatory modifications brought about by a different governing law.<sup>16</sup> These differences could turn out to be either an advantage or a disadvantage to these registries but could well be perceived as unfair. Over time, this could, and in all likelihood, would lead to some form of jurisdiction shopping by registries.

A third disadvantage is the fact that a choice must be made on the contents of the “Menu” and that while there are some regions which are highly legally integrated (e.g., Europe) others are not at all, such as the Asia-Pacific region. Where exactly to draw the line and how to regionalize the world in terms both compatible with ICANN’s operations and with the variety of legal systems and traditions may end up being a difficult and contentious task. And, of course, the menu option could present ICANN with the challenge of operating under contract clauses with significantly differing interpretations around the world.

### **B. “California” (or “fixed law”) Approach**

A second possible option is the “California” approach, whereby all RAs expressly state that the contract is governed by the law of the State of California and U.S. federal law.

This option has the advantage of certainty, since all RAs will be construed under the same governing law. It also has the advantage of being consistent with the drafting approach in the RA, which is drafted according to U.S. law principles. This is more likely to result in the agreements being interpreted as the drafters intended, while avoiding the unintended consequences discussed above under the Menu approach.

The main disadvantage of this option is that it forces all registries worldwide to look to California law when interpreting their contract with ICANN. While US-based registries might not see that as a problem, several members of the Sub-group outlined the inconsistency between the global mandate of ICANN and the imposition of California law in its contracts with registries. Moreover, this might place some non-US registries at a disadvantage in interpreting and potentially litigating the RA, since their knowledge of California and US law might be limited. Finally, California law might act as a chilling effect on potential litigation, discouraging litigants from litigating simply based on their lack of knowledge of California law.

### **C. Carve-out Approach**

---

<sup>16</sup> “Mandatory” provisions are understood here as elements of the governing law which may not be contractually set aside and necessarily govern the legal relations of the parties. This is different from *super-mandatory* provisions which apply according to objective criteria (such as the place of performance of the contract) and notwithstanding the choice of governing law made by the parties. This may be more prevalent in civil law countries than common law ones.

A third possible option would be a “Carve-Out” approach, whereby certain parts of the contract which may require or benefit from uniform treatment for all registry operators are governed by a predetermined law (e.g., California) and other parts (e.g., eligibility rules for second level domains, privacy and data protection rules) are governed by either the same law which governs the registry as a legal person or by using the “Menu” approach for these other parts of the RA.

This approach has the advantage of certainty of interpretation for the uniform provisions of the Agreement, while allowing greater flexibility for other portions.

Moreover, generally speaking, this approach shares many advantages and disadvantages with the menu approach.

Another disadvantage of this option is the fact that the applicable law within each RA is not uniform. This option assumes that all the obligations contained in the RA can be neatly separated in categories, which are then “labeled” with a given applicable law. In practice, it may well turn out that many obligations are interdependent and as such, this choice may make the RA difficult for interpret for the parties and eventually for arbitrators, and as such make dispute outcomes more difficult to predict, which in turn could diminish accountability.

#### **D. Bespoke Approach**

Next, there is the “Bespoke” approach, where the governing law of the entire agreement is the governing law of the Registry Operator.

This approach has some of the advantages of the Menu approach, by allowing each Registry Operator to have their “home” choice of law.

As for disadvantages, they are also shared with the Menu approach and it could be added that these disadvantages find themselves compounded here by the fact that this approach consists, in practice, of a very large menu whose contents are determined by the place of incorporation/location of the registry (as a legal person.) In that sense, it can be very hard to predict the result of the application of a multitude of different bodies of laws to the RA. Some registries might find themselves at an advantage, others at a disadvantage, and some might find themselves with large parts of the RA reinterpreted or inapplicable due to mandatory provisions of the governing law, or simply with an RA which is very difficult to interpret.

#### **E. Status Quo Approach**

A fifth possible approach is to retain the status quo, i.e., have no “governing law” clause in the RA. The advantages of this approach have been explained by ICANN Legal in a document sent to the Sub-group in response to questions asked by the Sub-group<sup>17</sup>:

*Historically, the Registry and Registrar Accreditation Agreements are and have been silent on the choice of law to be applied in an arbitration or litigation. This allows the parties to an arbitration or litigation to argue (pursuant to the relevant arbitration rules, court procedures and rules, and laws) what law is appropriate to govern the specific conduct at issue. Arbitrators and courts are well-suited to make those types of determinations.*

A disadvantage of the Status Quo approach is that potential contracted parties outside of the United States could be deterred by what they perceive as essentially a contract under US law. In addition, currently, some contracted parties have to ask ICANN for permission to comply with the laws of their own jurisdiction, since they do not want compliance with these laws to constitute a breach of the RA. Another disadvantage was noted in the introduction to this section -- that the governing law is undetermined, which creates ambiguity in interpreting the contract.

## **2. Choice of law provision in registrar accreditation agreements**

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

## **3. Choice of venue provisions in registry agreements**

When entering into contracts with registries, ICANN could offer a list of possible venues for the arbitration to take place rather than generally imposing Los Angeles, California as the place (and hence, both the “seat” and physical location) of the arbitration. The rest of the arbitration clause (namely, the rules of arbitration being ICC rules) would remain unchanged.

The registry which enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

---

<sup>17</sup> The questions may be found at <https://community.icann.org/download/attachments/59643282/Jurisdiction%20Questions%20for%20ICANN%20Legal.pdf?version=1&modificationDate=1487972863000&api=v2>. The response may be found at <https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/64081953/ICANN%20Responses%20to%20JX%20Questions-SE.pdf>

Having this option open would diminish the cost of litigation for registries, potentially allowing registries to start arbitration procedures at a location which is more amenable to them than Los Angeles, California (although Los Angeles could remain an option.)

From the perspective of the contract issuer (which, in our case, would be ICANN), one risk associated with such a change is having to deal with a different *lex arbitri* than that of California. ICANN would also have to hire local counsel and travel to various arbitration proceedings. Furthermore, the *courts* of the seat of the arbitration may be competent to order interim relief and hear challenges to the award, among other things.<sup>18</sup>

Finally, the options given in the “venue menu” could correspond to ICANN’s own regions as defined in ICANN’s bylaws, that is, ICANN could offer at least one venue per region.<sup>19</sup>

## Recommendations

As stated in the Background section, the aim of the Sub-group in formulating these Recommendations is to frame them as a suggestion of possible paths towards increased accountability.

### **Choice of law in Registry Agreements**

The Sub-group examined several options and suggests that ICANN, the contracted parties and the GNSO consider adopting a “Menu” approach to the choice of law provisions in gTLD Registry Agreements. The Sub-group offers several suggestions for menu options, including:

- The menu could be composed of one country from each ICANN Geographic Region.
- The menu could be composed of a small number of countries from each Region.
- The menu could also include the status quo, i.e., no choice of law.
- The menu could also include the registry’s jurisdiction of incorporation as a choice.
- The menu could also include the countries in which ICANN has physical locations.

---

<sup>18</sup> In addition to interim relief and award challenges, the *lex arbitri* is also relevant when witnesses are involved or when one of the parties would claim that the subject matter of the dispute is not arbitrable. The contents of the *lex arbitri* are to be found in the arbitration laws of a given country. Such laws are today rather standardized and in that sense, it is possible to further mitigate this risk by assessing the contents of the arbitration laws of each possible venue offered as an option in the “menu.”

<sup>19</sup> “As used in these Bylaws, each of the following is considered to be a “Geographic Region”: (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America.” ICANN Bylaws, Art. 7.5.

### **Choice of Law in Registrar Accreditation Agreements**

The Sub-group suggests that ICANN, the contracted parties and the GNSO consider options for the RAA similar to those discussed for the RA, above.

### **Choice of Venue in Registry Agreements**

The Sub-group suggests that a menu approach also be considered for the venue provision of the RA.

## **Further Discussion of Jurisdiction-related Concerns**

There were a number of concerns raised in the Sub-group where the Sub-group had substantive discussions, but did not get to a point of conclusion. As an example, there were discussions of limited, partial, relative or tailored immunity for ICANN that did not come to conclusion.

These concerns were put on the table by different stakeholders, and for these stakeholders, these are legitimate concerns. As these concerns were not discussed to the end, there should be a path forward for these concerns beyond the CCWG-Accountability, which was tasked to look into a limited number of issues within a limited period of time and with a limited budget.

Therefore, the Sub-group suggests that a further other multistakeholder process of some kind should be considered to allow for further consideration, and potentially resolution, of these concerns. We believe that this Report, with its annexes, can be a very useful tool for further debates which will surely take place – whether in another cross-constituency effort or in a future ATRT Review, or in some other ICANN context. The appropriate forum for such discussions is beyond the mandate of the CCWG; however, we encourage the community to build on the work of the Sub-group and prior work in this area.

**Annex A – Questionnaire and Responses**



# Jurisdiction Questionnaire

Created by Brenda Brewer, last modified on May 15, 2017

## CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire

<https://www.icann.org/news/announcement-2-2017-02-09-en>

### INTRODUCTION

The newly-adopted ICANN bylaws created several Work Stream 2 accountability subgroups. These subgroups are part of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

One of these subgroups, the Jurisdiction Subgroup, is seeking responses to this questionnaire for use in the Subgroup's deliberations. According to [Section 27.1\(b\)\(vi\)](#) of the Bylaws and to the extent set forth in the [CCWG-Accountability Final Report](#),<sup>[1]</sup> the Jurisdiction Subgroup is addressing questions related to ICANN's jurisdiction,\* including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability and the actual operation of ICANN's policies.

To help the Subgroup in these endeavors, we are asking you to consider and respond to the following specific questions. The Subgroup is asking for concrete, factual submissions (positive, negative, or neutral) that will help ensure that the Subgroup's deliberations are informed, fact-based, and address real issues. The Subgroup is interested in all types of jurisdiction-related factual experiences responsive to these questions, not just those involving actual disputes/court cases.

The questionnaire is available in each of the 6 languages supported by ICANN (see below). You may respond to the questionnaire in any of these languages.

Responses must be transmitted via email to; [ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org). Responses must clearly identify the individual responding and, where applicable, the organization for which the response is being submitted. Responses may be submitted at any point during the response period.

The subgroup will accept responses until **23:59 UTC 17 April 2017**.

[1] See [CCWG-Accountability Main Report](#), paragraphs 6 and 234, and Annex 12, paragraphs 25-31.

\* For this Questionnaire, "ICANN's jurisdiction" refers to (a) ICANN being subject to U.S. and California law as a result of its incorporation and location in California, (b) ICANN being subject to the laws of any other country as a result of its location within or contacts with that country, or (c) any "choice of law" or venue provisions in agreements with ICANN.

### QUESTIONNAIRE

**Responses must be transmitted via email to; [ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)**

**1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?**

***If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.***

**2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?**

***If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.***

**3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.***

**4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* *If so, please provide documentation***



## Translations

For translations of the questionnaire please see the following:

Language	Word Doc	PDF
English	EN	EN
Arabic	AR	AR
Spanish	ES	ES
French	FR	FR
Russian	RU	RU
Chinese	ZH	ZH

## Responses

Jurisdiction Questionnaire List Archives: <http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/>

	Date	Response from	Archive link	Attachment
1	10 Feb 2017	Vanda Scartezini	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000002.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000002.html</a>	
2	21 Feb 2017	Brian J. Winterfeldt	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000005.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000005.html</a>	
3	21 Feb 2017	Luis R. Furlan	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000006.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000006.html</a>	
4	22 Feb 2017	Karina Cortes	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000007.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-February/000007.html</a>	
5	04 Apr 2017	Shin Takamura	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000008.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000008.html</a>	PDF
6	06 Apr 2017	Just Net Coalition	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000009.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000009.html</a>	PDF
7	07 Apr 2017	Carlos Vera	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000010.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000010.html</a>	
8	12 Apr 2017	Michael Graham	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000011.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000011.html</a>	

Pages / ... / Jurisdiction

	Date	Response from	Archive link	Attachment
9	17 Apr 2017	Cristina Monti	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000013.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000013.html</a>	
10	17 Apr 2017	Mohammad Reza Mousavi Information Technology Organization of Iran	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000012.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000012.html</a>	PDF
11	17 Apr 2017	Jorge Cancio   .swiss Registry	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000015.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000015.html</a> <ul style="list-style-type: none"><li>EN Translation</li></ul>	EN PDF revision
12	17 Apr 2017	Queh Ser Pheng	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000017.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000017.html</a>	
13	17 Apr 2017	Yulia Elanskaya	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000016.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000016.html</a> <ul style="list-style-type: none"><li>EN Translation</li></ul>	EN PDF
14	17 Apr 2017	Internet Governance Project   Farzanah Badii	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000018.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000018.html</a>	PDF
15	17 Apr 2017	Ministry of ICT of Colombia   Jaifa Margarita Mezher Arango	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000019.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000019.html</a> <ul style="list-style-type: none"><li>EN Translation</li></ul>	EN PDF
16	17 Apr 2017	Rita Forsi	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000021.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000021.html</a>	PDF
17	17 Apr 2017	Jesús Rivera	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000020.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000020.html</a>	
18	18 Apr 2017	Mzia Gogilashvili	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000022.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000022.html</a>	
19	19 Apr 2017	Matthieu Aubert	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000023.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000023.html</a>	
20	20 Apr 2017	Government of Guyana   Lance Hinds	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000024.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-April/000024.html</a>	PDF
21	17 Apr 2017	Internet Governance Research Center, Chinese Academy of Information Communications and Technology	<a href="http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-May/000026.html">http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/2017-May/000026.html</a>	EN PDF ZH PDF
--	02 May 2017	Response of the Ministry of Telecom and Mass Communications of the Russian	CCWG-Accountability-WS2-Jurisdiction- Questionnaire- Ministry Telecom Russian Federation-	

	Date	Response from	Archive link	Attachment
--	02 May 2017	Response of the Ministry ICT Columbia	CCWG-Accountability-WS2-Jurisdiction-Questionnaire - Ministry ICT Columbia	
--	15 May 2017	Summary of Responses	CCWG-Accountability-WS2-Jurisdiction-Questionnaire-SummaryofResponsesV1.6BT.pdf	

## Jurisdiction Questionnaire Subgroup Team

**Questionnaire Subgroup Team Archives:** <http://mm.icann.org/pipermail/ws2-jurisdiction-questionnaire/>

Name
Greg Shatan
David McAuley
Vindushi Marda
Kavouss Arasteh
Parminder Singh
Christopher Wilkinson
Erich Schweighofer
Tatiana Tropina

## ARTICLE 29 Data Protection Working Party



Brussels, 26 September 2012

Dr. Steve Crocker and Mr. Akram Atallah  
Chairman and interim CEO of the Board of  
Directors  
Internet Corporation for Assigned  
Names and Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

**By email to the Director of Board Support:**  
[diane.schroeder@icann.org](mailto:diane.schroeder@icann.org)

**Subject: Comments on the data protection impact of the revision of the ICANN RAA concerning accuracy and data retention of WHOIS data**

Dear Mr Crocker and Mr Atallah,

In the context of ICANN's revision of the Registrar Accreditation Agreement (RAA) and the RAA Negotiations Summary Memo<sup>1</sup>, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 WP)<sup>2</sup> wishes to respond to your call for input from data protection authorities.<sup>3</sup>

The Working Party limits this contribution to proposed changes in the RAA that will likely affect the personal data protection rights of European citizens that have registered or will register a domain name.

---

<sup>1</sup> RAA Negotiations Summary Memo, ICANN Proposed DRAFT 4 June 2012, URL: <http://prague44.icann.org/meetings/prague2012/presentation-raa-negotiation-issues-04jun12-en.pdf>

<sup>2</sup> The Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data is an independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC. The Article 29 Working Party is competent to examine any question covering the application of the data protection directives in order to contribute to the uniform application of the directives. It carries out this task by issuing recommendations, opinions and working documents.

<sup>3</sup> Can authorities expert in data privacy assist in proposing how ICANN and the Registrars should address the competing legal regimens into a standard that can be uniformly implemented? RAA Negotiations Summary Memo, p. 5.

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 2/13.

Website: [http://ec.europa.eu/justice/policies/privacy/index\\_en.htm](http://ec.europa.eu/justice/policies/privacy/index_en.htm)

The Working Party recalls its previous contributions to the process of collecting and disclosing WHOIS data, as included in the Opinion 2/2003 on the application of the data protection principles to WHOIS directories<sup>4</sup> as well as its letters of 22 June 2006 to the Board of Directors of ICANN<sup>5</sup> and of 12 March 2007 to the Chairman of the Board of Directors of ICANN<sup>6</sup> in which the relevant data protection principles have been outlined.

The Working Party notes that the proposed new RAA contains two new requirements for *registrars*, the private corporations that offer internet domain names to the public and that are responsible for maintaining the contact details of domain name holders in the publicly accessible WHOIS database.

#### 1. Annual re-verification of contact details

The first issue is a new requirement for registrars to verify domain name holders' contact details via telephone and e-mail, and to annually re-verify these contact details. The proposed *Whois accuracy program specification*<sup>7</sup> makes it mandatory for registrars to obtain and verify both an e-mail address and a telephone number from all domain name holders and to annually re-verify these details, by either calling or sending an e-mail or SMS with a unique code that has to be verified by the registrant.

Accuracy of personal data is an important requirement in data protection law. However, the necessity to keep personal data accurate may not lead to an excessive collection or further processing of personal data. It is important to distinguish between contact details collected by registrars in the course of a contract, and contact details that have to be published in the WHOIS database.

The problem of inaccurate contact details in the WHOIS database cannot be solved without addressing the root of the problem: **the unlimited public accessibility of private contact details in the WHOIS database**. It is a fact that these contact details are being harvested on a large scale and abused for spamming. **In other words, the way the system is designed provides a strong incentive for natural persons to provide inaccurate contact details. Regrettably, ICANN has decided not to work on alternative layered access models, such as the OPoC model repeatedly proposed as proportionate alternative by the Working Party.**

As highlighted in previous letters to ICANN, purpose limitation/finality is crucial to determine whether the processing of personal data is compliant with the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Data Protection Directive"), as translated in the national laws of the 27 EU Member States. As you explicitly acknowledge in the Negotiations Summary, the request for annual re-verification of domain name holders data as well as the request to verify both the e-mail address as well as the telephone number, originates from law enforcement.

---

<sup>4</sup> URL: <http://www.icann.org/correspondence/schaar-to-cerf-22jun06.pdf>

<sup>5</sup> URL: <http://gns0.icann.org/correspondence/schaar-to-cerf-12mar07.pdf>

<sup>6</sup> Whois accuracy program specification, ICANN Proposed DRAFT 3 June 2012, IRI- 39306v3 1, URL: <http://prague44.icann.org/meetings/prague2012/presentation-whois-accuracy-03jun12-en.pdf>

<sup>7</sup> URL: [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/wpdocs/2003/wp76\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp76_en.pdf)

In assessing these proposals, ICANN should be aware that the purpose of collecting and publishing contact details in the WHOIS database is to facilitate contact about technical issues. The original purpose definition reads: *"The purpose of the gTLD Whois service is to provide information sufficient to contact a responsible party for a particular gTLD domain name who can resolve, or reliably pass on data to a party who can resolve, issues related to the configuration of the records associated with the domain name within a DNS nameserver."*

In your summary of the debate about (public accessibility of) WHOIS DATA you write: *"Over time, WHOIS data has been increasingly used for other constructive and beneficial purposes; (...) However, some WHOIS data uses that have emerged are viewed as potentially negative;(...)."*<sup>8</sup>

The fact that WHOIS data can be used for other beneficial purposes does not in itself legitimise the collection and processing of personal data for those other purposes.

The Working Party finds the proposed new requirement to annually re-verify both the telephone number and the e-mail address and publish these contact details in the publicly accessible WHOIS database excessive and therefore unlawful. Because ICANN is not addressing the root of the problem, the proposed solution is a disproportionate infringement of the right to protection of personal data.

## 2. Data retention

The second issue is a new requirement for registrars to retain data of domain name holders for a period of two years after the contract for the domain has been ended.

The proposed Data retention specification<sup>9</sup> has a very broad scope. It is not limited to the personal data collected for the WHOIS database, but also specifies other categories of data that can be processed by registrars, such as telephone numbers and e-mail addresses not contained in the WHOIS data as well as credit card data (*means and source of payment or a transaction number provided by a third party payment processor*), communication identifiers such as a Skype handle and log files containing the source IP address and HTTP headers, dates, times, and time zones of communications and sessions, including initial registration.

This proposed new requirement does not stem from any legal requirement in Europe<sup>10</sup>, but again, is explicitly introduced by ICANN to accommodate wishes from law enforcement.

The Working Party strongly objects to the introduction of data retention by means of a contract issued by a private corporation in order to facilitate (public) law enforcement. If there is a pressing social need for specific collections of personal data to be available for law enforcement, and the proposed data retention is proportionate to the legitimate aim pursued, it

---

<sup>8</sup> URL: <http://www.icann.org/en/resources/policy/background/whois>

<sup>9</sup> Data retention specification, ICANN Proposed DRAFT 3 June 2012, IRI--33673v4, URL:

<http://prague44.icann.org/meetings/prague2012/presentation-data-retention-03jun12-en.pdf>

<sup>10</sup> The European data retention directive 2006/24/EC imposes data retention obligations on providers of public electronic communication networks and services. Registrars are not such providers and are therefore not subjected to this European data retention obligation.

is up to national governments to introduce legislation that meets the demands of article 8 of the European Convention on Human Rights and article 17 of the International Covenant on Civil and Political rights.<sup>11</sup>

The fact that these personal data can be useful for law enforcement does not legitimise the retention of these personal data after termination of the contract. In fact, such a retention period would undermine the first new requirement, to re-verify the contact details every year. If ICANN would be able to prove the necessity for such a yearly re-verification for the purpose of facilitating technical contact with domain name holders, any data kept beyond one year would in fact be excessive, because apparently to a large extent outdated or otherwise unreliable.

Because there is no legitimate purpose, and in connection with that, no legal ground for the data processing, the proposed data retention requirement is unlawful in Europe. Since the registrars (both within Europe and worldwide to the extent they are processing personal data from EU citizens) are data controllers (responsible for the collection and processing of personal data), the Working Party is concerned that this new obligation will put them in the uncomfortable position of violating European data protection law. The Working Party would deeply regret a situation where data protection authorities were to be forced to enforce compliance and urges you to rethink the proposals.

The Working Party has on several occasions expressed an interest in being consulted by ICANN about privacy-related WHOIS issues.<sup>12</sup> We repeat that we are ready to discuss any issue that ICANN feels would be useful in relation to the application of EU and national data protection legislation in respect of WHOIS services and would appreciate it if the relevant ICANN staff would contact the Working Party to ensure that ICANN has a full understanding of the concerns we have expressed.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm  
Chairman of the Article 29  
Working Party

---

<sup>11</sup> Obligations with regard to the protection of personal data also follow from the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) and the UN Guidelines concerning computerized personal data files (1990).

<sup>12</sup> See also the letter from the WP29 Chairman of 24 October 2007, URL: <http://gnso.icann.org/correspondence/cerf-to-schaar-24oct07.pdf>

## 第 58 次 ICANN 会议中国社群交流会会议速记节选

时间：2017 年 3 月 29 日（下午）

地点：中国信息通信研究院科研楼 2 层报告厅

主题：第 58 次 ICANN 会议中国社群交流会 ICANN 管辖权问题讨论

主持人：本次会议想与大家重点讨论 ICANN 司法管辖权问题。我先来念问卷的四个问题。（省略读问题）

刘丽梅：关于司法管辖权，因为我们是签约方，我们注意到在跟 RA 签署的时候有一个非常有意思的事情，RA 的协议中针对签约不同主体可以适用不同法律，一般商业化的公司或者机构在跟 ICANN 签署的时候遵守的是加州洛矶山县法律，ICANN 跟一些政府组织还有一些有特殊需要的组织，用的瑞士日内瓦的法律，因为我不是特别懂法律，我觉得这个是不太公平而且是不合理的，用一种比较通俗的话说就是看人下菜的感觉，所以我觉得这是最大的问题所在，这是我们一个核心的观点。

张建川：我觉得这里要害是逻辑推演，今后如果我们发生官司，你在美国、新加坡，实际上想问你实际的经验，特别第四条你曾经有没有发生类似东西，你还得给他证据，证据非常难，实际上没有发生过，所以就不太好回答这个问题，第四点没有产生，逻辑推演也是这个问题，如果发生争议当然不想到加州去打官司。

主持人：关于第四点，您能举出例子吗？

张建川：拿不出来。

Pam Little：ICANN 跟注册局签约有不同的司法管辖适用地，有的签瑞士，有的美国。ICANN 是私人的公司，是在加州的非盈利组织，又管到域名管到 IP 地址。我们跟 ICANN 的和约事实上是私人合约，但是政府跟 ICANN 签约可能有政府其他的考量，我不熟悉也不评论。管辖权问题可能影响到注册局、注册商，假设哪一天我们与 ICANN 有争议，到最后走仲裁或者上法院，只能受制于加州司法管辖权，对于我们也许是不利的。注册商、注册局跟 ICANN 的和约出现争议时，司法管辖权问题将会有影响，但现在问卷调查的问题是问“过去”有没有影响。过去有影响的例子很少，所以只能说目前没有，但是将来可能会有，这些问题似乎是 Leading questions。

张建川：问题里面有预设答案。



江雅云：我们觉得问卷中的问题是很狡猾的问题。ICANN 的司法管辖权，尽管尚未发生实质的阻碍，但已经产生实际的影响。一方面，目前的 ICANN 司法管辖权设置是不科学、不合理的。举例而言，中国的注册商在中国境内、以遵守中国法律为前提，履行其与 ICANN 之间的合约。但事实上，ICANN 工作人员大部分可能并不了解中国法律，一旦注册商与 ICANN 之间发生合约条款的分歧，ICANN 很可能做出与中国法律相背的处理决定。但即使走到法律程序，鉴于目前 ICANN 司法管辖权的设置，我们必须去美国起诉，而美国法庭对合同履行地中国的适用法律也并不了解，同样可能做出与 ICANN 相同的判断和处理，无法切实保证美国区域之外注册商的权益。另一方面，由于这种不科学不合理的司法管辖权的存在，注册商在遇到分歧时，往往选择“服从”ICANN 的决定。因此从表面上来看目前所有和 ICANN 相关的事情我们都是和平解决，但本应该是可以分清楚孰是孰非的问题，却因为司法管辖权的安排，就用和稀泥的态度解决了，长远来说损害了域名行业的利益，导致合理的域名行业的法律秩序不能建立。

某注册局代表：之前开会并不是我参加的，跟这块业务比较相关的业务团队还有法务团队的建议，他们给的只是针对这个问卷本身问题给了一些建议，他们建议目前来说这些确实对现在业务过去业务没有什么影响，就是这些。

阚凯力：对这个问题的看法，我认为应该分为二个层面：一个是公司层面，另一个是政府层面。从公司层面看，因为是公司与 ICANN 之间的商务合同，而且可以谈判，所以建议由各个公司自己选择认为有利的适用法律地点，在双方接受的条件下，按照签订的合同执行。从政府层面的角度看，ICANN 作为全球互联网的管理者，适用美国加州法律，确实有一些欠妥。但是，解决方案在哪里？现在还看不到能够各方一致同意的解决方案：放到联合国肯定 ICANN 不会接受，如果主张放到中国或者其他任何国家，恐怕其他国家也难以接受。因此，在没有看到一个可能的方案之前，我建议中国政府方面在仔细研究提取各方意见的同时，不对任何不成熟的意见轻易表态。

罗嘉荣：这个里面的问题是比较 leading question，刚刚看工作组名单中，中国人很少参与，有一个参与者是一个学生，因为这个问卷已经出来了，那边做影响比较麻烦一点，社群对这一块关注的话，应该多一两位中国社群可以参与这个小组的工作。

蔡雄山：ICANN 和注册商、注册局的合同是民事的合同，民事的合同可以选择适用法律。事实上，很多互联网的合同都是适用加州的法律。但真正核心问题是国际社会讨论 ICANN 管辖权的时候，大家别忘了不仅仅是民事的，还有行政、刑事的，ICANN 是美国注册机构，这个机构美国政府可不可以把它征收了，如果美国政府把它征收了影响到全世界互

联网稳定。各国的使馆，使馆外交人员是享有豁免的。但 ICANN 是注册在美国的实体又接受美国法律管，确实这个问题有点无解。问题不是合同是否适用加州法律，而是说美国政府可不可以查封 ICANN，甚至通过法律手段控制导致 ICANN 不能履行职能，影响到全世界互联网安全和稳定，这是我个人观点。

徐龙第：ICANN 到目前表现良好，这应是很大的优势，这是基本事实，最近好像美国几个智库给建议，你还是要坚持，第三个针对这五个问题来个逆向思维，如果将来可能会有哪些问题，有哪些问题最成为争议，比如说合同上的，比如说是实践注册过程当中的，比如说费用当中的，比如说是国家层面上的，在最可能发生问题上大家列个清单，用一种柔和的语言把这个问题回答了。

郎平：我认同之前几位的发言，尤其是 Pam 说的问卷比较 leading question，现在互联网已经成为关系到我们国家政治经济安全很重要一项设施也好技术也好，但是我们把 ICANN 管理的资源定义为关键的资源，所以如果我把对一个国家安全很有很相关的资源放在美国司法管辖权下，那主要是出于政治担心，所以我觉得从国际政治来讲，政府之所以提出应该改变司法管辖权，主要出于国家安全的考虑。应该做一个专家组评估报告，因为刚才我们从不同立场都提到了对我们的影响，但是我觉得如果我们能够把这些影响都综合起来做一个评估的话，看一下哪一些影响是我们应该去防范的，哪一些影响是我认为它绝对不可能发生的，所以根据不同的威胁，不同的评估我们可以采取不同的对策，谢谢。

刘晗：我首先谈谈关于 ICANN 司法管辖权问题与中国的关系。如果从纯粹法律角度来谈，如果真的出现一家中国公司和 ICANN 发生纠纷打到加州法院，美国联邦法院是有先例的，在 Vitamin C 的案件中，美国联邦第二巡回法院认为应当根据中国商务部提供的法庭之友意见书中对于中国反垄断法的理解，因而判决中国公司胜诉。如果以后出现了类似的中国公司向 ICANN 主张权利的案件，中国方面可以让政府和业界相互的配合，以便在不改变管辖权的情况下争取自身的权益。其次，针对全球互联网治理与主权的问题，我认为国家主权实际上在网络空间中从来没有缺席，虽然从互联网诞生开始就有很多呼声认为网络空间应该独立于传统物理世界的主权。我举一个例子，大家都知道 JON POSTEL，JON POSTEL 在 1998 年曾经试图将 8 个根域名服务器独立于美国政府，然而克林顿当局却断然拒绝，并以治罪相威胁，由此可见一斑：主权国家从来就没有完全放弃对于根域名的控制权。

赫芳北：谈一下自己的看法，ICANN 是一个公司行使国际组织的职能，而且这种在互联网关键信息技术资源分配上这是非常不合适的，也不适合互联网整体一个发展。我们的政府包括社群包括业界都要大力在 ICANN 发挥作用。我们要熟悉国际规则，用好规则，从

规则的服从者到变成游戏规则的制定者。我们在 GAC 里加强政府的作用政府的角色，发挥多方面从政府、社群、业界多方面在 ICANN 的作用，贡献咱们中国的智慧和方案。

陈戎：司法管辖权的问题，GAC 非常关注这个问题很说明问题，是从国家安全这个角度来考虑的，所以我想这个问题可以分为两个层面来看，如果从 GAC 角度从政府这个角度从国家安全这个角度来切入，因为我觉得不仅表面上我这么讲，实际上国家利益都在这里，但是官方表态，政府表态，其他企业有很多事情可以做，比如说不同的企业可能关注点不太一样，我觉得 ICANN 还有特别好的地方也是想表达一下，包括我们这些问卷其实给你一个机会你反馈自己的意见，给了我们一个机会，不一定要按照问题去答，我可以把所有关切都写上来。

王伟：这个问题可以留给下一代解决，有可能这个事情不是一两年能解决的事情，但是把它作为一个长期关注一个点。

宋靖：我个人理解 ICANN 有两个性质，一方面纯粹公益，保证安全稳定维护根服务器系统，这些工作包括国家地区顶级域名分配完全是那个国家主权范围内的事，这些事是纯公益的，不应该受到单一某个国家政府或者司法管辖法院控制的，本来就是我主权范围内的事，为什么要受一个国家的司法管辖权，从这个角度看大家有时候会觉得说应该会给予司法豁免，就像联合国建在美国纽约，不能说美国警察把联合国秘书长这些人带走了。这一块是不可诉，商业上应该是可诉的，能够达成这样的法律安排，还能够达到效果这也是有难度的。

主持人：感谢今天大家留到这么晚，晚上愉快！

## CCWG-ACCOUNTABILITY WORK STREAM 2, JURISDICTION SUBGROUP QUESTIONNAIRE

### PREAMBLE

The newly-adopted ICANN bylaws created several Work Stream 2 accountability subgroups. One of these subgroups, the Jurisdiction Subgroup, is seeking responses to this questionnaire for the community to participate in the Subgroup's deliberations.

According to [Section 27.1\(b\)\(vi\) of the Bylaws](#), and to the extent set forth in the CCWG-Accountability [Final Report](#)<sup>1\*</sup>, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability and the actual operation of ICANN's policies.

To help the Subgroup in these endeavors, we are asking you to consider and respond to the following specific questions. The Subgroup is asking for concrete, factual submissions (positive, negative, or neutral) that will help ensure that the Subgroup's deliberations are informed, fact-based, and address real issues. The Subgroup is interested in all types of jurisdiction-related factual experiences responsive to these questions, not just those involving actual disputes/court cases.

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

*Domain name services have not been affected by ICANN's jurisdiction.*

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

*For the .co ccTLD, dispute resolution is carried out pursuant to the UDRP policies and no impacts have been observed.*

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.*

*We do not have any links or copies.*

4.
  - a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* *If so, please provide documentation.*

*We do not have any documented material of instances where ICANN has been unable to comply with its mission.*

---

<sup>1</sup> See CCWG-Accountability Main Report, paragraphs 6 and 234, and Annex 12, paragraphs 25-31.

\* A los fines del presente Cuestionario, "jurisdicción de la ICANN" se refiere a: (a) la ICANN está sujeta a las leyes de los Estados Unidos de América y de California, como resultado de su constitución y ubicación en el Estado de California; (b) la ICANN está sujeta a las leyes de cualquier otro país como resultado de su ubicación dentro de o en contacto con ese país; o (c) cualquier disposición de "elección del derecho aplicable" o lugar en los acuerdos con la ICANN.

**b.** Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.*

*From our experience, we do not have any confirmation of any alternative jurisdiction for ICANN to pursue its mission.*

PISTE DE TRAVAIL 2 DU CCWG  
-  
RESPONSABILITÉ, QUESTIONNAIRE DU SOUS  
-  
GROUPE RELATIF  
À LA JURIDICTION  
ME1 24013371v.2

**Réponses données par:**

**Registre du domaine .swiss**

Office fédéral de la communication OFCOM

rue de l'Avenir 44

Case postale 252

2501 Bienne

[domainnames@bakom.admin.ch](mailto:domainnames@bakom.admin.ch)

[www.bakom.admin.ch](http://www.bakom.admin.ch) / [www.dot.swiss](http://www.dot.swiss) / [www.nic.swiss](http://www.nic.swiss)

- 1. Vos activités, votre vie privée ou votre capacité à utiliser ou obtenir des services liés aux noms de domaine ont-elles été affectées, d'une quelconque façon, par la juridiction de l'ICANN ?**

Cela a effectivement été le cas. La Confédération suisse a souhaité gérer le domaine générique «.swiss» en tant que domaine communautaire («Community TLD») dans l'intérêt du pays et de sa population (communauté suisse dans son ensemble). Cela n'a toutefois pas été évident pour le Gouvernement suisse de se déterminer à conclure un contrat de registre avec l'ICANN compte tenu en particulier des problèmes que pose potentiellement la juridiction de l'ICANN.

C'est la question du droit applicable au contrat de registre qui se révèle en premier lieu problématique:

- Le contrat de registre ne comporte aucune clause d'élection de droit, de sorte que le droit applicable n'est pas défini par ce contrat; cela crée une grande insécurité juridique et potentiellement un problème juridictionnel dans la mesure où:
  - o il appartiendrait aux arbitres ou aux juges compétents – qui pourraient relever d'une juridiction états-unienne - de déterminer quel droit gouverne la relation entre le registre et l'ICANN;
  - o le droit applicable devrait se déterminer sur la base des attentes légitimes que les parties peuvent avoir en matière de droit applicable. Selon la pratique actuelle en matière commerciale, le droit applicable est celui de la partie qui rend la prestation caractéristique, c'est-à-dire a priori l'ICANN. Un registre devrait dès lors potentiellement compter avec une application du droit de l'Etat de Californie.
- Le droit applicable détermine aussi la faculté de l'ICANN de réclamer des dommages-intérêts punitifs ou exemplaires (soit, dans l'ordre juridique US, des dommages-intérêts très supérieurs au préjudice effectivement subi, afin de sanctionner un comportement), dans le cas où le registre violerait le contrat de manière délibérée et répétée (chiffre 5.2 du contrat de registre). Cette institution bien établie de la Common Law est inconnue du droit suisse qui fonctionne selon le principe indemnitaire (les dommages-intérêts servent à réparer le dommage mais ne peuvent pas enrichir le lésé), et devrait être considérée comme contraire à l'ordre public. Si le droit suisse s'applique au contrat, de tels dommages ne peuvent pas être octroyés. La reprise d'institutions typiques de la Common Law dans le contrat de registre pose

par principe des problèmes de compatibilité avec d'autres ordres juridiques et laisse par ailleurs entendre que le droit californien devrait a priori s'appliquer au contrat de registre.

- Il est compréhensible et pertinent que les règles ou obligations fondamentales qui figurent dans le contrat de registre s'appliquent de la même manière à tous les registres de par le monde et soient dès lors être interprétées d'une manière uniforme. Au-delà des quelques règles et obligations absolument fondamentales, il serait judicieux et conforme à une attente légitime de soumettre la relation contractuelle entre l'ICANN et un registre au droit national de ce dernier. Cela d'autant plus que le gestionnaire d'un domaine générique (TLD) se voit déléguer de larges compétences puisqu'il lui appartient notamment de fixer le but du domaine, l'éligibilité ou encore et les conditions d'attribution des noms de domaine, sans compter qu'il dispose d'une grande liberté quant à la manière dont un domaine est effectivement géré.

En ce qui concerne la compétence juridictionnelle, la clause d'arbitrage (chiffre 5.2 du contrat de registre «Arbitration text for intergovernmental organizations or governmental entities») a permis au registre du «.swiss» de prendre comme arbitre l'International Court of Arbitration of the International Chamber of Commerce à Genève en Suisse (la providence faisant dans notre cas bien les choses, ce qui a finalement constitué un élément essentiel permettant à la Confédération suisse de conclure un contrat de registre avec l'ICANN). Il serait toutefois à notre avis judicieux:

- de permettre également aux registres privés de se déterminer quant au choix de leur arbitrage;
- d'étendre les possibilités de choix pour les registres (par principe la possibilité de choisir un arbitrage reconnu dans chaque pays).

A noter finalement que la question préalable qui s'est posée pour le domaine «.swiss» est celle de la nature juridique d'un contrat conclu par un Etat, resp. son gouvernement avec un organisme privé comme l'ICANN qui exerce une tâche internationale d'intérêt public. Le contrat a en dernière analyse été considéré par le Gouvernement suisse en tant que contrat *sui generis* appelé *State Contract*.

## **2. La juridiction de l'ICANN a-t-elle affecté un processus de règlement de litiges ou une procédure judiciaire liés aux noms de domaine dans lesquels vous étiez impliqué ?**

Cela n'a pas été le cas jusqu'ici, mais cela pourrait l'être dans le futur:

- au sujet du droit applicable au contrat de registre lors d'un éventuel litige qui mettrait le registre du .swiss aux prises avec l'ICANN;
- si un tiers ouvre action contre l'ICANN auprès d'une juridiction US contre l'attribution par l'ICANN du «.swiss» ou concernant la gestion du «.swiss», ou directement contre le registre du .swiss pour sa gestion du domaine «.swiss».

## **3. Avez-vous des copies de et/ou des liens vers des rapports vérifiables relatant les expériences d'autres parties qui pourraient répondre aux questions ci-dessus ? En cas de réponse affirmative, veuillez fournir ces copies et/ou liens.**

Les actions judiciaires aux USA dont a fait l'objet le processus d'attribution par l'ICANN du domaine générique «.africa » constitue à notre avis une expérience révélatrice en relation avec la juridiction.

Il en va de même de l'ouverture d'une action judiciaire visant à saisir le ccTLD de l'Iran ("American court rules that Israeli plaintiffs can't seize the Iranian ccTLD"; see <http://www.internetgovernance.org/2016/08/04/plaintiffs-cant-seize-ir-court-rules/>).

Aux yeux du registre du «.swiss», il apparaît extrêmement problématique que des juridictions US puissent être saisies de litiges concernant la gestion d'un domaine communautaire comme le «.swiss» qui vise uniquement à servir l'intérêt de la communauté suisse.

**4. a. Avez-vous connaissance de cas documentés dans lesquels l'ICANN n'a pas été en mesure de poursuivre sa mission en raison de sa juridiction ?\* Si oui, veuillez fournir des pièces justificatives.**

A notre connaissance, l'ICANN a suspendu le processus d'attribution du domaine générique «.africa» dans l'attente des décisions judiciaires que devaient rendre les diverses juridictions états-uniennes saisies.

**b. Avez-vous connaissance de l'existence d'une juridiction alternative en vertu de laquelle l'ICANN ne serait empêchée de poursuivre sa mission et en avez-vous des preuves ? Si oui, veuillez fournir des pièces justificatives.**

The issues mentioned above regarding applicable law, competent judge or arbiter, suggest in our opinion that additional flexibilities within the contractual arrangements are required in order to allow for a level playing field for registries established outside the US.

In addition, the cases mentioned under 3 and potential cases that may arise, suggest that decisions affecting fundamentally the global community as a whole, or specific local communities, should be protected against undue interference by the authorities of one specific country.

There are many examples of private organizations, based in different countries, which perform public interest functions, such as ICANN does, that are protected by tailor-made and specific rules, which, for instance, guarantee that their internal accountability and governance mechanisms and rules are not overridden by decisions stemming from authorities from the country they are established in.

Le Comité international de la Croix-Rouge (CICR) constitue à nos yeux un possible exemple de qui permettrait à l'ICANN d'exécuter sa mission à l'abri d'interventions politiques ou judiciaires non souhaitée ou souhaitables.

A l'instar de l'ICANN, le CICR est de nature hybride. En tant qu'association privée constituée au sens des articles 60 et suivants du Code civil suisse (RS 210; <https://www.admin.ch/opc/fr/classified-compilation/19070042/index.html>), son existence ne découle pas en soi d'un mandat conféré par des gouvernements. Par contre, ses fonctions et ses activités sont universelles, prescrites par la communauté internationale et fondées sur des règles de droit internationales ou globales.



**Please note that the original version is in Chinese. This English version is only for reference.**

## **Transcript from ICANN 58 China Internet Community**

### **Readout Session**

#### **(Excerpt)**

Time: March 29, 2017 (afternoon)

Venue: Lecture Hall, 2/F, Building A, China Academy of ICT (CAICT)

Theme: ICANN's Jurisdiction Discussion

Moderator: This meeting focuses on ICANN's jurisdiction issues. I'll first read the four questions in the questionnaire. (Questions read are omitted here.)

Liu Limei: As a contracting party, we noted that there was a very interesting thing as regards jurisdiction when we signed with RA. The agreement with RA states that different laws may be applicable to different contracting parties. A conventional commercial company or institution observes the laws of the Rocky Mountain County, California, in contracting with the ICANN, while some governmental organizations and organizations with special needs observe the Swiss laws. Regardless of my limited knowledge of laws, I believe it is not fair and is unreasonable. Frankly speaking, they are conditional, which is, in my opinion, the biggest problem. This is our key point of view.

Zhang Jianchuan: I think the key point here is logical deduction. Once we face a lawsuit, do we have to settle it in the United States or Singapore? I'd like to ask about your experience on the issue, especially the fourth question. You have to offer the organization evidence and evidence is hard to collect. The question is difficult to answer if similar issues did not happen before. So is logical deduction. No one wants to go to court in California on a dispute.

Moderator: Can you give us an example concerning the fourth question?

Zhang Jianchuan: I can't.

Pam Little: We note ICANN has entered various 2012 round new gTLD registry agreements

that are subject to different jurisdictions, such as those of Switzerland and California. While ICANN is a non-profit organization in California overseeing domain names and IP addresses, it is still a private company. As such, these registry agreements are private in nature, notwithstanding some of them are with governments and may have taken into account some special considerations, with which we are not familiar and therefore not in a position to comment. “ICANN’s jurisdiction”, as it refers to “(c) any “choice of law” or venue provisions in agreements with ICANN”, may potentially impact our registries and registrars in that if there is a dispute arising from those contracts that progresses to arbitration or court proceedings, the venue will be California, which may be a disadvantage to us. In other words, our registry and registrar business may potentially be affected by ICANN’s jurisdiction. However, given that questions 1 and 2 in the Questionnaire are framed in the past tense, we are not able to provide any past examples. Those questions may be viewed as leading for a pre-determined outcome.

Zhang Jianchuan: The questions are provided with illustrative answers.

Jiang Yayun: From our perspective, the questions in the Questionnaire seem fairly tricky. While ICANN’s jurisdiction may not have resulted in adverse outcome, its impact is real and material. We believe ICANN’s jurisdiction choice is neither scientific nor logical. For example, all registrars operating in China must comply with Chinese laws when they perform their obligations under their agreements (RAA) with ICANN. However, ICANN staff may not have the necessary knowledge or expertise of Chinese laws. Therefore, when a dispute arises under the RAA, ICANN’s determination may be inconsistent with the requirements under Chinese laws. Further, all legal proceedings are subject to the jurisdiction of California, USA. Those courts may lack expertise of Chinese laws, the laws that are applicable to the registrar’s performance if its RAA obligations. Similarly, those courts may make decisions that are inconsistent with registrars’ obligations under Chinese laws. This poses an unfair disadvantage to non US-based registrars. Under these circumstances, most registrars may rather “comply” with ICANN’s determination when they have a dispute or disagreement with ICANN. This may create an appearance that registrars are able to resolve their disagreements amicably with ICANN. But the fact may be that, due to their concerns over ICANN’s jurisdiction, registrars are being pragmatic in making concession instead of pursue legal options. In our view, the issue of ICANN’s jurisdiction may hinder the development of an appropriate legal regime for legitimate domain businesses, which in

turn is detrimental to the domain industry in the long run.

Representative from a Registry: These are the advices given by the relevant business teams and the legal affairs team as I had not participated in the previous meeting. Their advice concerns the questionnaire only. According to them, there is no impact on our business, present and past.

Kan Kaili: there are two layers for this debate. One is the contracting party, another is the government level. From the contracting party side, a contracting party is signing agreement with ICANN through negotiation. The contracting party can choose the applicable law which it thinks beneficial. From the government side, it is somewhat inappropriate that ICANN as a global administrator of the Internet has its jurisdiction in California. But how to solve this issue? I cannot see any solution. There is no mutually acceptable solution. With this I would suggest the government follow the discussion thread calmly rather than raising the issue.

Low Jiarong: This is a leading question. I find that there are few Chinese in the working group. One is a student. The questionnaire has been released. It will be difficult for us to describe the influence exactly. If the Chinese Internet Community concerns about the issue, it is better that one or two more members from Chinese community to join the working group.

Cai Xiongshan: Contracts between ICANN and registries or registrars are civil ones. And for civil contracts, you can choose the applicable laws. In fact, many Internet contracts use California laws as their applicable laws. The core of the ICANN jurisdiction issue in the international society is that, it is not only civil, but also administrative and criminal. ICANN is an organization registered in the United States. Is it possible that ICANN is requisitioned by the US government? The global Internet stability would be affected once it happens. Embassies and diplomats are exempt. However, ICANN is an entity registered in the U.S. and is under US jurisdiction. The question is unanswerable. The question is whether the US government can shut down ICANN, or control the ICANN through legal measures so that ICANN fails to function properly and the global Internet security and stability are seriously undermined, rather than whether the contracts are subject to California laws or not. This is my personal opinion.

Xu Longdi: Up till now, ICANN has been doing well, which is a great advantage and is a basic fact. Recently, some American think tanks advised ICANN continue their efforts. The third one suggests a reverse thinking on the five questions. For example, what issues may occur in the future? What questions are the most controversial? You can list the issues that are most likely to

occur, for example, in terms of contracting, registration, fees, and national issues. This method answers the question in a mild way.

Lang Ping: I agree with the previous speeches, especially Pam's leading question comment on the questionnaire. Internet has become an important facility or technology for China's political and economical security. As ICANN manages resources key to our national security, our concern over its jurisdiction is mainly political. As regards to international politics, I believe the government raises the jurisdiction issue change for reasons of national security considerations. I recommend that an expert team prepare an evaluation report. Previously, we've mentioned the influence from different angles. If we can evaluate all the influences comprehensively and determine which deserves precautions and which are unlikely to happen. We should take different strategies for different threats. Thank you.

Liu Han: I want to first talk a little bit about the controversy over the judicial jurisdiction of ICANN and its relevance to China. I think within the current legal setting, Chinese companies can have a way to cope with the problem of resolving disputes with ICANN under American law. From a pure legal point of view, if a Chinese company has a litigation with ICANN in a California court, there is a federal court precedent. In the Vitamin C case, the Second Circuit Court ruled that it defers to the Chinese law as interpreted in the amicus brief provided by the Ministry of Commerce of the Chinese government, since it has no expertise on Chinese law. The result is that the Chinese company won the case. The implication is that if such a case related to ICANN arises in a California court, the Chinese company and the Chinese government can cooperate to present Chinese law to American courts. Second, regarding global Internet governance, I argue that state sovereignty has been never absent in cyberspace, despite numerous claims that cyberspace is independent from governments of physical world. The creation of ICANN, for example, happened against the backdrop of a soul-stirring event in which the American government tried to put the root of DNS in their control. I mean the Clinton administration's 1998 move against Jon Postel's attempt to removed four root DNS servers from the supervision of the federal government. That shows the historical origins of the controversy over global Internet governance: the sovereign nation-state has never relinquished its fundamental control over the root of the Internet.

Hao Fangbei: In my personal view, ICANN is a company fulfilling functions of an international organization. It is inappropriate for such a company to distribute key Internet IT

resources and is not beneficial for the development of the Internet. Our government, community, and industry shall all play a strong role in ICANN. We must be familiar with the international rules, use the rules, and turn ourselves from a rule observer to a rule maker. The government is enhancing its role in GAC. The government, community, and industry shall contribute Chinese wisdom and solutions in ICANN.

Chen Rong: GAC's concern on the jurisdiction issue is in view of national security. Personally, I think the issue can be considered in two aspects. In view of GAC, the government, and national security, the issue concerns national interests, not just in words. But in addition to official statements and governmental statements, enterprises have also a lot of things to do. For example, different companies have different concerns. I think it is a good thing for ICANN to send questionnaires. It offers you an opportunity to make your voice heard. We do not have to give exact answers to these questions. We can write down all our concerns on it.

Wang Wei: The question can be left to the next generation, as it could not be solved in one or two years. Instead, it can be made a long-term issue.

Song Zheng: In my opinion, ICANN has two features. One is that it serves only public welfare and engages the security and stability of root server systems. These tasks, including the distribution of top-level domain names in countries and regions, are absolutely the scope of the sovereignty within countries and purely of public welfare, and should not be controlled by a single government or jurisdiction. From this point of view, we may doubt why such affairs are subject to the jurisdiction of a country and believe that they should be given judicial exemption. It is similar to the United Nations in New York. The US police cannot just lock away the UN Secretary-General. This is unactionable. Commercially, it may be actionable. However, even if it is possible to make such legal arrangements, it would be truly difficult to achieve such effects.

Moderator: Thank you for staying so late today. Wish you a good evening!

# QUESTIONNAIRE

Responses must be transmitted via email to; [ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

***If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.***

Yes.

## 1. Application of the EU legislation on the protection of personal data to WHOIS Directories.

The European Commission has received several complaints from EU citizens, pointing out to the potential violation of their right to protection of personal data under EU law (Directive 95/46/EC, to be replaced by Regulation 2016/679<sup>1</sup> on 25 May 2018), in relation to processing of personal data by the WHOIS database, including publishing personal data by registrars.

The most recent case we have is from February 2017, when we received an email from a European citizen working from home as a freelance photographer expressing concerns as to the protection of her right to data protection, given that her street address was displayed publicly in the WHOIS database.

The problem is not new. A letter on this matter was sent to ICANN by Article 29 Data Protection Working Party (composed of national supervisory authorities) already on 26 November 2012. This letter highlighted in particular:

*"Because there is no legitimate purpose, and in connection with that, no legal ground for the data processing, the proposed data retention requirement is unlawful in Europe. Since the registrars (both within Europe and worldwide to the extent they are processing personal data from EU citizens) are data controllers (responsible for the collection and processing of personal data), the Working Party is concerned that this new obligation will put them in the uncomfortable position of violating European data protection law."*

[full letter provided in attachment].

The European Commission, the Article 29 Working Party and the European Data Protection Supervisor are further discussing the application of the EU data protection legislation to the WHOIS directories.

Regulation 2016/679 will also apply to controllers and processors from third countries offering goods or services or monitoring the behaviour of individuals in the EU.

## 2. Application of EU legislation on the protection of geographical indications to the new gTLD programme.

We have also had conflicts of jurisdiction in the context of the new gTLD programme, with inconsistencies with EU legislation on the protection of geographical indications (GI)

---

<sup>1</sup> Regulation 2016/679 on the protection of natural persons with regard to processing of personal data on the free movement of such data

concerning .wine and .vin. Fortunately, after long and protracted discussions and CEP (Cooperative Engagement Process) a satisfactory solution for the Parties was finally found in this particular case, in order to avoid consumer deception and misappropriation risks, and to protect European Union and national laws (including those applicable to other jurisdictions).

The Commission tried to find a solution which respects the legitimate interests of the European wine sector by supporting direct negotiations between rights holders of GI and the applicants of .wine and .vin. Global wine organisations, with the support of the Commission, provided a global list of GI names to ICANN, including EU GI names included in the e-Bacchus list, so that those are given special protection.

Following over one year of discussions between all parties involved, sufficient progress was made on the introduction of adequate criteria to protect wine producers around the world and global consumers who might wish to use the dot.wine and/or dot.vin top level domain names.

**2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?**

***If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.***

**3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.***

**4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* *If so, please provide documentation.***

**b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.***

While the European Commission is not in a position to document the existence of alternative jurisdictions where ICANN would not be prevented from pursuing its Mission, we are aware that ICANN, over the course of several years, has been investing a significant amount of work, time and resources investigating this issue. It would be useful to know the outcome (if any) of this work and therefore we would welcome an exhaustive ICANN report on its activities in this regard.

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] Jurisdiction Questionnaire

Luis R. Furlan [furlan at uvg.edu.gt](mailto:furlan@uvg.edu.gt)

Tue Feb 21 21:47:49 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire Responses](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] questionnaire](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

Please find answers after each question: \*QUESTIONNAIRE\*

\*Responses must be transmitted via email to;  
[ccwg-acctws2.jurisdiction.questionnaire at icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)  
<[ccwg-acctws2.jurisdiction.questionnaire at icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)>\*

\*1.\* Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

No.

\*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.\*

\*2. \*Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

No.

\*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.\*

\*3. \*Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? \*If the answer is yes, please provide these copies and/or links.\*

No.

\*4 \*\*a.\* Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* \*If so, please provide documentation.\*

No.

\*b. \*Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? \*If so, please provide documentation. \*

No.

Regards,  
\*\*Luis R. Furlán



ccTLD .gt  
Universidad del Valle de Guatemala

\*"Obstacles are things you see, \*\*when you take your eyes off the goal"\*

"Obstáculos son cosas que vemos,

\*cuando quitamos los ojos de la meta" \*

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170221/c382fecc/attachment.html>>

----- next part -----

A non-text attachment was scrubbed...

Name: firmacorreoIng.png

Type: image/png

Size: 116257 bytes

Desc: not available

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170221/c382fecc/firmacorreoIng.png>>

- 
- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire Responses](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] questionnaire](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] Questionnaire

Mzia Gogilashvili [mgogilashvili at gncc.ge](mailto:mgogilashvili@gncc.ge)

Tue Apr 18 07:30:03 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
- **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way? - NO

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in? - NO

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links. - NO

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation. - NO

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation. - NO

Sorry for late response.

მზია გოგილაშვილი

საერთაშორისო ურთიერთობების მთავარი სპეციალისტი

საქართველოს კომუნიკაციების ეროვნული კომისია

Mzia Gogilashvili

Chief Expert on International Relations

Georgian National Communications Commission

---

Tel.: +995 32 2311699 Mobile: +995 577 737763

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170418/c01dba74/attachment.html>>

----- next part -----

A non-text attachment was scrubbed...

Name: image001.jpg

Type: image/jpeg

Size: 2200 bytes

Desc: not available

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170418/c01dba74/image001.jpg>>

- 
- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

## CCWG-ACCOUNTABILITY WORK STREAM 2, JURISDICTION SUBGROUP QUESTIONNAIRE

### INTRODUCTION

The newly-adopted ICANN bylaws created several Work Stream 2 accountability subgroups. These subgroups are part of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

One of these subgroups, the Jurisdiction Subgroup, is seeking responses to this questionnaire for use in the Subgroup's deliberations. According to [Section 27.1\(b\)\(vi\)](#) of the Bylaws and to the extent set forth in the CCWG-Accountability [Final Report](#),<sup>1</sup> the Jurisdiction Subgroup is addressing questions related to ICANN's jurisdiction,\* including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability and the actual operation of ICANN's policies.

To help the Subgroup in these endeavors, we are asking you to consider and respond to the following specific questions. The Subgroup is asking for concrete, factual submissions (positive, negative, or neutral) that will help ensure that the Subgroup's deliberations are informed, fact-based, and address real issues. The Subgroup is interested in all types of jurisdiction-related factual experiences responsive to these questions, not just those involving actual disputes/court cases.

The questionnaire is available in each of the 6 languages supported by ICANN. You may respond to the questionnaire in any of these languages.

Responses must be transmitted via email to (email address). Responses must clearly identify the individual responding and, where applicable, the organization for which the response is being submitted. Responses may be submitted at any point during the response period.

The subgroup will accept responses until 23:59 UTC 17 April 2017.

---

<sup>1</sup> See CCWG-Accountability Main Report, paragraphs 6 and 234, and Annex 12, paragraphs 25-31.

\* For this Questionnaire, "ICANN's jurisdiction" refers to (a) ICANN being subject to U.S. and California law as a result of its incorporation and location in California, (b) ICANN being subject to the laws of any other country as a result of its location within or contacts with that country, or (c) any "choice of law" or venue provisions in agreements with ICANN.

## QUESTIONNAIRE

Responses must be transmitted via email to [ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)

Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

### **No difficulties to date**

Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved

### **This has not been an issue**

Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.*

### **I do not**

**4. a.** Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* *If so, please provide documentation.*

### **Not at this time, logic suggests however that ICANN may have challenges pursuing in countries under terrorist watch or US Economic Sanctions**

**b.** Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.*

**All Jurisdictions have specific policies that may or not prevent ICANN from pursuing its mission in some instances**

## CCWG-ACCOUNTABILITY WORK STREAM 2, JURISDICTION SUBGROUP QUESTIONNAIRE

### INTRODUCTION

The newly-adopted ICANN bylaws created several Work Stream 2 accountability subgroups. These subgroups are part of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

One of these subgroups, the Jurisdiction Subgroup, is seeking responses to this questionnaire for use in the Subgroup's deliberations. According to [Section 27.1\(b\)\(vi\)](#) of the Bylaws and to the extent set forth in the CCWG-Accountability [Final Report](#),<sup>1</sup> the Jurisdiction Subgroup is addressing questions related to ICANN's jurisdiction,\* including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability and the actual operation of ICANN's policies.

To help the Subgroup in these endeavors, we are asking you to consider and respond to the following specific questions. The Subgroup is asking for concrete, factual submissions (positive, negative, or neutral) that will help ensure that the Subgroup's deliberations are informed, fact-based, and address real issues. The Subgroup is interested in all types of jurisdiction-related factual experiences responsive to these questions, not just those involving actual disputes/court cases.

The questionnaire is available in each of the 6 languages supported by ICANN. You may respond to the questionnaire in any of these languages.

Responses must be transmitted via email to (email address). Responses must clearly identify the individual responding and, where applicable, the organization for which the response is being submitted. Responses may be submitted at any point during the response period.

The subgroup will accept responses until 23:59 UTC 17 April 2017.

---

<sup>1</sup> See CCWG-Accountability Main Report, paragraphs 6 and 234, and Annex 12, paragraphs 25-31.

\* For this Questionnaire, "ICANN's jurisdiction" refers to (a) ICANN being subject to U.S. and California law as a result of its incorporation and location in California, (b) ICANN being subject to the laws of any other country as a result of its location within or contacts with that country, or (c) any "choice of law" or venue provisions in agreements with ICANN.

## QUESTIONNAIRE

Responses must be transmitted via email to [ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)

- 1.** Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*

**I do not recognize such cases as those in the question.**

- 2.** Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*

**I do not recognize such cases as those in the question.**

- 3.** Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.*

**No.**

- 4. a.** Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* *If so, please provide documentation.*

**No.**

- b.** Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.*

**No.**

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] Questionnaire Answers

Michael Graham (ELCA) [migraham at expedia.com](mailto:migraham@expedia.com)

Wed Apr 12 20:30:45 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Answer to questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] ICANN-Jursidiction Questionnaire](#)
  - **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)
- 

## QUESTIONNAIRE

Responses must be transmitted via email to; [ccwg-acctws2.jurisdiction.questionnaire at icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)<[mailto:ccwg-acctws2.jurisdiction.questionnaire at icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)>

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

Not to my knowledge

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

Not to my knowledge

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

No

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

No

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170412/945a2dab/attachment.html>>

---

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Answer to questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] ICANN-Jursidiction Questionnaire](#)
  - **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)
- 

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)



## Internet Governance Response to the WS2 Jurisdiction Questionnaire:

The Internet Governance Project at the Georgia Institute of Technology appreciates the chance to respond to the questionnaire that the WS 2 group on Jurisdiction provided. This has been a long awaited discussion and we are glad to be able to relay the problems that some users face in using the DNS due to ICANN's jurisdiction.

1. We received some feedback from those who would like to fill in the questionnaire but were concerned about its formulation. Some of them informed us that because they are part of the domain name industry, they did not feel comfortable with directly putting their names forward and calling out problems, since they feared that this might hamper their business or other relation with ICANN and the registries and registrars.
2. Through research and discussion with those affected by US sanctions, IGP will cover some of the problems that residents of some countries face in using domain names. The answers are mainly related to question 1, 2 and 3.
3. Note that in this report we only describe third party problems. We cannot specify names and unless the documents are public, cannot refer to links.

### **The ability to use or purchase domain name related services:**

**Question 1:** *Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?*

*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*

In responding to this question, we call attention to three issues.

**Issue 1:** Application for new gTLD registration proved to be difficult for residents from countries subject to the US sanctions. ICANN in the new gTLD applicant guidebook stated that: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license."<sup>1</sup>

The new gTLD applicants who are not on SDNs list however report that the process of requesting ICANN to apply for an OFAC license is not transparent, and takes a long time to receive a response from ICANN. ICANN does not provide any indication that they have applied for OFAC license and the process is very lengthy. The registrar accreditation application includes a clause on OFAC;<sup>2</sup> however, the process has not been delineated and ICANN makes no commitment to transparency and responsiveness with regards to the application for an OFAC license.

---

<sup>1</sup> New gTLD Applicant Guidebook, 1-25

<sup>2</sup> <https://www.icann.org/resources/pages/application-2012-02-25-en>

**Issue 2:** Sometimes the registrars seem to follow OFAC sanctions even when it appears that they are not based in the U.S. For example Gesloten.cw, a registrar based in Curacao (Netherlands Antilles) follows OFAC regulations in its legal agreement with the registrants.<sup>3</sup> Another example is Olipso, an ICANN accredited registrar based in Turkey (Atak Domain Hosting). Olipso also prohibits persons located in sanctioned countries from using its services due to OFAC.

The uncertainty regarding the application of OFAC to non US-based registrars is the kind of jurisdiction issue that ICANN's workstream 2 process should explore. Some registrars not based in the US might want to avoid risk and not provide services for sanctioned countries because of their contract with ICANN.

The fact that a registrar not based in the U.S. prohibits registrants in sanctioned countries to use its services is very concerning. If non-US registrars must comply with US laws because of their contractual relation with ICANN, then ICANN's jurisdiction could be interfering with ICANN's mission, commitments and core values, which commits it to the global interoperability and openness of the Domain Name System.

**Issue 3.** Transferring money from countries under sanction to ICANN, due to US financial embargo on these countries, is very costly.

### **ICANN's jurisdiction and litigation**

**Question number 2:** *Has ICANN's jurisdiction affected any dispute resolution process or litigation related to domain names you have been involved in? If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*

In responding to this question, we call attention to one issue.

ICANN's jurisdiction has affected .IR, .SY and .KP due to a case brought by a group of terrorist victims in the US that had a writ of attachment against the state of Iran. Relying on US laws and arguing that ICANN is incorporated in the US, the litigants argued that these ccTLDs are attachable property that could be seized by the plaintiff. It was a long legal battle but the importance of its effect on the operation of .IR and how the people of Iran who had registered domain names with .IR reacted is ignored during the discussions. From the reaction of the Iranian media, evidently many businesses felt that their virtual presence was at risk and were worried that .IR be removed from the root zone. In an interview with an Iranian newspaper, the

---

<sup>3</sup> (17) "Prohibited Persons (Countries, Entities, and Individuals)" refers to certain sanctioned countries (each a "Sanctioned Country") and certain individuals, organizations or entities, including without limitation, certain "Specially Designated Nationals" ("SDN") as listed by the government of the United States of America through the Office of Foreign Assets Control ("OFAC"), with whom all or certain commercial activities are prohibited. If you are located in a Sanctioned Country or your details match with an SDN entry, you are prohibited from registering or signing up with, subscribing to, or *using any service of Parent.*"

director of .IR, explained that most of the users of .IR are from the private sector. He gave some reassurances that the attachment of .IR is impossible. But something interesting in that interview moves us forward to the second point: the director of .IR said in the interview that ICANN is an international organization, international laws apply to such organization and a local court sentence does not apply to .IR.<sup>4</sup>

Obviously, some ccTLDs are not aware of ICANN's jurisdiction implications on their operation and ICANN is responsible to raise such awareness among the ccTLDs.

It is important to note how the US courts have dealt with claims against foreign ccTLDs. While ICANN is not an international organization in its formal sense, the Appeals Court in the US in the case of .IR, showed deference to ICANN's mission which is to serve an international community. The court, while affirmed the district court judgment not to attach .IR, first respected the third party rights and stated that: "We assume without deciding that the ccTLDs the plaintiffs seek constitute "property" under the FSIA and, further, that the defendant sovereigns have some attachable ownership interest in them. Nonetheless, pursuant to the terrorist activity exception, the court has the "authority" to "prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment"—i.e., we are expressly authorized to protect the interests of ICANN and other entities. 28 U.S.C. § 1610(g)(3). Because of the enormous third-party interests at stake—and because there is no way to execute on the plaintiffs' judgments without impairing those interests—we cannot permit attachment."<sup>5</sup>

Then, relying on the US Amicus Brief the court respected the fact that ICANN serves a global community

"In light of the plaintiffs' recognition that ICANN's control "stems only from the fact that the global community allows it to play that role," Appellants' Br. at 34, and considering that the delegation of the three defendant sovereigns' ccTLDs could likely antagonize the global community, see Br. for United States as Amicus Curiae at 13 ("It is not difficult to imagine that a court-ordered change to the authoritative root zone file at the behest of private plaintiffs would prompt members of the global Internet community to turn their backs on ICANN for good."), we believe the doomsday scenario is not beyond imagining"<sup>6</sup>

### **Other reports:**

---

<sup>4</sup> <http://donya-e-eqtesad.com/SiteKhan/812011/>

<sup>5</sup> Weinstein v. Islamic Republic Iran, No. 14-7193 (D.C. Cir. Aug. 2, 2016)

<sup>6</sup> Weinstein v. Islamic Republic Iran, No. 14-7193 (D.C. Cir. Aug. 2, 2016)

**Question 3.** *Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.*

We have reiterated some of the issues we said in this blog post, but please refer to it for other issues and more explanation.

<http://www.internetgovernance.org/2017/01/13/icanns-jurisdiction-sanctions-and-domain-names/>

See also <http://donya-e-eqtesad.com/SiteKhan/812011/>

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

# CCWG-Accountability Work Stream 2

## Issues Jurisdiction Questionnaire

---

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that “affected” may refer to positive and/or negative effects.

*Yes. In 2013-2014 Italy was directly involved in the so-called “.wine issue”.*

Italy and European Union recognize the protection of Geographical Indications (GIs)<sup>1</sup> through a very detailed regulation.

The *de facto* non-recognition of GIs by US, and consequently by ICANN for example in its Registry Agreement and Uniform Domain Name Dispute Resolution Policy (UDRP)<sup>2</sup>, caused almost two years of intense debate among GAC members (US, Australia and New Zealand against the rest of the GAC), between GAC and the ICANN Board, between Governments and ICANN<sup>3</sup>.

In line with the American approach to the GIs, domain names which consist, contains or unduly evoke GIs, have not been accorded consistent protection as those defined in the International Treaty or the European Regulation.

For that reason, such domain names can be easily registered and used in a deceptive manner.

Italy asked for protecting GIs by reserving the registration of their respective domain names to the rightholders, according to the TRIPS provisions, but ICANN was reluctant to impose such safeguards to the candidate Registries.

In the end .wine issue was closed not in a satisfactory but at least acceptable manner for Italian rightholders, but this could serve as a good example to show how the US jurisdiction of ICANN affected the Italian business.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that “affected” may refer to positive and/or negative effects.

- 
- <sup>1</sup> The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
  - The Agreement on Trade-Related Aspects of Intellectual Property Rights
  - Regulation (EU) No 1151/2012 of 21 November 2012
  - Regulation (EC) No 1234/2007 of 22 October 2007
  - Regulation (EC) No 110/2008 of 15 January 2008
  - Council Regulation (EC) 1601/91

<sup>2</sup> The process which regulates the disputes that arise in gTLDs when a second level registration conflicts with an intellectual property right

<sup>3</sup> See for example <https://www.icann.org/en/system/files/correspondence/giacomelli-to-chehade-crocker-19jun14-en.pdf>

Yes, for the .wine issue, Italy filed two Reconsideration Requests<sup>4</sup>, one of which was signed by the then Minister of Economic Development, Ms. Federica Guidi<sup>5</sup>. Both the Reconsideration Request were rejected<sup>6</sup>

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

4a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.

4b Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

*In general, conflicts of jurisdiction on the Internet might have implications with respect to the "EU acquis", e.g. as regards data protection and geographical indications;*

*For that reason it is necessary that an Independent third party studies possible conflicts of laws and jurisdictions in relation to the Internet and, on that basis and if warranted, consider options for action in order to prevent these conflicts and to solve them should they occur.*

Rita Forzi  
Italian GAC Representative  
Director General  
Ministry of Economic Development

<sup>4</sup> <https://www.icann.org/en/system/files/files/request-italian-government-18apr14-en.pdf>

<sup>5</sup> <https://www.icann.org/en/system/files/files/request-italian-government-09apr14-en.pdf>

<sup>6</sup> <https://www.icann.org/en/system/files/files/recommendation-european-commission-et-al-14may14-en.pdf>

# Response to the questionnaire issued by the Jurisdiction Subgroup of CCWG- Accountability, Work Stream 2

Just Net Coalition

[info@JustNetCoalition.org](mailto:info@JustNetCoalition.org)

Submitted by Norbert Bollow, Co-convenor

*The Just Net Coalition<sup>1</sup> (JNC) comprises several dozen organisations and individuals from different regions globally concerned with internet governance, human rights and social justice, and the relationship between them.*

We choose to respond only to questions 4a and 4b, which as below.

***4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.***

ICANN's mission is “to ensure the stable and secure operation of the Internet's unique identifier systems”<sup>2</sup>. In performing its mission, “ ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole”<sup>3</sup>. The laws or the public interest of one country can therefore not be prioritized over those of others. Application of US jurisdiction (or of any other national jurisdiction) over ICANN results in a prioritization of US (or corresponding country's) law and public interest over those of other countries. It thus interferes with the ability of ICANN to pursue its mission “for the benefit of the Internet community as a whole”.

In assessing the impact of US jurisdiction over ICANN, the above question 4a needs to be interpreted broadly. It must cover all provable facts that point to the constraints put by the US jurisdiction on ICANN's ability to pursue its mission. This includes past instances where it can be shown that ICANN intended to do something, or actually did, but was stopped by the force of some element of US jurisdiction. However, the effect of law (or jurisdictional authority) is assessed not only in its consequences on actual actions, but also in its force of dissuading or encouraging potential actions.

Let us illustrate this with the commonplace example of traffic law. It will be of a limited meaning to ask how “often” has an anti-speeding law rendered motorists unable to speed over, say, 130 Kmph. The concerned traffic law surely influences the behaviour of drivers, who are much less likely to drive fast than they would be if there were no speed limits, as long one can safely assume (or know) that there is a high enough enforcement efficiency in that jurisdiction.

---

<sup>1</sup> <http://justnetcoalition.org>

<sup>2</sup> See 1.1(a) of ICANN's Bylaws, at: <https://www.icann.org/resources/pages/governance/bylaws-en>

<sup>3</sup> See 1.2(a) of ICANN's Bylaws

There exist a set of US laws, and executive, legislative and judicial powers, which apply to people and organisations in the US. The US is known to have a high enforcement capacity to ensure that these powers are normally respected and that all the subject actors shape their behaviour and actions in accordance with them. Accordingly, all evidence of existence of such laws, and executive, legislative and judicial powers, which have incidence upon ICANN's policy and implementation role, and are thus able to constrain them, constitute documentary proof for the purpose of this question.

Many in the ICANN community promote the illusion that ICANN's main reliance is on contractual law, where the venue and choice of law are indicated in the contract itself. And that this voluntary choice of venue and law by the contracting parties is the main or even the exclusive jurisdictional concern for ICANN's policy processes. Interestingly in this regard, a participant noted recently on the Internet Society's policy e-list that ICANN makes policy-by-contracts. It is a well-known fact that public law of the country of incorporation and location supersedes any contractual law. To quote from the CCWG's jurisdiction sub-group's evolving paper on "Influence of ICANN's existing jurisdiction";

Where a non-U.S. law violates the forum state's public policy, that law will not be applied. *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 543 ("the forum state will not apply the law of another state to enforce a contract if to do so would violate the public policy of the forum state.").

a. For example, recognizing strict liability of manufacturers and compensating injured parties for pain and suffering are public policies of California that will be recognized over non-U.S. law. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 735 & n.28 (2d Dist. 1972).

If US public policies supersede any non-US law that may be invoked by an ICANN contract, they certainly do also supersede ICANN's own policies. This legal position should settle the matter of supremacy of US policies and laws over ICANN actions, including its policy processes.

The actual number of US laws and state powers having some incidence on ICANN's work of global governance is endless. We are, therefore, unable here to prepare a list of them, doing which will also be inadequate since new laws can be made any time. What we provide below are the more immediately visible instances of US jurisdiction's influence, or even interference with ICANN's global governance functions.

### ***1. Cases where US courts have already exercised jurisdiction, by taking cognisance of a suit, giving interim/ final orders etc***

A full compendium of litigation concerning ICANN is found at:

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

It is pertinent to see that in almost all these cases, a US court has considered not just matters of private contracts between ICANN and another party but also some elements of US public law, and of (US) public interest. Most significantly, going through these cases shows that ICANN never contested the application of California, USA courts jurisdiction, and California and US public laws, over ICANN's policy and related functions. The concerned courts also took it as an uncontested matter, not to be discussed, that California, USA jurisdiction, and all California and US public policy law, would apply to ICANN's functions and actions (logically so, since ICANN is a California, USA, entity).

This provides clear proof, if one was ever required, that the entire range of public law of the US,



and the jurisdiction of every relevant US court, fully apply to ICANN functions and actions. In carrying out its mission, ICANN therefore must act within these laws. Accordingly, as much as traffic laws constrain the behavior of every motorist, US public law and its courts – and generally, the US jurisdiction – constrain ICANN actions. The US jurisdiction constrains ICANN in carrying out its mission in so far as it cannot undertake any action in pursuance of the mission that is contrary to US law. ICANN's mission, and the actions flowing from it, are supposed to be determined by global community processes, and not by US law and its interpretation by US courts. Herein lies the contradiction, hidden in plain sight.

If in none (or very few) cases did US court actually force ICANN to change its actions, it is because in most cases the *facts* of ICANN's actions were found by US courts not to violate US law. The need for ICANN's actions to remain within US laws was never contested. To the best of their very capable judgement, ICANN's battery of lawyers ensure that every of its actions adheres to US law. Such pre-configuring of ICANN's actions to US law is as much a problem as any subsequent action of a US court forcing ICANN's hand. Even with such preconfiguring, as far as US law clearly applies on ICANN, it cannot be assumed that the *facts* of the cases that ICANN finds itself embroiled in will always be judged in its favour.

The above is the most pertinent assessment from perusal of various ICANN related cases in US courts, and it applies to all US court cases involving ICANN. We briefly touch below on a few cases of actual litigation involving ICANN to illustrate this assessment.

a) .AFRICA case

See the below links for reference.

<https://www.icann.org/news/announcement-2-2016-03-05-en>

<https://www.prlog.org/12539064-united-states-court-has-granted-an-interim-relief-for-dca-trust-on-africa.html>

In this case, an US court temporarily prevented ICANN from delegating the .AFRICA top-level domain (TLD) for ZA Central Registry (ZACR). This prevented ICANN from pursuing its mission because it prevented ICANN from making a decision by applying its documented policies and remaining accountable to the Internet community through its own mechanisms.

b) Iran and Congo ccTLD cases

See these links.

<https://www.icann.org/resources/pages/icann-various-2014-07-30-en>

<https://www.icann.org/en/system/files/files/appellants-brief-26aug15-en.pdf>

<https://www.icann.org/resources/pages/itoh-v-icann-2012-02-25-en>

In these two cases, suits were brought against those who run country top level domains (ccTLDs), respectively, Iran and Congo, which are considered sovereign functions as per Tunis Agenda para 63. The applicants requested “attachment” of ccTLDs and IP addresses, which is essentially equivalent to requesting their re-delegation. In both these cases, ICANN was sought to be forced into some action in relation to these ccTLD owners, which would have been a breach of its own processes, and pursuance of its mandate. What is significant is that the US courts accepted their jurisdiction in the matter of ccTLDs of sovereign nations, which points to a clear possibility that at a different time, with a different set of contested facts, a US court might force ICANN to interfere with another country's ccTLD. This is clearly unacceptable, but as long as ICANN is under US jurisdiction it remains quite possible.

## c) Competition law cases

See.

<https://www.icann.org/resources/pages/namespace-v-icann-2012-11-02-en>  
<https://www.icann.org/en/news/litigation/manwin-v-icm>

In these cases, US courts tested ICANN's policy processes and their operationalisation against public laws of the US, in the area of economic regulation, especially as related to competition. This again shows that US courts have no hesitation to assess ICANN's actions in relation to US public law, which leaves the possibility very much open of interference in these areas. This also makes it clear that ICANN needs to pre-configure US law in making its policies and their operationalisation, which violates its mandate of serving the global "Internet community as a whole".

## **2. Cases where executive agencies of US impinge upon ICANN's actions**

ICANN has to obtain clearance from Office For Foreign Assets Control (OFAC) of the US government to interact with any entity, including any individual, from a country that is under OFAC sanctions. For instance, any individual from any such country supported by ICANN for attending any ICANN meeting, even outside the US, needs to be covered under such clearance. OFAC clearance is also needed for ICANN's engagement with agencies running ccTLDs of the concerned countries. No party from any of the sanctioned countries have applied for gTLDs, but the problems that such an application will run into are obvious. It is perhaps due to the existence of OFAC that no entity from these countries have applied, which underlines the prospective and not just retrospective impact of law.

The below is from ICANN's gTLD applicants handbook<sup>4</sup> (emphasis added).

***ICANN must comply with all U.S. laws, rules, and regulations.*** One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ***ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption.*** ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. ***In any given case, however, OFAC could decide not to issue a requested license.***

The US government has an absolute right to determine which country it may, at any time, put under OFAC sanctions. The recent US government order placing travel restrictions on residents of a number of countries points to how rapidly such situations can change.

In the circumstances, ICANN's global governance functions stand on extremely shaky grounds, when one government, whenever it wants, can decide which country(ies), and its residents, to exclude from the benefits of such governance.

## **3. Cases of US law or executive power causing interference in downstream layers of DNS (below ICANN), which makes likely that such actions will get directed at ICANN in future, in cases**

---

<sup>4</sup> <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>

### ***where ICANN alone can execute enforcement (like in the case of gTLDs)***

US executive agencies have routinely considered the DNS as a legitimate lever to exercise its coercive powers. Especially for entities outside the US that it seeks to impact, and who are provided DNS service from an entity within the US, it has unhesitatingly employed US jurisdiction over the US based DNS provider to pull the DNS plug on the “erring non US based entities”.

Please see the below news reports on hundreds of such cases.

<https://www.wired.com/2012/03/feds-seize-foreign-sites/>

<http://opinion.latimes.com/opinionla/2010/11/seizing-domain-names-without-coica.html>

ICANN, as a US non profit, is no different than a US-based registry or registrar located in the US, in terms of how a US authority can and will employ it for coercive actions against “errant entities”. Since most entities use a .com, .net, etc domain name, till now the means of enforcement have been through the corresponding registries, mostly Verisign. However, in case of gTLDs operated by a registry outside the US, ICANN alone can provide the means of coercive action – that of disabling the gLTD. There is no question that, as Verisign has so often been forced by US agencies to disable domain names, sooner or later so will ICANN be forced. Doing this just to uphold US law would constitute a constraint on ICANN's responsibility to act in the interest of global Internet community.

Entities lower than ICANN in the DNS chain have often acted under OFAC threat in manners that seems inappropriate vis a vis global accountability of DNS. Below are some such examples:

- Due to OFAC sanctions over Crimea, there was a major disruption in the domain name service in Crimea as US based registries and registrars withdrew their service, on a very short notice.

See <http://minsvyaz.ru/en/events/32631/> and <http://www.interfax.com/newsinf.asp?id=568197> .

- When ResellerClub moved its main place of activity to the US it decided to cancel all domain name registrations that were held by people residing in countries under sanctions, <https://blog.resellerclub.com/important-changes-in-resellerclubs-countries-of-operation/> .
- Even registries not located in the US, such as those based in the Netherlands and Turkey, are following OFAC sanctions due to their contractual relationship with ICANN, <http://www.internetgovernance.org/2017/01/13/icanns-jurisdiction-sanctions-and-domain-names/> .

This further points to how the menacing shadow of OFAC (and similar other US enforcement agencies, existing and those which may come to exist in the future) permanently hangs over ICANN's functions and actions.

#### ***4. A suggestive list of regulatory bodies that can direct ICANN on matters under their purview, which is very likely as ICANN allocates new sectoral gTLDs.***

The Federal Communications Commission (FCC) was instituted when telephony was the principal medium of telecommunication. It has reinterpreted its mandate to cover the new facts and situations that the Internet brings forth. The FCC has an express mandate over the numbering system of telephony. If it finds it necessary, it could extend that mandate to cover IP addresses and possibly also domain names, or the functions of ICANN. Current references to this area in FCC documents speaks about forbearance, and not denial, of its authority over IP addresses. The very meaning of

forbearance is that it can be vacated, and authority on the corresponding area exercised. It is untenable that ICANN should function as a key global governance body under this ever-present threat that it can be pulled into being regulated by the FCC wherever the latter decides it fit to do so.

The FCC is just the more obvious US regulatory agency that can exercise authority over ICANN. As the digital phenomenon, and with it the significance of Internet names, begins to pervade every social sector, transforming it and becoming a central feature of it, the mandate of practically every US regulatory agency could impact ICANN's functions. This holds especially as sector-based gTLDs are allowed (often with their own rules for inclusion, for example .pharmacy) and when gTLDs are granted to entities that are key players in different sectors. Consequently, whether it is the Food and Drugs Authority or the Federal Trade Commission or the Federal Energy Regulatory Commission, or various state utility commissions in the US, and so on, there is no end to very possible US jurisdictional incursions upon ICANN's functions. A sector regulator in the US, say in the area of health/ pharmaceuticals, transportation, hotels, etc, may find issues with the registry agreement conditions that ICANN allows for a sectoral gTLDs that is in the area of its mandate. Such a sector regulator might be able to force ICANN to either rescind or change the agreement, and the conditions under it.

***4 b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.***

There are three alternative jurisdictional arrangements that we present here, whereby ICANN will not be prevented from pursuing its mission of serving the global Internet community as a whole, as it is so prevented in its current jurisdictional status.

***1. Incorporation under international law***

The best and most sustainable arrangement would be for ICANN to be incorporated under international law, which will need to be negotiated specifically for this purpose among countries. This is also the most democratic arrangement. It can be done without touching the current multistakeholder governance structure and community accountability mechanisms of ICANN.

A number of international organisations exist on the basis of international law, governing various social sectors and aspects. Two such well-known organizations are not intergovernmental organizations: the International Committee of the Red Cross<sup>5</sup>, and the International Federation of Red Cross and Red Crescent Societies<sup>6</sup>. While most international organizations have inter-governmental governance mechanism, it is up to the enabling international law to decide the governance mechanism of an organisation formed under it. It need not necessarily be inter-governmental: the Red Cross provides examples of non-governmental governance mechanisms. A new international law could mandate ICANN to keep running as it does currently, in a multistakeholder fashion.

As an international organisation, ICANN would have a host country agreement with the country of its physical seat<sup>7</sup> (which can continue to be the US). It would accordingly not be subject to any of the jurisdictional problems that we have described above, in terms of pursuing its mission of global governance of Internet names and numbers.

<sup>5</sup> <https://www.icrc.org/en/document/statutes-international-committee-red-cross-0>

<sup>6</sup> [http://www.ifrc.org/Global/Governance/Statutory/2015/Constitution-2015\\_EN.pdf](http://www.ifrc.org/Global/Governance/Statutory/2015/Constitution-2015_EN.pdf)

<sup>7</sup> The immunities granted by Switzerland to the two cited Red Cross organisations are at: <https://www.admin.ch/opc/fr/classified-compilation/19930062/index.html> and <https://www.admin.ch/opc/fr/classified-compilation/20002706/index.html>

## **2. Obtaining immunity under US International Organisations Immunity Act**

It is possible for ICANN to seek immunity from US jurisdiction under the US International Organisations Immunity Act. This can be done in a partial manner so that ICANN retains its nexus with California non profit law, to enable its internal governance processes, including the newly instituted Independent Review Panel.

There are instances of US non profits having been given immunity under this Act, even as they continue to be registered as US non profit and rely on US law for their overall governance. One such organisation is the International Fertilizer and Development Centre, which was cited as an example of possible jurisdictional immunity for ICANN to look at by an ICANN-commissioned report which can be seen at <https://archive.icann.org/en/psc/corell-24aug06.html> .

As mentioned, such immunity from US jurisdiction could be granted in a manner that excludes from the immunity California non profit law (or any other laws that ICANN's effective working requires to be excluded from the immunity). Such an exclusion can be a part of the US government order providing immunity, or ICANN itself can waive its immunity to that extent. A useful discussion on such circumscribed immunity can be found in pp. 90-100 (waiver by governing instrument is discussed in pp. 86-97) of this report: <https://gns0.icann.org/en/issues/igo-ingo-crp-access-initial-19jan17-en.pdf>

If ICANN obtains such legal immunity under the mentioned US Act, the above listed jurisdictional issues, described in response to question 4a, could be avoided.

## **3. Keep a standing back-up option to move out in case of US jurisdiction intervention**

ICANN can institute a fundamental by-law that its global governance processes will brook no interference from US jurisdiction. If any such interference is encountered, parameters of which can be clearly pre-defined, a process of shifting of ICANN to another jurisdiction will automatically be set into motion. A full set-up – with registered HQ, root file maintenance system, etc – will be kept ready as a redundancy in another jurisdiction for this purpose.<sup>8</sup> Chances are overwhelming that, given the existence of this by-law, and a fully workable exit option being kept ready at hand, no US state agency, including its courts, will consider it meaningful to try and enforce its writ. This arrangement could therefore act in perpetuity as a guarantee against jurisdictional interference without actually ICANN having to move out of the US.

---

<sup>8</sup> This can be at one of the existing non US global offices of ICANN, or the location of one of the 3 non-US root servers.

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire Responses

Winterfeldt, Brian J. [BWinterfeldt at mayerbrown.com](mailto:BWinterfeldt@mayerbrown.com)

*Tue Feb 21 18:24:12 UTC 2017*

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Chérie dans le Seigneur](#).
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

To Whom It May Concern:

We write to provide responses on behalf of Mayer Brown LLP to the ICANN CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire. Please find our responses below.

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

Mayer Brown LLP represents various clients including brand owners, registrants, registry operators and registrars. The identity of these clients, where not already a matter of public record, is subject to attorney-client confidentiality. These parties have generally been affected by ICANN's jurisdiction, primarily the prescription of jurisdiction and venue in Los Angeles County, California. We support such jurisdiction and venue in these contexts.

Otherwise, ICANN's jurisdiction has not negatively affected our clients' businesses, or their ability to purchase or use domain name services. Overall, we strongly favor keeping ICANN incorporated and headquartered in California, as agreed upon during CCWG-Accountability Work Stream 1.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

ICANN's jurisdiction in California has at times partially informed the development of persuasive legal arguments we have made on behalf of our clients in various dispute resolution processes related to domain names, including UDRP proceedings and new gTLD program objection proceedings, particularly reliance on U.S. and California jurisprudence and legislation. Nevertheless, as ICANN is a global multi-stakeholder community, we strive to support our legal arguments with persuasive surveys of international legal norms. For example, UDRP complaints we file routinely include evidence of trademark rights in the jurisdiction of the Respondent. And, as another example, string confusion objections and responses we have filed on behalf of our clients routinely sought to present a representative survey of national intellectual property laws defining confusing similarity. None of these disputes involved ICANN directly as a party. However, we strongly favor keeping ICANN incorporated and headquartered in California, as agreed upon during CCWG-Accountability Work Stream 1.

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

No. We do not see the probative value of this inquiry, which attempts to garner information where survey respondents have no actual or direct knowledge.

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its

Mission because of its jurisdiction?\* If so, please provide documentation.

No, we are not aware of any instances where ICANN has been unable to pursue its Mission because of its jurisdiction.

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

For all of the reasons and rationale expressed as part of the Work Stream 1 consensus building process, we do not believe any alternative jurisdiction would provide any greater ability for ICANN to pursue its Mission.

---

We appreciate the CCWG-Accountability and ICANN's consideration of these responses.

Best regards,

Brian

Brian J. Winterfeldt  
Co-Head of Global Brand Management and Internet Practice  
Mayer Brown LLP  
[bwinterfeldt@mayerbrown.com](mailto:bwinterfeldt@mayerbrown.com)<mailto:[bwinterfeldt@mayerbrown.com](mailto:bwinterfeldt@mayerbrown.com)>  
1999 K Street, NW  
Washington, DC 20006-1101  
202.263.3284 direct dial  
202.830.0330 fax

1221 Avenue of the Americas  
New York, New York 10020-1001  
212.506.2345 direct dial

---

This email and any files transmitted with it are intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. If you are not the named addressee you should not disseminate, distribute or copy this e-mail.

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170221/44f98bfc/attachment.html>>

- 
- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Chérie dans le Seigneur](#).
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] questionnaire

Karina Cortes [karina.cortes@nic.pr](mailto:karina.cortes@nic.pr)

Wed Feb 22 19:21:50 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
  - Messages sorted by: [\[date\]](#) [\[thread\]](#) [\[subject\]](#) [\[author\]](#)
- 

\* Puerto Rico (.pr) registry \*

\*Responses must be transmitted via email to; \*

[\\*ccwg-acctws2.jurisdiction.questionnaire@icann.org\\*](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)

<[ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)>

\*1. \*Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

No.

\*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.\*

\*2. \*Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

Yes. It has affected the litigation process positively given that Puerto Rico has political (and therefore juridical) ties with the United States.

\*If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.\*

\*3. \*Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? \*If the answer is yes, please provide these copies and/or links.\*

No.

\*4 a.\* Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* \*If so, please provide documentation.\*

\*No.\*

\*b. \*Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? \*If so, please provide documentation. \*

\*No.\*



--

Karina Cortés  
Nic.pr

DISCLAIMER: This e-mail contains proprietary information some of which may be legally privileged. It is for the intended recipient only. If an addressing or transmission error has misdirected this e-mail, please notify the author by replying to it. If you are not the intended recipient you may not use, disclose, distribute, copy, print or rely on this e-mail.

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170222/87d5f7a6/attachment.html>>

- 
- Previous message: [[CCWG-AcctWS2.Jurisdiction.Questionnaire](#)] [Jurisdiction Questionnaire](#)
  - Messages sorted by: [[date](#)] [[thread](#)] [[subject](#)] [[author](#)]

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

I would appreciate the chance to respond to the questionnaire that the WS 2 group on Jurisdiction provided.

In response to “Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

If the answer is yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that “affected” may refer to positive and/or negative effects.”

Using some of essential services regarding domain name and numbering are definitely banned because of the political conflicts (such as US sanctions) which we thing they should be neutralized by ICANN jurisdiction.

In response to question number 4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.

1. Domain name registrants in Iran which is subject to U.S. sanctions have been struggling with the arbitrary cancellation of their domain names by some registrars. Some registrars (both American and non-American) might stop providing services to countries sanctioned under the Office of Foreign Affairs Control (OFAC) regime. Sometimes they do this without prior notice. For instance several applications were submitted by Iranian entities and ICANN didn't approve referring to applied sanctions.
2. As you may know, the United States District Court of Columbia issued an order for ICANN to seize Iran's internet domain (.ir) and IP addresses in order to pressure Iran for another totally refused settlement. Court papers have been served to ICANN and seek ownership of top-level domain names like .ir TLD, the ايران TLD and all Internet Protocol (IP) addresses being utilized by the Iranian government and its agencies. The court didn't accept their application but it is considered as an outstanding major risk we would like your cooperation to avoid.

**Mohammad Reza Mousavi**  
**Information Technology Organization of Iran**  
**International department**

## **Ответы Министерства связи и массовых коммуникаций Российской Федерации на вопросник по Юрисдикции Сквозной Рабочей группы сообщества по усовершенствованию подочетности ICANN, Рабочий поток 2**

Министерством связи и массовых коммуникаций Российской Федерации (Минкомсвязь России) — федеральный орган исполнительной власти, который занимается выработкой и реализацией государственной политики и нормативно-правовым регулированием в следующих сферах:

- сфере информационных технологий (включая использование информационных технологий при формировании государственных информационных ресурсов и обеспечение доступа к ним),
- сфере электросвязи (включая использование и конверсию радиочастотного спектра) и почтовой связи,
- сфере массовых коммуникаций и СМИ, в том числе электронных (включая развитие сети Интернет, систем телевизионного (в том числе цифрового) вещания и радиовещания и новых технологий в этих областях),
- сфере печати, издательской и полиграфической деятельности,
- сфере обработки персональных данных.

Минкомсвязь России является одним из учредителей Координационного центра доменов RU/РФ, который является администратором национальных доменов верхнего уровня .RU и .РФ. и выполняет функции национальной регистратуры, и активно участвует в принятии важных стратегических решений, касающихся вопросов развития российских национальных доменов.

**1. Повлияла ли юрисдикция ICANN каким бы то ни было образом на ваш бизнес, частную жизнь или возможность использования или покупки услуг, связанных с доменными именами?**

**Ответ - Да.**

ICANN, являясь глобальной операционной организацией и выполняя, по сути, наднациональные функции, тем не менее, находится под юрисдикцией одного государства, и обязана соблюдать все законы, правила и постановления, действующие в США, включая программы экономических и торговых санкций как указано в [gTLD Applicant Guidebook](#) (Руководство Заявителя для новых доменов верхнего уровня) версия 2012-06-04 Раздел 1.2 пункт 1.2.1:

*«Компания ICANN должна соблюдать все законы, правила и постановления, действующие в США. К таким сводам постановлений относится программа экономических и торговых санкций, которую проводит Управление по*

*контролю за иностранными активами (OFAC) Министерства финансов США. Эти санкции действуют в отношении определенных стран, а также частных лиц и организаций, которые включены в «черный» список OFAC — Список граждан особых категорий и запрещенных лиц. Компании ICANN запрещено предоставлять большинство товаров или услуг жителям и государственным органам стран, против которых применяются санкции, а также лицам, включенным в «черный» список, без разрешения правительства США. ICANN обычно не стремится получить лицензию на предоставление товаров или услуг лицам или организациям, занесенным в «черный» список.»*

В дополнение к уже изложенному требованию из gTLD Applicant Guidebook, аналогичное юридическое положение, требующее исполнения всех законов, правил и постановлений, действующих в США, а том числе и программы экономических и торговых санкций, которую проводит Управление по контролю за иностранными активами (OFAC) Министерства финансов США, есть и в документе, регулирующем Аккредитацию новых Регистраторов (Раздел 4. «Процесс подачи Заявки» документа «Аккредитация Регистратора: Заявка». И, таким образом, не только податели заявок на новые домены верхнего уровня (которые могут стать Реестрами по результатам обработки заявок) обязаны соглашаться с такими требованиями, но и компании, собирающиеся получать Аккредитацию Регистратора ICANN.

В соответствии с решением администрации США [Executive Order 13685](#) (от 19 декабря 2014) запрещающим американским компаниям с 1 февраля 2015 г. оказывать услуги и продавать товары в Республике Крым вести бизнес с физическими и юридическими лицами, расположенными в Республике Крым, в январе 2015 года находящиеся в Крыму пользователи Google Apps получили уведомление, что в течение недели доступ к услугам для физических лиц на данной территории будет приостановлен. За этим событием последовали аналогичные уведомления от других американских технологических компаний, в том числе Amazon, Apple, PayPal. Вскоре после этого были получены обновления веб-браузера Chrome от Google с сообщением о блокировке и/или удаления сайтов и хостинга, зарегистрированных на физических лиц, проживающих на этой территории.

Доменная индустрия не осталась в стороне. Ряд американских компаний Регистраторов, в частности GoDaddy, в одностороннем порядке заявили об удалении из реестра зон, в том числе .com, .net, .org и .info, доменных имен Администраторов доменов из Республике Крым. Американские Регистраторы сослались на торговые ограничения, которые не позволяют американским компаниям вести бизнес с физическими и юридическими лицами, расположенными в Республике Крым.

Таким образом американские компании были вынуждены исполнить Executive Order 13685. Данный прецедент подчеркивает насколько уязвима стабильность работы Интернет при нахождении ICANN в юрисдикции США, так как ICANN, как и любая американская компания, должна безусловно исполнять все требования национального законодательства.

В заявлении представителя России на 52-й конференции ICANN и в Совместном заявлении, поддержанном лидерами российского интернет-сообщества (Координационным центром доменов RU/РФ; Российской ассоциации электронных коммуникаций; Региональным общественным центром интернет технологий (РОЦИТ); Союзом интернет операторов; Фондом развития интернет-инициатив; Организацией по борьбе с цензурой в Интернет RuBlackList.NET и др.) на российском Форуме по управлению Интернетом (RIGF-2015), данные действия получили оценку сообщества как дискриминирующие права пользователей сети Интернет по территориальному принципу.

С 2015 года и по данный момент нам не известно ни об одном случае получения лицензии OFAC корпорацией ICANN для кого-либо из своих прямых контрагентов, как Регистраторов, так и Реестров, что не позволяет считать риск применения такого регулирования не заслуживающим внимания.

Также считаем, что мы считаем необходимым проведение анализа не только уже свершившихся и подтвержденных актов невыполнения ICANN своих функций по причине юрисдикции, но и проведения анализа рисков возможного невыполнения ICANN своих функций в будущем по причине юрисдикции.

Рабочая группа сообщества по усовершенствованию подотчетности ICANN не должна подменять всесторонний анализ рисков только сбором информации о свершившихся инцидентах. В связи с этим мы рекомендуем Рабочей группе сообщества по усовершенствованию подотчетности ICANN (CCWG-Accountability) в рамках Рабочего потока 2 провести всесторонний анализ рисков для ICANN и решений призванных избежать выявленных рисков.

**2. Повлияла ли юрисдикция ICANN\* на какой-либо относящийся к доменным именам процесс урегулирования спора или разбирательство в суде с вашим участием?**

**Ответ - Нет данных**

**3. Есть ли у вас копии документов и/или ссылки на какие-либо достоверные сообщения об опыте других лиц, позволяющем дать ответ на приведенные выше вопросы?**

**Ответ - Нет**

**4. а. Известно ли вам о каких-либо существенных, документально подтвержденных случаях, когда ICANN не смогла выполнить свою миссию по причине юрисдикции?**

**Ответ - Нет данных**

Миссия ICANN изложена в документе «ICANN Bylaws» (<https://www.icann.org/resources/pages/bylaws-2012-02-25-en#I>)

*«The mission of The Internet Corporation for Assigned Names and Numbers («ICANN») is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:*

*1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are*

*a. Domain names (forming a system referred to as "DNS");*

*b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and*

*c. Protocol port and parameter numbers.*

*2. Coordinates the operation and evolution of the DNS root name server system.*

*3. Coordinates policy development reasonably and appropriately related to these technical functions.»*

По нашему мнению пункт «3» не может быть исполнен полностью, поскольку все политики/правила (ICANN термин «policies»), и их применение (ICANN термин «implementation») рассматриваются с точки зрения Калифорнийского законодательства (поскольку ICANN является «nonprofit public benefit corporation») и это не позволяет в полной мере соответствовать требованиям современного мира, в котором сами Реестры доменов верхнего уровня, заключают договора с Регистраторами, а так же Регистраторы заключают договора с Администраторами доменов согласно законодательству других стран, что неизбежно приводит к проблемам с разрешением конфликтов между разными национальными законодательствами. В связи с этим, вопросы несоответствия политик и договоров ICANN требованиям различных национальных законодательств регулярно поднимается на официальных Конференциях ICANN.

В данный момент наиболее широко известным примером такого несоответствия правилам и договорам ICANN является вступающий в силу 25 Мая 2018 года закон новый ЕС о Персональных данных (GDPR, (EU) 2016/679), идущий на смену Директиве 95/46/ЕС, которая была ратифицирована Российской Федерацией.

На конференции ICANN в Копенгагене (март 2017), были проведены встречи с представителями Регуляторных органов ЕС по защите Персональных данных (Council of Europe Data Protection Commissioners),

которые показали полную неготовность ICANN к вступлению в силу такого закона, характеризующегося очень жесткими требованиями ко всем стадиям работы с персональными данными.

( <https://schedule.icann.org/event/9np1/gac-meeting-council-of-europe-data-protection-commissioners> - встреча с GAC,  
<https://schedule.icann.org/event/9nnl/cross-community-discussion-with-data-protection-commissioners> - встреча с участниками конференции)

Например, требование данного закона о «праве на забвение» ([http://ec.europa.eu/justice/data-protection/reform/files/regulation\\_oj\\_en.pdf](http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf), (66), страница L 119/13) и о необходимости возможности изъятия Согласия (Consent), физически невыполнимо на данный момент, поскольку после удаления домена из DNS в течение времени, требуемого на прохождение всех стадий жизненного цикла домена (<https://www.icann.org/resources/pages/gtld-lifecycle-2012-02-25-en>, Redemption Grace, Pending Delete фазы ), все еще можно получить данные Администратора домена через WHOIS сервис.

При этом список таких несоответствий на данный момент не составлен ICANN, несмотря на то, что опубликован данный закон ЕС был почти год назад (27 апреля 2016), что может позволить сделать выводы о том, как исполняется Миссия ICANN с учетом требования юрисдикции.

В качестве документальных данных можно привести транскрипт записи с сессии GAC с представителями Регуляторных органов ЕС по защите Персональных данных (Council of Europe Data Protection Commissioners) на конференции ICANN 58, Хельсинки ([http://schd.ws/hosted\\_files/icann58copenhagen2017/9c/I58CPH\\_Mon13Mar2017-GAC%20Meeting%20-%20Council%20of%20Europe%20Data%20Protection%20Commissioners-en.pdf](http://schd.ws/hosted_files/icann58copenhagen2017/9c/I58CPH_Mon13Mar2017-GAC%20Meeting%20-%20Council%20of%20Europe%20Data%20Protection%20Commissioners-en.pdf)).

Мы твердо придерживаемся позиции, что кроме анализа уже совершенных и подтвержденных случаев (post factum), когда ICANN не смогла выполнить свою миссию по причине юрисдикции, необходимо проанализировать следующие актуальные вопросы по существу ситуации:

- Почему ресурсы глобальной общественной инфраструктуры, которой фактически является сеть Интернет, находятся под юрисдикцией одной страны?
- Почему все ccTLD - страновые домены (например «.RU» или любой другой страны) должны быть предметом юрисдикции одной страны?
- Как географические домены (например, «.AFRICA») должны быть предметом юрисдикции США?

Такой подход может позволить избежать потенциальных рисков, в частности, когда ICANN будет вынуждена выполнять условия торговых санкций или решений суда определённой юрисдикции.

**б. Располагаете ли вы документами, подтверждающими существование альтернативной юрисдикции, где ICANN не столкнулась бы с препятствиями при выполнении своей миссии?**

**Ответ – Да, ссылаясь на прецедент, приведенный в п.1.**

В связи с этим считаем необходимым провести детальную оценку справедливого распределения средств управления Интернетом на основе международных соглашений между странами под эгидой ООН (см. [Устав ООН](#)), вне рамок национальных юрисдикций.

В качестве возможных сценариев решения проблемы с юрисдикцией ICANN призываем обсудить различные варианты. Например, ICANN может быть зарегистрирована в соответствии с международным правом.

Другой возможный сценарий - разнесение по разным юрисдикциям основных функций ICANN (разработка политик, операционная деятельность и управление root zone).

Еще одним сценарием организации деятельности ICANN и решения вопроса юрисдикции может стать решение Правительства США о применении к ICANN юрисдикционного иммунитета в соответствии с United States International Organisations Immunities Act.



## **Response of the Ministry of Telecom and Mass Communications of the Russian Federation to CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire**

The Ministry of Telecom and Mass Communications of the Russian Federation (The Russian Ministry of Communications) is the governmental agency responsible for developing and implementing national policy and legal regulation in following spheres:

- Information technology (including information technology usage for creation of government information resources and promotion of access to such resources),
- Telecommunications (including the allocation and conversion of the radio frequency spectrum) and postal communications,
- Mass communications and mass media, as well as the electronic media (including development of the Internet, television and radio broadcasting systems (incl. digital broadcasting), and related technological innovation),
- Publishing, printing, and distribution of printed media,
- Personal data processing.

The Russian Ministry of Communications is a founding member of the Coordination Center for TLD RU/PФ — administrator of national top level domains .RU and .PФ (national registry). The Ministry also plays an active role in making important strategic decisions related to development of Russian national domains.

**1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN’s jurisdiction in any way?**

**Answer: Yes.**

ICANN is a global operational organization and, in fact, it performs supranational functions. However, it is under the jurisdiction of a single state and must comply with all the laws, rules, and regulations of the USA, including the economic and trade sanctions, as indicated in [gTLD Applicant Guidebook](#) version 2012-06-04, section 1.2, item 1.2.1:

*“ICANN must comply with all U.S. Laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC’s List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. Government authorization or exemption.*

*ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List.”*

In addition to this requirement in gTLD Applicant Guidebook, similar legal provision, requiring compliance with the U.S. laws, rules, and regulations, including the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury, is set out in the document governing new registrar accreditation (“Registrar Accreditation: Application”, section 4. “Application Process”). Hence, not only the new top-level domain applicants (potential registries after application evaluation) must agree to these requirements, but also companies seeking accreditation as ICANN registrar.

According to the [Executive Order 13685](#) of U.S. Administration (December 19th, 2014) prohibiting U.S. companies from supplying services and goods in the Republic of Crimea, doing business with individuals and entities located in the Republic of Crimea since February 1st, 2015, Google Apps users located in Crimea were notified in January 2015 that access to Google services for accounts located in Crimea will be suspended within a week. This was followed by notifications from other U.S. technology companies like Amazon, Apple, Paypal. Soon afterwards, Google Chrome web browser updates were issued. They contained message about blocking and/or removal of web-sites and hosting registered by individual residents of this region.

Domain industry was affected as well. Several U.S. registrar companies (for example, GoDaddy) announced unilaterally that domain names of registrants from the Republic of Crimea will be removed from registries .com, .net, .org, .info, and others. U.S. registrars referred to trade restrictions which do not allow them to do business with individuals and entities located in the Republic of Crimea.

Accordingly, U.S. companies had to follow the Executive Order 13685. This precedent highlights the real threat to Internet stability owing to ICANN’s U.S. jurisdiction, since ICANN, just like any other U.S. company, must comply with all applicable national law.

Russian representative at ICANN 52 and authors of the Joint Statement, supported by leaders of the Russian Internet community (Coordination Center for TLD RU/PФ; Russian Association for Electronic Communications; Regional Public Center of Internet Technologies (ROCIT); Union of Internet Operators; Internet Initiatives Development Fund; Internet Anti-Censorship Organization RuBlackList.NET, etc.) at the Russian Internet Governance Forum (RIGF-2015), stated that community considers these actions as the discrimination against Internet users on the basis of their geographical location.

We are not aware of any OFAC license received by ICANN since 2015 for any of contracted parties (both registrars and registries), so that regulatory risk should be considered.

We also believe that in addition to the review of actual confirmed ICANN failures to fulfill responsibilities due to its jurisdiction, it's necessary to analyze risks of potential future ICANN's failures to fulfill responsibilities due to its jurisdiction.

Cross Community Working Group on Enhancing ICANN Accountability should not replace comprehensive risk analysis with just gathering information about actual incidents. We therefore recommend that Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) carry out comprehensive ICANN's risk analysis and develop solutions to mitigate these risks during Work Stream 2.

**2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?**

**Answer: No information available**

**3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above?**

**Answer: No**

**4. a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?**

**Answer: No information available**

The mission of ICANN is set out in ICANN's Bylaws (<https://www.icann.org/resources/pages/bylaws-2012-02-25-en#I>)

*"The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:*

*1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are*

*a. Domain names (forming a system referred to as "DNS");*

*b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and*

*c. Protocol port and parameter numbers.*

*2. Coordinates the operation and evolution of the DNS root name server system.*

*3. Coordinates policy development reasonably and appropriately related to these technical functions."*

We think that it is impossible to implement item 3 in full, because all ICANN's policies and their implementation are assessed for compliance with the California law (because ICANN is nonprofit public benefit corporation), and that does not allow to fully meet the demands of the modern world, where top-level domain registries enter into agreements with registrars individually, and registrars enter into agreements with the registrants in compliance with law of other countries,

and this inevitably creates intractable conflicts between national law systems. Therefore, the issue of inconsistencies between policies and agreements of ICANN and the requirements of different national law systems is raised regularly at ICANN's official meetings.

The new EU personal data protection act (General Data Protection Regulation – GDPR 2016/679) coming into force on May 25th, 2018, and replacing Directive 95/46/EC, ratified by the Russian Federation, is currently the most widely known example of such inconsistency to ICANN's policies and agreements.

During ICANN meeting in Copenhagen (March 2017) there were sessions with representatives of EU personal data protection regulatory bodies (Council of Europe Data Protection Commissioners), and these sessions revealed that ICANN is by no means ready for this law's entry into force and its very stringent requirements regarding all stages of personal data handling.

(<https://schedule.icann.org/event/9np1/gac-meeting-council-of-europe-data-protection-commissioners> – session with GAC,  
<https://schedule.icann.org/event/9nnl/cross-community-discussion-with-data-protection-commissioners> – session with conference participants)

For example, “right to be forgotten” provided for in that law ([http://ec.europa.eu/justice/data-protection/reform/files/regulation\\_oj\\_en.pdf](http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf), (66), page L 119/13) and the possibility of consent withdrawal are not actually implementable currently, because after domain removal from DNS it is still possible to get registrant data via WHOIS during all last stages of the domain lifecycle (<https://www.icann.org/resources/pages/gtld-lifecycle-2012-02-25-en>, Redemption Grace, Pending Delete stages).

That said, the list of such inconsistencies is not yet compiled by ICANN, although this EU law was published almost a year ago (on April 27th, 2016). This allows to draw some conclusions regarding ICANN's mission fulfillment in the context of jurisdictional issue.

The recorded transcript of GAC session with the Council of Europe Data Protection Commissioners at ICANN 58 in Helsinki ([http://sched.ws/hosted\\_files/icann58copenhagen2017/9c/I58CPH\\_Mon13Mar2017-GAC%20Meeting%20-%20Council%20of%20Europe%20Data%20Protection%20Commissioners-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/9c/I58CPH_Mon13Mar2017-GAC%20Meeting%20-%20Council%20of%20Europe%20Data%20Protection%20Commissioners-en.pdf)) can be used as the documentary evidence.

We stand firm on the position that in addition to the post-factum review of actual confirmed ICANN failures to fulfill mission due to its jurisdiction, it's necessary to review the following relevant substantive questions:

- Why the resources of such a global public infrastructure like Internet are under the jurisdiction of the single state?

- Why all country code top-level domains, ccTLD (for example, “.RU” or domains of any other country) should be under the jurisdiction of the single state?
- Why geographical domains (for example, “.AFRICA”) should be under the jurisdiction of the USA?

Such approach will help to avoid potential risks, in particular, when ICANN will have to implement the requirements of trade sanctions or court judgments of the certain jurisdiction.

**b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission?**

**Answer: Yes. Referring to a precedent given in section 1.**

In this regard, we consider necessary the detailed assessment of the equitable distribution of Internet governance resources on the basis of international treaties between states under the auspices of the United Nations (see [UN Charter](#)), beyond the limits of national jurisdictions.

We urge to discuss different possible ways to address the issue of ICANN’s jurisdiction. For example, ICANN could be established pursuant to the international law.

Another possible way is to separate main ICANN’s responsibilities (policies development, operational activities, and root zone management) over different jurisdictions.

One more way to arrange ICANN’s activity and to address jurisdictional issue could be U.S. Government decision recognizing ICANN’s jurisdictional immunity in accordance with the United States International Organizations Immunities Act.

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] Jurisdiction Questionnaire

Matthieu Aubert - [SafeBrands by Mailclub] [m.aubert at safebrands.com](mailto:m.aubert@safebrands.com)

Wed Apr 19 08:50:11 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Questionnaire](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

Dear All,

\_In case it could help and if not to late : \_/  
<[mailto:ccwg-acctws2.jurisdiction.questionnaire at icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)>/

\*1.\* Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

No/. The handling of complaints like Whois inaccuracy is improving.  
/

\*2. \*Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

/No.  
/

\*3. \*Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? /No.  
/

\*4 \*\*a.\* Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\*/No.  
/

\*b. \*Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? /No.  
/

/

All the Best,

Matthieu

--

photo

<<http://www.linkedin.com/in/matthieu-aubert-96825810/>>

<<http://twitter.com/safebrands>>

Matthieu Aubert

Director of Legal Department • Manager of partner relations, SafeBrands

Line : +33 (0)4 88 66 22 12

<tel:Line%20:%20+33%20%280%294%2088%2066%2022%2012>

France : +33 (0)4 88 66 22 22  
<tel:France%20:%20+33%20%280%294%2088%2066%2022%2022>  
Mobile : +33 (0)6 75 21 59 13  
<tel:Mobile%20:%20+33%20%280%296%2075%2021%2059%2013>  
[m.aubert\\_at\\_safebrands.com](mailto:m.aubert_at_safebrands.com) <mailto:[m.aubert\\_at\\_safebrands.com](mailto:m.aubert_at_safebrands.com)>  
Skype: matthieu-aubert <#>  
[www.safebrands.com](http://www.safebrands.com) <<http://www.safebrands.com>>  
Pôle Média de la Belle de Mai • 37 rue Guibal • 13003 Marseille • France  
  
<<https://www.linkedin.com/in/matthieu-aubert-96825810/>>

SafeBrands sera présent à \*l'INTA Annual Meeting à Barcelone, du 20 au 24 mai 2017  
\* Retrouvez-nous dans le \*Hall 8.1 / Stand C61-C62 \*

/Pour convenir d'un rendez-vous, vous pouvez me contacter dès à présent./

-----  
N.B : En application des principes de respect de l'équilibre vie privée vie professionnelle à SafeBrands, les mails qu'il m'arrive d'envoyer en dehors des heures ou jours ouvrables n'appellent pas de réponse immédiate.

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170419/cbdb3520/attachment.html>>

- 
- Previous message: [[CCWG-AcctWS2.Jurisdiction.Questionnaire](#)] [Questionnaire](#)
  - Next message: [[CCWG-AcctWS2.Jurisdiction.Questionnaire](#)] [CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire](#)
  - **Messages sorted by:** [[date](#)] [[thread](#)] [[subject](#)] [[author](#)]

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] jurisdiction questionnaire

Vanda Scartezini [vanda at scartezini.org](mailto:vanda@scartezini.org)

*Fri Feb 10 18:27:58 UTC 2017*

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] test](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Good day](#)
- **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

## QUESTIONNAIRE

Responses must be transmitted via email

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

R- No this this moment.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

R - No, at least on my knowledge

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

R - No nothing to help

4. 4a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction? \* If so, please provide documentation.

R- none to help.

4b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentati

R - I believe any jurisdiction has its pros & cons, but we need to see how things will perform during Mr. Trump's Administration in US. By now it is unpredictable if the reality we have seen till now under US jurisdiction will continue. It is, in my opinion too early to take any decision YES or NO for current or alternate jurisdiction due changes in several relevant countries occurring this and next year.

Best regards, below all my data.

Vanda Scartezini  
Polo Consultores Associados  
Av. Paulista 1159, cj 1004  
01311-200- Sao Paulo, SP, Brazil  
Brazilian citizen  
Land Line: +55 11 3266.6253  
Mobile: + 55 11 98181.1464  
Sorry for any typos.  
HAPPY 2017!



----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170210/850b4308/attachment.html>>

---

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] test](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Good day](#)
  - **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)
- 

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

# [CCWG-AcctWS2.Jurisdiction.Questionnaire]

## Jurisdiction Questionnaire

Ser Pheng QUEH (IMDA) [QUEH\\_Ser\\_Pheng at imda.gov.sg](mailto:QUEH_Ser_Pheng@imda.gov.sg)  
Mon Apr 17 15:06:50 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] ".swiss" Registry input to jurisdiction questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] The questionnaire is available in each of the 6 languages supported by ICANN \(see below\). You may respond to the questionnaire in any of these languages.](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)
- 

Dear ICANN CCWG-Accountability Work Steam 2,

Below please find our responses to the Jurisdiction Questionnaires:

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction in any way? If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

Response: NO

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in? If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

Response: NO

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

Response: NO

4. a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction? If so, please provide documentation.

Response: NO

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

Response: NO

Regards,

QUEH Ser Pheng

Singapore GAC Representative

Deputy Director, Internet Resource Management, Connectivity and Competition Development Group

D (+65) 6211 0173 | E [queh\\_ser\\_pheng\\_at\\_imda.gov.sg](mailto:queh_ser_pheng_at_imda.gov.sg) | W:

[www.imda.gov.sg](http://www.imda.gov.sg) | <http://www.imda.gov.sg/>

10 Pasir Panjang Road, #10-01, Mapletree Business City, Singapore 117438

[cid:168A4D79-8FB8-4AE1-830E-6A14C0D214E5][cid:FD1BD0D7-DA8E-48EE-A07A-CC9D858EC8DA]

<<https://www.facebook.com/IMDAsg/>>[cid:F4E3BC34-4F29-49B8-92AF-94B819B226B8]

<<https://twitter.com/IMDAsg>>[cid:C974B3D0-9AE3-4418-BDEC-6A9F6305C5B1]

<<https://www.youtube.com/IMDAsg>>[cid:C491523B-6440-4B06-B19A-6D52A5D29BDC]

<<https://www.imda.gov.sg/forms/subscribe>>[cid:F7072DA0-AD82-4E11-AE94-D3CD94C8EF4A]

NOTICE: This e-mail (including any attachments) may contain confidential or legally privileged information. Any unauthorised use, retention, reproduction or disclosure is prohibited and may attract civil and criminal penalties. If this e-mail has been sent to you in error, please delete it and notify us immediately. Please consider the environment before you print this email.

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/attachment.html>>

----- next part -----

A non-text attachment was scrubbed...

Name: image013.jpg

Type: image/jpeg

Size: 11466 bytes

Desc: image013.jpg

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image013.jpg>>

----- next part -----

A non-text attachment was scrubbed...

Name: image014.jpg

Type: image/jpeg

Size: 1044 bytes

Desc: image014.jpg

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image014.jpg>>

----- next part -----

A non-text attachment was scrubbed...

Name: image015.jpg

Type: image/jpeg

Size: 1038 bytes

Desc: image015.jpg

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image015.jpg>>

----- next part -----

A non-text attachment was scrubbed...

Name: image016.jpg

Type: image/jpeg

Size: 1035 bytes

Desc: image016.jpg

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image016.jpg>>

----- next part -----

A non-text attachment was scrubbed...

Name: image017.jpg

Type: image/jpeg

Size: 1051 bytes

Desc: image017.jpg

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image017.jpg>>

----- next part -----

A non-text attachment was scrubbed...

Name: image018.jpg

Type: image/jpeg

Size: 3446 bytes

Desc: image018.jpg

URL: <<http://mm.icann.org/pipermail/ccwg->

[acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image018.jpg](http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/72aedb10/image018.jpg)>

---

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] ".swiss" Registry input to jurisdiction questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] The questionnaire is available in each of the 6 languages supported by ICANN \(see below\). You may respond to the questionnaire in any of these languages.](#)
  - **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)
- 

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

**This translation is not approved by the « .swiss » registry and that the original response should always be consulted.**

CCWG-ACCOUNTABILITY  
WORK STREAM 2, SURVEY OF  
THE JURISDICTION SUBGROUP  
ME1 24013371v.2

**Answers provided by:**

**".swiss" domain registry**

Office fédéral de la communication OFCOM

rue de l'Avenir 44

Case postale 252

2501 Bienne

[domainnames@bacom.admin.ch](mailto:domainnames@bacom.admin.ch)

[www.bacom.admin.ch](http://www.bacom.admin.ch) / [www.dot.swiss](http://www.dot.swiss) / [www.nic.swiss](http://www.nic.swiss)

**1. Have your activities, your privacy, or your ability to use or procure services related to domain names been affected, in any way, by the jurisdiction of ICANN?**

That has indeed been the case. The Swiss Confederation wished to manage the generic domain name ".swiss" as a Community TLD in the interest of the country and its people (the Swiss community as a whole.) The Swiss Confederation wished to manage the generic domain name ".swiss" as a Community TLD in the interest of the country and its people (the Swiss community as a whole.) However, it was not a foregone conclusion for the Government of Switzerland to enter into a Registry Agreement with ICANN, taking into account the problems potentially posed by the jurisdiction of ICANN.

In this regard, the law applicable to the Registry Agreement has been identified as being the main issue:

- The Registry Agreement contains no provision relative to the choice of jurisdiction, the applicable law consequently not being defined by the Agreement. This creates great legal uncertainty and a potential issue as regards the jurisdiction given that:
  - o it would be the prerogative of the arbitrators or the judges having jurisdiction -who could come from a US Court- to determine what law governs the relationship between ICANN and the registry;
  - o the applicable law should be determined on the basis of the legitimate expectations which the parties may have in terms of applicable law. Pursuant to the current business practice, the applicable law is that of the party that provides the service in question, i.e. ICANN, a priori. A registry should therefore expect the potentially applicable law to be the law of the State of California.
  
- The applicable law further determines the faculty of ICANN to claim punitive or exemplary damages (i.e. under US law, damages highly surpassing the damage actually suffered, in order to punish a behavior), in the event the registry were to breach the contract in a deliberate and repeated manner (section 5.2 of the Registry Agreement.) This well-established institution of Common Law is non-existent under Swiss law, which follows the principle of compensation (damages are used to repair the damage but cannot enrich the claimant,) and should be considered to be contrary to public order. Were the Swiss law to apply to the Agreement, such damages would not be granted. Following the principles of the institutions typical to the Common Law provided for in the Registry Agreement poses issues of compatibility with other legal orders and suggests that Californian law would -a priori- apply to the Registry Agreement.

- It is understandable and appropriate that the fundamental provisions or duties contained in the Registry Agreement should apply equally to all registries around the world and be therefore interpreted in a uniform way. Beyond a few provisions and duties which are absolutely fundamental, it would be judicious and consistent with a legitimate expectation that the contractual relationship between ICANN and a registry be subject to the national law of the latter. The foregoing is all the more reasonable given that the manager of a generic domain (TLD) is delegated broad powers, as it is within its scope to establish the purpose of the domain, the eligibility, or the terms of the assignment of domain names, not to mention that it has great freedom as to the way in which a domain is actually managed.

With regard to territorial jurisdiction, the arbitration clause (section 5.2 of the Registry Agreement entitled "Arbitration text for intergovernmental organizations or governmental entities") has allowed the ".swiss" registry to submit itself to the arbitration of the International Court of Arbitration of the International Chamber of Commerce in Geneva, Switzerland (in our case, a godsend which was, ultimately, an essential element for the Confederation Swiss to enter into a Registry Agreement with ICANN.) However, it would be wise in our opinion:

- to also allow private registries to decide on the choice of their arbitration;
- to broaden the possibilities of choice for all registries (by principle, to choose an arbitration recognized in each country.)

Finally, it is to be noted that the matter which arose in the case of the domain ".swiss" is that of the legal nature of an agreement entered into by a State, whereby its government shall be bound to a private entity as ICANN, which executes an international task of public interest. The Agreement has ultimately been considered by the Swiss Government as a *sui generis* agreement called *State Contract*.

**2. Has the jurisdiction of ICANN affected any process of dispute settlement or any legal proceedings related to domain names in which you were involved?**

This has not been the case so far, but it could be in the future:

- regarding the law applicable to the Registry Agreement in the event of a potential dispute that would oppose the ".swiss" registry to ICANN;
- if a third party were to take a legal action against ICANN before a US Court opposing ICANN's assignment of ".swiss" or the management of ".swiss", or directly against the registry of ".swiss" for its management of the ".swiss" domain.

**3. Do you have any copies and/or links to verifiable reports regarding the experiences of others which could answer the questions above? If yes, please provide said copies or links.**

In our view, the legal proceedings having taken place in the United States regarding the assignment process of the ".africa" generic domain by ICANN is revealing with regard to jurisdiction.

The same could be said of the opening of a judicial proceeding to seize Iran's ccTLD ("American court rules that Israeli plaintiffs can't seize the Iranian ccTLD"; see <http://www.internetgovernance.org/2016/08/04/plaintiffs-cant-seize-ir-court-rules/>).

To the ".swiss" registry, it seems extremely problematic that the US Courts may hear disputes regarding the management of a Community domain name as ".swiss," whose sole purpose is to serve the interests of the Swiss community.

**4. a. Are you aware of any documented cases in which ICANN was not able to fulfill its mission because of its jurisdiction?\*** If yes, please provide supporting evidence.

To our knowledge, ICANN has suspended the process of assignment of the generic domain ".africa" pending the ruling of the various US Courts involved.

**b. Are you aware of any alternative jurisdiction under which ICANN would not be precluded from fulfilling its mission? If so, have you any proof? If yes, please provide supporting evidence.**

In our opinion, the issues mentioned above regarding applicable law and competent judge or arbiter suggest that additional flexibilities within the contractual arrangements are required in order to allow for a level playing field for registries established outside the US.

In addition, the cases mentioned under 3 and the potential cases that may arise suggest that decisions affecting fundamentally the global community as a whole, or specific local communities, should be protected against undue interference by the authorities of one specific country.

There are many examples of private organizations, based in different countries, which perform public interest functions, such as ICANN does, that are protected by tailor-made and specific rules, which, for instance, guarantee that their internal accountability and governance mechanisms and rules are not overridden by decisions stemming from authorities from the country they are established in.

In our view, the International Committee of the Red Cross (ICRC) is a possible example which would allow ICANN to fulfill its mission whilst protecting itself from undesired and undesirable political or judicial interference.

Like ICANN, the ICRC is of a hybrid nature. As a private association formed under sections 60 and following of the Swiss civil Code (RS 210; <https://www.admin.ch/opc/fr/classified-compilation/19070042/index.html>), its existence does not in itself stem from a mandate conferred by governments. By contrast, its functions and its activities are universal, prescribed by the international community, and based on international or global laws.

# [CCWG-AcctWS2.Jurisdiction.Questionnaire] Jurisdiction Questionnaire

Jesús Rivera [jrivera@conatel.gob.ve](mailto:jrivera@conatel.gob.ve)

Mon Apr 17 21:43:47 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Questionnaire](#)
- **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

Dear Srs.

We hereby send the responses of Venezuela to the Jurisdiction Questionnaire as indicated below,

Best Regards

Eng. Jesús Rivera  
Venezuela GAC Representative  
IANA Administrative Contact for .VE

\_\*QUESTIONNAIRE\*\_

/Responses must be transmitted via email to;  
[ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)  
<mailto:[ccwg-acctws2.jurisdiction.questionnaire@icann.org](mailto:ccwg-acctws2.jurisdiction.questionnaire@icann.org)>/

\*1.\* Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

\*NO\*

/If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

/

/

/

\*2.\* Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

/If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

/

\*/NOT YET, particular cases are usually resolved with the intervention of competent national authorities and interested parties as well as with the participation and advisory role of WIPO staff./\*/

/



\*3. \*Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? /If the answer is yes, please provide these copies and/or links.

/

/\*NO\*

/

\*4 \*\*a.\* Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* /If so, please provide documentation.

/

/\*NO\*

/

\*b. \*Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? /If so, please provide documentation.

/

/

\*NO\*

/

--

-----  
Ing. Jesús Rivera  
Jefe de División de Investigación y Seguimiento Internacional/  
Head of International Research Division  
Comisión Nacional de Telecomunicaciones (CONATEL)  
Avenida Veracruz, Edificio CONATEL, Piso 2  
Telef: +58212-9090-466  
Caracas 1060, Venezuela  
[jrivera@conatel.gob.ve](mailto:jrivera@conatel.gob.ve)  
-----

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170417/9a4ae5b5/attachment.html>>

- 
- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Jurisdiction Questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Questionnaire](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

# [CCWG-AcctWS2.Jurisdiction.Questionnaire]

## Answer to questionnaire

Carlos Vera [cvera@gmail.com](mailto:cvera@gmail.com)

Fri Apr 7 19:16:46 UTC 2017

- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] JNC response to Jurisdiction Questionnaire](#)
- Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Questionnaire Answers](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction\* in any way?

NO.

2. Has ICANN's jurisdiction\* affected any dispute resolution process or litigation related to domain names you have been involved in?

NO.

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? If the answer is yes, please provide these copies and/or links.

NO

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?\* If so, please provide documentation.

NO

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

NO

----- next part -----

An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/ccwg-acctws2.jurisdiction.questionnaire/attachments/20170407/b03815da/attachment.html>>

- 
- Previous message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] JNC response to Jurisdiction Questionnaire](#)
  - Next message: [\[CCWG-AcctWS2.Jurisdiction.Questionnaire\] Questionnaire Answers](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

---

[More information about the CCWG-AcctWS2.Jurisdiction.Questionnaire mailing list](#)

## **Annex B – Questions to and Responses from ICANN Legal**

## QUESTIONS FOR ICANN LEGAL FROM CCWG ACCOUNTABILITY JURISDICTION SUBGROUP

- A. Jurisdictions Where ICANN May be Subject to Litigation. The CCWG-Accountability Jurisdiction Subgroup would like to understand in which jurisdictions ICANN (incorporated as a nonprofit corporation in California) may be subject to litigation as a defendant (i.e., where the court's personal jurisdiction over ICANN may be satisfied and maintained). The Jurisdiction Subgroup would appreciate the assistance of ICANN Legal in this task. The Subgroup has prepared the following questions:
1. We have assumed, but would like to confirm, that ICANN is subject to suit in the countries where it has the following "physical presences":
    - o Headquarters office and state of incorporation:
      - USA (specifically Los Angeles, California)
    - o Hub offices:
      - 
      - Turkey
      - Singapore
    - o Engagement offices:
      - China
      - Belgium
      - Switzerland
      - Uruguay
      - Kenya
      - Republic of Korea
      - USA (specifically Washington DC)
  2. We believe it would be useful for us to know whether jurisdiction over ICANN in litigation could be maintained elsewhere (other than the above). Specifically, we would like to know about the following categories of jurisdictions:
    - a. US states and jurisdictions other than California.
    - b. Countries other than the above where ICANN employees reside and work remotely (and are being paid by ICANN in the employee's local currency)
    - c. Countries where ICANN has no ongoing physical presence but has held one or more ICANN public meetings (e.g., ICANN 57 in Hyderabad, India) or other significant events (e.g., GDD Summit) which are significant to ICANN's multistakeholder operations.
    - d. Jurisdictions where contracted parties are incorporated, headquartered or located.
    - e. Jurisdictions where ICANN meets none of the above criteria.
  3. If there is a judgment against ICANN, would the impact differ based on the category of jurisdiction above?

4. How would concepts of general jurisdiction vs. specific jurisdiction apply to any of the above questions?
5. How do issues of proper venue (or the lack thereof) impact the answers to the above questions?
6. How would questions 1-2 be answered for PTI, rather than ICANN?

We note that in its [Articles of Incorporation](#) ICANN states, among other things, that it shall promote the global public interest in the operational stability of the Internet and that it will operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We also note that in its [Bylaws](#) ICANN commits, among other things, to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We generally understand that in many places jurisdiction for litigation is premised on physical presence in some manner. But we wonder whether in the digital age the concept of “targeting” (or some other legal theory) can be used as a basis for litigation jurisdiction over ICANN.

In other words we wonder whether a party, based where ICANN has no office, could successfully maintain a lawsuit against ICANN in a local court based on the argument that ICANN targeted them improperly for some action or on some other legal theory.

We are looking for general advice rather than a country-by-country analysis, being interested in trends and reasonable probability and not legal certainty at this point.

B. Choice of Law and Venue in ICANN’s Contracts. The Subgroup would also like to understand how ICANN handles choice of law and venue in ICANN’s contracts.

1. For each type of ICANN contract, please indicate whether the contract specifies (a) the choice of law or (b) the venue. Where either is specified, please indicate the jurisdiction and/or venue specified, and the reasons for these choices. Where ICANN does not specify choice of law or jurisdiction, please explain why.
2. For the contracts discussed above, please indicate whether there have been instances where different choices were specified, and whether this was requested by ICANN or by the other contracting party. If so, please list the other jurisdictions and/or venues that were used in these contracts.

## ICANN Responses to WS2 Jurisdiction Questions – 10 April 2017

Jurisdictions Where ICANN May be Subject to Litigation. The CCWG-Accountability Jurisdiction Subgroup would like to understand in which jurisdictions ICANN (incorporated as a nonprofit corporation in California) may be subject to litigation as a defendant (i.e., where the court's personal jurisdiction over ICANN may be satisfied and maintained). The Jurisdiction Subgroup would appreciate the assistance of ICANN Legal in this task. The Subgroup has prepared the following questions:

1. We have assumed, but would like to confirm, that ICANN is subject to suit in the countries where it has the following "physical presences":

O\_ \_Headquarters office and state of incorporation:2

- \_USA (specifically Los Angeles, California)

O\_ \_Hub offices:

- \_Turkey
- \_Singapore

O\_ \_Engagement offices:

- \_China
- \_Belgium
- \_Switzerland
- \_Uruguay
- \_Kenya
- \_Republic of Korea
- \_USA (specifically Washington DC)

**ANSWER:** There are many places where ICANN could appropriately subject to suit, and ICANN has submitted to the jurisdiction of courts in some of the above locations. There is no jurisdiction where ICANN has been provided with immunity from the courts/litigation. As a result, there is always the possibility that litigation could be initiated or maintained against ICANN in any of the above-referenced locations, or any other location. Whether any specific court is an appropriate place to maintain a suit against ICANN is a separate question based upon the facts and the circumstances of each case, including the conduct alleged, the ties to the selected jurisdiction, and the propriety of the court to hear any individual case (based on issues of both personal jurisdiction and subject matter jurisdiction or analogous concepts). These are questions for the court to decide.

**As a result, there is no bright-line rule as to whether any litigation can or cannot be successfully maintained against ICANN in any location just by virtue of ICANN having a hub or engagement office in that location. ICANN has never agreed to waive its ability to bring any and all appropriate defenses to litigation.**

2. We believe it would be useful for us to know whether jurisdiction over ICANN in litigation could be maintained elsewhere (other than the above). Specifically, we would like to know about the following categories of jurisdictions:

a. US states and jurisdictions other than California and the District of Columbia (e.g., Illinois, Guam).

b. Countries or jurisdictions other than the above where ICANN employees reside and work remotely (and are being paid by ICANN in the employee's local currency) (e.g., France).

c. Countries or jurisdictions where ICANN has no ongoing physical presence but has held one or more ICANN public meetings (e.g., ICANN 57 in Hyderabad, India) or other significant events (e.g., GDD Summit) which are significant to ICANN's multistakeholder operations.

d. Jurisdictions where contracted parties are incorporated, headquartered or located (e.g., Ireland).

e. Jurisdictions where ICANN meets none of the above criteria.

**ANSWER:** As noted above, ICANN could appropriately be subject to jurisdiction in multiple places. The propriety of any court's assertion of jurisdiction over ICANN must be viewed in light of the claims at issue in the litigation, how those claims are tied to the selected jurisdiction, ICANN's alleged ties to those jurisdictions, etc. ICANN cannot presume to know what any court would do if faced with these claims, but ICANN would assert any and all appropriate defenses to any litigation, including jurisdictional challenges (among other items). As noted in response to Question 1, there is no bright-line rule as to whether any litigation can or cannot be successfully maintained against ICANN in any location just by virtue of the contacts (or lack of contact) noted in this question.

3. If there is a judgment against ICANN, would the impact on ICANN differ based on the category of jurisdiction above? Would ICANN be able to avoid the effects of a judgment in any jurisdiction (e.g., by ending its physical presence in that jurisdiction).

**ANSWER:** There is a wealth of jurisprudence on the ability to enforce judgments in jurisdictions other than where a judgment is initially rendered. If a judgment (appropriately rendered) is then appropriately perfected against ICANN in an appropriate jurisdiction, it would be difficult for ICANN to avoid the effects of that judgment. It is worth noting that litigation in the United States tends to look at the state of the parties at the time of initiation of the suit. For example, ICANN could not avoid having a judgment entered against it (if appropriate after litigation, etc.) for conduct brought to suit in 2016 by ending its presence in the jurisdiction in 2017.

This question can also be viewed more broadly, and not just about litigation and judgments, but in the impacts of doing business in a particular place. For example, ICANN's business currently is based upon significant contacts and maintenance of business ties within the U.S. If ICANN were to move headquarters outside of the U.S. tomorrow (which it has no plans to do) there are still likely a significant number of contacts that ICANN maintains in the U.S. such that ICANN would still be subject to following the laws required in order to conduct business in the U.S., such as observing U.S.-imposed sanctions.

4. How would concepts of general jurisdiction vs. specific jurisdiction<sup>3</sup> apply to any of the above questions?

**ANSWER:** Concepts of general jurisdiction (where ICANN is generally held to suit based upon its overall contacts with a jurisdiction) and specific jurisdiction (where ICANN is held to suit based upon actions targeted or tied to a specific area) are essential to the answers above. They are part of the facts and circumstances that any court must consider when identifying if the court has jurisdiction over the parties to the litigation.

5. How do issues of proper venue<sup>4</sup> (or the lack thereof) impact the answers to the above questions?

**ANSWER:** As with Question 4 (whether the court has jurisdiction over the dispute or the parties to the

dispute) the issue of venue (i.e., whether the court is the appropriate legal forum for the dispute) is also essential to any court's decision to proceed with a suit that has been filed before it.

6. How would questions 1-2 be answered for PTI, rather than ICANN?

**ANSWER: As with ICANN, PTI has not been granted immunity in any country, territory or court. The ability to maintain suit against PTI would depend on the facts and circumstances of each case. PTI does not maintain offices or have any employees located outside of the United States.**

7. We note that in its [Articles of Incorporation](#) ICANN states, among other things, that it shall promote the global public interest in the operational stability of the Internet and that it will operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We also note that in its [Bylaws](#) ICANN commits, among other things, to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We generally understand that in many places jurisdiction for litigation is premised on physical presence in some manner. But we wonder whether in the digital age the concept of "targeting" (or some other legal theory) can be used as a basis for litigation jurisdiction over ICANN.

In other words we wonder whether a party, based where ICANN has no office, could successfully maintain a lawsuit against ICANN in a local court based on the argument that ICANN targeted them improperly for some action or on some other legal theory.

**ANSWER: ICANN cannot provide a potential roadmap for litigants or provide admissions in response to these questions that might make it easier for a litigant, wherever they happen to be, to bring ICANN into court. The ability for a litigant to state a valid cause of action under law and achieve judgment against ICANN is dependent upon many things, such as: the law the litigant is relying upon/cause of action; the actions of ICANN that the litigant believes supports the cause of action; the propriety of jurisdiction (based on ICANN's actions, the litigants actions, actions of others, the competence and jurisdiction of the court, etc.); and the evidence presented about such a claim. ICANN cannot presume what a court would do in this hypothetical situation, just as ICANN cannot presume or predict what the outcome will be of any litigation actually filed against it.**

We are looking for general advice rather than a country-by-country analysis, being interested in trends and reasonable probability and not legal certainty at this point.

B. Choice of Law and Venue in ICANN's Contracts. The Subgroup would also like to understand how ICANN handles choice of law and venue in ICANN's contracts.

1. For each type of ICANN contract, please indicate whether the contract specifies (a) the choice of law or (b) the venue. Where either is specified, please indicate the jurisdiction and/or venue specified, and the reasons for these choices. Where ICANN does not specify choice of law or jurisdiction, please explain why.

**ANSWER: Based on the CCWG-Accountability's report setting out the scope of the WS2 topics, ICANN notes that focus is on registry and registrar contracts. ICANN's Registry Agreements and Registrar Accreditation**



Agreements are based on model templates, each of which was developed with stakeholders and subject to public comment.

In Registry Agreements, particularly the base agreement developed in the New gTLD Program, venue has two possibilities: (1) arbitration and litigation in Los Angeles County, California, and (2) arbitration and/or litigation in Geneva, Switzerland. Only intergovernmental organizations, governmental entities, or registry operators facing other special circumstances may select Geneva for venue. Agreement on Geneva as an alternative venue for dispute resolution was reached during the development of the Applicant Guidebook for the New gTLD Program, and is reflected by the availability of alternative text of Section 5.2 of the base agreement. As other venue locations have not been considered through the ICANN process, ICANN has not entered into any Registry Agreement with a venue other than Los Angeles or Geneva. There are approximately 10 registry operators that are not IGOs or governmental entities that have Geneva identified for venue.

The model Registrar Accreditation Agreement requires the venue for arbitration and litigation to take place in Los Angeles, California. ICANN does not have any Registrar Accreditation Agreements that vary on this issue.

Historically, the Registry and Registrar Accreditation Agreements are and have been silent on the choice of law to be applied in an arbitration or litigation. This allows the parties to an arbitration or litigation to argue (pursuant to the relevant arbitration rules, court procedures and rules, and laws) what law is appropriate to govern the specific conduct at issue. Arbitrators and courts are well-suited to make those types of determinations.<sup>1</sup>

ICANN has other contracts that are core to service to its mission. For example, out of the IANA Stewardship Transition Process, ICANN now has contracts with the Regional Internet Registries for the performance of the IANA Numbering Functions, the IETF for performance of the IANA Protocol Parameters Functions, and Public Technical Identifiers for the performance of the IANA Naming Functions. Each of these agreements had appropriate public consultation associated with their development.

For the SLA with the RIRs, (<https://www.icann.org/stewardship-implementation/service-level-agreement-sla-for-the-iana-numbering-services>) the venue selected is Geneva, Switzerland or such other location as is agreed by the parties. The governing law is specified as the State and Federal laws applicable in the State of California.

For the Memorandum Of Understanding Concerning The Technical Work Of The Internet Assigned Numbers Authority and the supplemental agreement thereto entered into for the protocol parameters work (<https://www.icann.org/en/stewardship-implementation/2016-supplemental-agreement-with-the-internet-engineering-taskforce-ietf>), there is no discussion of an arbitration or litigation process, nor choice of law. The MoU and supplemental agreement maintain other escalation and termination rights.

The ICANN-PTI IANA Numbering Services Agreement specifies the governing law as the laws of the State of California, United States of America (excluding conflict of law rules), and venue in a court within the State of

---

<sup>1</sup> ICANN has a few legacy agreements with managers of ccTLDs, and a special agreement with EURID for the operation of the .EU ccTLD. Under that EURID/ICANN Agreement, arbitration must occur in a place of legal residence of either party; an injunction may be granted by a court with appropriate jurisdiction in a place of legal residence of the party against whom the injunction is sought; and awards may be enforced in any court of competent jurisdiction. The choice of law requires Belgian law to apply to acts of EURID and California law to apply to acts of ICANN.

California. The customer mediation process is also required to follow the laws of California and to be conducted in the State of California unless mutually agreed.

For all of these agreements, there are no third-party beneficiaries. What this means is that the agreements do not provide rights to people or entities that are not party to the agreements to claim breach of contract (or other causes of action) solely because of the existence of the contract. Therefore, the venue and choice of law clauses define commitments among contracted parties, and do not define generally where ICANN or the contracted party has agreed to be subject to suit for a particular purpose. Modifications to the Registry and Registrar Accreditation Agreements, including modifications to the standard choice of venue or law provisions (where applicable), would have to be reached through the relevant base agreement modification procedure.

ICANN, of course, has a number of other contracts that it enters into in order to perform its operations, ranging from leases for office space, and contracts for office machines and cleaning services, through to engagement with vendors and others professional service contractors. ICANN follows procurement guidelines for those engagements, and, where appropriate, includes clauses related to choice of law and venue for disputes into those contracts. Within these operations-based agreements, ICANN and the contractor negotiate for the most appropriate selection of each, at times even identifying that in relation to a single contract different laws might govern the conduct of different parties. Each negotiation is fact-specific.

2. For the contracts discussed above, please indicate whether there have been instances where different choices were specified, and whether this was requested by ICANN or by the other contracting party. If so, please list the other jurisdictions and/or venues that were used in these contracts.

**ANSWER: As discussed above, there are no instances of Registry or Registrar Accreditation Agreements resulting in a different venue or selection of law other than California, USA or Geneva, Switzerland.**

Thank you very much for your assistance with these questions.

**Annex C – Litigation Summaries**

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	Bartlett D. Morgan
Name of Case:	<b>Subramaniam v. ICANN, et al</b>
Parties: <sup>1</sup>	Denise Subramaniam (Plaintiff) ICANN (Defendant), Susan k Woodard (Defendant), Charles Steinberger (Defendant), Internet.bs (Defendant)
Citizenship of Parties:	United States of America
Court/Venue:	Circuit Court of the State of Oregon, Washington County, Oregon, USA
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	Yes.  The complaint brought into question provisions in the ICANN Registrar Accreditation Agreement which the Plaintiff alleged created obligations not just between ICANN and accredited registrars but also third parties. At Clause 5.6, that agreement indicated, <i>inter alia</i> , that "...In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award), jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA;..."
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	Nil since there was no substantive written decision in the case. The case came to an end when the Claimant failed to prosecute the claim and there was no response to an Order to Show Cause.
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	Nil since there was no substantive written decision in the case. The case came to an end when the Claimant failed to prosecute the claim and there was no response to an Order to Show Cause.

<sup>1</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

Date Case Began:	Proceedings were filed on April 6, 2011
Date Case Ended:	Proceedings ended on August 22, 2011
Causes of Action: <sup>2</sup>	Chiefly violations of Ors §72 “Sales Act” also violations of the USC §12182 “Americans with Disabilities Act”
Issues Presented/Brief Summary of Case:	As the claim was not concluded in the usual way (i.e. on the merits after trial of the issues), no issues were traversed <i>per se</i> .  The underlying claim was primarily founded on the Plaintiff’s contention that: <ol style="list-style-type: none"> <li>1. One of the defendants, Charles Steinberger, owned a company - 4Domains Inc - which sold the Plaintiff domain names.</li> <li>2. 4Domains Inc was an ICANN accredited Registrar.</li> <li>3. 4Domains Inc became insolvent and eventually filed for bankruptcy.</li> <li>4. 4Domains Inc, in breach of its contractual obligations to ICANN, did not inform ICANN that it was insolvent prior to filing for bankruptcy.</li> <li>5. Had 4Domains Inc informed ICANN of its insolvency, the subsequent transfer and loss of certain domain names registered by her with 4Domains Inc would not have occurred.</li> </ol>
Was Preliminary Relief Requested (and if so, was it granted)?:	One of the Defendants (Susan Woodard, the trustee in bankruptcy for the bankruptcy estate of defendant Charles Steinberger) caused the claim to be removed from Oregon State Court and referred directly to the Bankruptcy Court for the Middle District of Florida. ICANN only became properly involved after this removal had already taken place. Eventually, ICANN’s motion to withdraw the reference to the Florida Bankruptcy Court was granted and the claim was transferred to the Federal District Court for the District of Oregon.

---

<sup>2</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

Relief Requested by Plaintiff:	The Plaintiff, Subramaniam, primarily sought damages. Specifically, damages in the sum of \$2,537,500.00 plus \$165,00.00 from filing until domains in question were restored; damages in the sum of \$2,750,000.00 for the second claim; damages in the sum of \$500,000.00 for the third claim; and \$100,000.00 for the fourth claim.
Outcome of Case and Relief Granted (if any):	Case dismissed with prejudice after the claimant failed to respond to ICANN's motion to dismiss and generally failed to prosecute the case.
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>3</sup>	There was no substantive written decision in the case. The case came to an end when the Claimant failed to prosecute the claim and there was no response to an Order to Show Cause.
Relevance of the case to the Jurisdiction Subgroup mandate:	There was no written decision and so, it is impossible to infer relevance.
Impact of case on ICANN accountability/operations: <sup>4</sup>	Nil.
Did the Court comment on any jurisdiction-related matters?:	no
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff's claims?:	no
Key Documents:	Plaintiff's Complaint Order of Dismissal

<sup>3</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>4</sup> Indicate whether the case had, will have or could have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies.

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	David McAuley
Name of Case:	Economic Solutions, Inc. (ESI) v. ICANN
Parties: <sup>5</sup>	Economic Solutions, Inc. (P); ICANN (D)
Citizenship of Parties:	ICANN – California; ESI – possibly in the U.S. State of Missouri as the case was filed there but this citizenship is uncertain based on documents filed on ICANN litigation page.
Court/Venue:	U.S. Federal District Court, Eastern District of Missouri
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	N/A – not a contract claim.
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	N/A
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	N/A
Date Case Began:	Indeterminate; this is a very early case on ICANN’s litigation page. The page has links to only two case documents: (1) a Nov. 11, 2000, <a href="#">declaration</a> by ICANN general counsel, and (2) a court <a href="#">order</a> denying ESI’s request for a temporary restraining order (TRO) to keep ICANN from establishing a new generic TLD of ".biz," ".ebiz" or any other designation which would be confusingly similar to the ".bz" ccTLD.

<sup>5</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

Date Case Ended:	Indeterminate. The court order denying the TRO was on Nov. 13, 2000. It is unclear from this webpage how case developed after this order.
Causes of Action: <sup>6</sup>	Not stated. The court order makes it appear the cause of action had three claims: a Lanham Act (trademark) violation claim; an unfair competition claim; and a “tortious interference” claim. In brief, the two documents make it appear that ESI feared that ICANN would delegate .biz as a gTLD while ESI was trying to arrange to operate (and commercialize) .bz for the government of Belize.
Issues Presented/Brief Summary of Case:	One issue was noted in both documents – the existence, or not, of personal jurisdiction over ICANN in a court in Missouri. A second issue, the appropriateness of a temporary restraining order against ICANN, was discussed in the order (with further background about how ICANN operated at the time in the declaration).
Was Preliminary Relief Requested (and if so, was it granted)?:	Yes, the request for a TRO – it was denied.
Relief Requested by Plaintiff:	All we see from these documents is the request for the TRO.
Outcome of Case and Relief Granted (if any):	There are no further documents linked on the ICANN litigation page after the denial of the TRO.
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>7</sup>	Yes. Indeterminate.
Relevance of the case to the Jurisdiction Subgroup mandate:	The declaration by the ICANN general counsel provides insight into ICANN’s thinking in 2000 about it being subject to personal jurisdiction in a state in which it had no physical presence.

<sup>6</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

<sup>7</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.



	He also spoke against the idea that ICANN’s website was possibly relevant to personal jurisdiction.
Impact of case on ICANN accountability/operations: <sup>8</sup>	Indeterminate.
Impact if case were decided for the other party?:	Too attenuated given lack of documents developing each party’s theory of the case.
Did the Court comment on any jurisdiction-related matters?:	<p>Yes. First some background. In the declaration document, ICANN general counsel Louis Touton noted, “ICANN has no assets in the State of Missouri. It does not solicit any business in Missouri. It does not sell any goods or services in Missouri. It does not have a bank account in Missouri. In fact, I am unaware that anybody associated with ICANN has ever been to Missouri in connection with ICANN's business. Nobody from ICANN has met personally with any of plaintiff's representatives, in Missouri or elsewhere.” Touton also described the ICANN website, essentially saying it was not interactive and did not sell items.</p> <p>The court, in its order, said this, among other things: “The bulletin-board function of defendant's website does not create full-fledged interactivity and does not strongly establish any particularized Missouri contact, much less a purposeful contact by defendant ... relating to this litigation.”</p>
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claims?:	<p>No, other than saying that ESI had not submitted sufficient information on which to demonstrate that it would probably succeed on the merits of its claims considering ICANN’s declaration. (This is, of course, a pre-transition case - among other things, the ICANN declaration said that the U.S. Commerce Department would have to approve of the .biz delegation and issue instructions to add it to the root zone file.)</p> <p>The court also questioned ESI’s showing that it would suffer irreparable harm absent a TRO.</p>

---

<sup>8</sup> Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.

Key Documents:	Linked above.
----------------	---------------

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	Greg Shatan
Name of Case:	Image Online Design, Inc. v. ICANN
Parties: <sup>9</sup>	P: Image Online Design, Inc., D: ICANN
Citizenship of Parties:	Image Online – US (California), ICANN – US (California)
Court/Venue:	U.S. Federal District Court for the Southern District of California
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	Yes -- 2000 New TLD Registry Application Form, with certain additional documents incorporated by reference. No choice of law provision.
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	Not stated
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	US Federal Trademark Law (Lanham Act); California law
Date Case Began:	October 17, 2012

<sup>9</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

Date Case Ended:	February 7, 2013
Causes of Action: <sup>10</sup>	Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Trademark and Service Mark Infringement Under 15 U.S.C. Sec. 1114(1), Trademark and Service Mark Infringement and False Designation of Origin Under 15 U.S.C. Sec. 1125(a), Contributory Trademark and Service Mark Infringement Under 15 U.S.C. Secs. 1114(1) and 1125(a), Intentional Interference with Contractual Relations, Intentional Interference with Prospective Economic Advantage
Issues Presented/Brief Summary of Case:	IOD applied for .WEB in the 2000 round, but it was not given to anyone. IOD then operated .WEB as a TLD on an alternative root. IOD had a trademark registration for .WEB, but for mouse pads and backpacks (not registry services). IOD sought to prevent ICANN from delegating .WEB and sought to include itself in the application process for .WEB without reapplying or following instructions that ICANN had provided for prior applicants. IOD was not included among the applicants for .WEB. IOD contended offering .WEB to others before dealing with IOD's application constituted breach of contract (i.e., the 2000 Application), when taken together with certain statements made by ICANN Board members. IOD also contended that if ICANN allowed another party to operate .WEB it would constitute trademark infringement and/or contributory trademark infringement. IOD also claimed that such use would infringe purported common law trademark rights for .WEB for registry services. IOD also claimed that offering .WEB to other parties constituted intentional interference with contractual relations (i.e., IOD's customer contracts) and intentional interference with prospective business advantage.
Was Preliminary Relief Requested (and if so, was it granted)?:	Yes, IOD asked for a TRO and PI to prevent ICANN and all other persons acting with ICANN from using the .WEB TLD in a manner that is likely to cause confusion. It does not appear that the TRO request was argued. The case was dismissed before reaching the preliminary injunction request.

<sup>10</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

Relief Requested by Plaintiff:	Damages, ICANN's profits resulting from infringement of .WEB Mark, accounting and disgorgement of amounts by which ICANN has been unjustly enriched, treble damages for willful trademark infringement, punitive and exemplary damages, Permanent Injunction, attorneys' fees and costs.
Outcome of Case and Relief Granted (if any):	ICANN filed a Motion to Dismiss, which the Court granted, dismissing for failure to state a claim, for unripeness of statutory trademark claims, for lack of likelihood of confusion for statutory trademark claims, for lack of a common law trademark in .WEB for registry services on ICANN's Motion to Dismiss. No relief was granted to IOD.
Was Jurisdiction contested, and if so, what was the outcome?: <sup>11</sup>	No. Note that both parties were California corporations.
Relevance of the case to the Jurisdiction Subgroup mandate:	US Federal Court provided a forum for IOD to seek to hold ICANN accountable for actions that IOD believed were improper. IOD was able to do this without a significant risk of cost-shifting, since the US is not a "loser pays" jurisdiction, except in specific or exceptional cases. The standards for several of the causes of action were stated in the Complaint and in the Court's Order, demonstrating that US Federal law (with regard to the trademark claims) and California state law offered reasonably clear standards for each cause of action. The claim for breach of a covenant of good faith and fair dealing was based on an implied covenant stated in California law and not on an express covenant in the agreement. This implied covenant provides additional protection to contracting parties (note that it did not figure in the decision here),
Impact of case on ICANN accountability/operations: <sup>12</sup>	ICANN's operations in connection with the New gTLD Program were protected from interference by the operator of the .WEB alternative TLD

<sup>11</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>12</sup> Indicate whether the case had, will have or could have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies.

Impact if case were decided for the other party?:	
Did the Court comment on any jurisdiction-related matters?:	No.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff's claims?:	The court found that IOD had failed to state a claim on each of its causes of action. The court did note that some of the claims were not well-supported, e.g., the likelihood of confusion claim presented no argument or basis for the claim. It did not state that any of the claims were frivolous.
Key Documents:	Complaint, Motion to Dismiss and Response, Court Order

### **JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY**

Name of Case:	Name.Space, Inc. v. ICANN.
Parties: <sup>13</sup>	Name.Space, Inc. (NSI) (Plaintiff); ICANN (Defendant).
Citizenship of Parties:	NSI – a US company organized under State of Delaware law (principal office New York City); ICANN - US/California non-profit.
Court/Venue:	US federal district court in Los Angeles (appeal at US Ninth Circuit Court of Appeal which includes Cal.)
Choice of Law/Governing Law:	Federal claims under US federal law; some state claims were alleged in this US federal court under federal “diversity” jurisdiction and governed by Cal. law.
Date Case Began:	Oct. 10, 2012 (case filed in US district court).
Date Case Ended:	July 31, 2015 (lower court dismissal upheld on appeal).

<sup>13</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Causes of Action:	Federal anti-trust (conspiracy), monopoly, and trademark claims; Cal. state claims: violation of Cal. business laws (e.g., tortious interference with contract), unfair competition, common law trademark.
Issues Presented:	Did ICANN violate US competition and trademark laws, and related California statutes and common law, by refusing to delegate NSI gTLDs into the DNS root zone in the 2012 round of new gTLDs? NSI applied to place 118 gTLDs in root in 2000 and believed it would have those pending requests granted in 2012 round. Allegation that \$185,000 fee per application was consciously aimed at attacking NSI's business model. Allegation that ICANN permitted application for TLDs that NSI was already operating.
Preliminary Relief?:	NSI sought a preliminary injunction
Outcome:	District court dismissed case – decided insufficient factual pleadings to support federal anti-trust and monopoly claims – just conclusory statements. Trademark claims were found to be premature, no controversy existed yet. State law claims also conclusory statements lacking factual detail to support a claim. (Appeals court summarized this in this manner – NSI failed to allege that ICANN either delegated or intended to delegate any TLD that NSI uses.) The Ninth Circuit appeals court affirmed the dismissal (ICANN lists lower court and appeals court decisions in one link.)
Was Jurisdiction Contested? <sup>14</sup>	No
Effect on our Work: <sup>15</sup>	Unclear if any. However the district court did say this in its dismissal (among other things): “Because whatever monopoly power ICANN possesses was given to it by the United States Department of Commerce and not the result of the “willful acquisition” of monopoly power, the Court concludes that no amendment could cure the deficiencies in Plaintiff’s monopolization claim brought pursuant to Section 2 of the Sherman Act.” As we know, this circumstance relating to the Dept. of Commerce has changed.
Key Documents:	N/A

<sup>14</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

<sup>15</sup> Indicate whether the case had or will have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY

### 1. DCA v. ICANN (Trial Courts)

Name of Case:	DotConnectAfrica Trust v. ICANN
Parties: <sup>16</sup>	DotConnectAfrica Trust (DCA) (Plaintiff); ICANN (Defendant); Does 1-50 (these are as-yet unnamed Defendants). ZA Central Registry NPC named as defendant later.
Citizenship of Parties:	DCA -non-profit of Mauritius (principal office Kenya; representative in California); ICANN -Cal./US; Does – indeterminate. ZACR: South African.
Court/Venue:	Superior Court of California; Los Angeles County
Choice of Law/Governing Law:	California
Date Case Began:	Jan. 20, 2016 (case filed)
Date Case Ended:	N/A
Causes of Action:	Against ICANN: Breach of contract; Intentional misrepresentation; Negligent misrepresentation; Negligence. Against all defendants including ICANN: Fraud and conspiracy to commit fraud; Unfair competition. Added later – Intentional interference with contract; Confirmation of IRP award and declaratory actions.
Issues Presented:	Causes of action relate to delegation of the .africa new gTLD.
Preliminary Relief?:	DCA sought a preliminary injunction twice in Cal. state court.
Outcome:	DCA's first request for a preliminary injunction was <a href="#">denied</a> Dec. 22, 2016. Its second request was <a href="#">denied</a> on Feb. 3, 2017.

---

<sup>16</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Was Jurisdiction Contested? <sup>17</sup>	No
Effect on our Work: <sup>18</sup>	Unclear if any
Key Documents:	For a while this case, originally filed in Cal. state court, was removed on ICANN’s motion to a US federal district court in Los Angeles and that federal judge issued a preliminary injunction <a href="#">barring</a> ICANN from delegating .africa pending trial. Later, however, the federal judge ruled that ZACR was entitled to intervene and its intervention undermined so-called “diversity” jurisdiction in federal court – so in the same order the judge <a href="#">sent</a> the case back to California state court.

## 2. DCA v. ICANN (Appellate Court)

Name of Case:	DotConnectAfrica Trust v. ICANN and ZACR (two consolidated appellate actions)
Parties:	DotConnectAfrica Trust (DCA) (Appellee); ICANN (Appellant); ZACR and Does 1-50 (Appellants). DotRegistry LLC filed Amicus brief in support of DCA.
Citizenship of Parties:	DCA -non-profit of Mauritius (principal office Kenya; representative in California); ICANN -Cal./US; Does – indeterminate. ZACR: South African.
Court/Venue:	U.S. Court of Appeals for the Ninth Circuit
Choice of Law/Governing Law:	California
Date Case Began:	May 11, 2016 (ICANN notice of appeal of preliminary injunction)
Date Case Ended:	Dec. 14, 2016.
Causes of Action:	Appeal against federal district court’s order of preliminary injunction barring ICANN from delegating the .africa string pending trial.

<sup>17</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

<sup>18</sup> Indicate whether the case had or will have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.



Issues Presented:	ICANN argued that DCA’s covenant not to sue in its application was valid and binding; and that DCA would suffer no irreparable harm without an injunction in place.
Preliminary Relief?:	N/A
Outcome:	Appeal <a href="#">dismissed</a> on unopposed motions. Court denied ICANN’s request that the court reflect that the injunction is null and void.
Was Jurisdiction Contested?	ICANN <a href="#">noted</a> to appeals court on Oct 21, 2016, that district court ruled that it lacked subject matter jurisdiction after ZACR was ruled an “indispensable” party to the action, thus eliminating diversity jurisdiction. ICANN argued the appeal was moot and sought dismissal. On Oct 31, DCA <a href="#">agreed</a> that dismissal was proper but argued that the appeal court should not address the injunction as requested by ICANN.
Effect on our Work:	Unclear if any
Key Documents:	

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY

Name of Case:	Ben Haim v. Islamic Republic of Iran; Calderon-Cardona v. Democratic People's Republic of Korea; Rubin v. Islamic Republic of Iran; Stern v. Islamic Republic of Iran; Weinstein v. Islamic Republic of Iran; Wyatt v. Syrian Arab Republic
Parties: <sup>19</sup>	Susan Weinstein (P) - USA  Islamic Republic of Iran (D) - Iran

<sup>19</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

	ICANN (Garnishee) – USA United States (AC)
Citizenship of Parties:	See above
Court/Venue:	US District Court for the district of Columbia
Choice of Law/Governing Law:	FEDERAL RULE OF CIVIL PROCEDURE 69(a) AND D.C. CODE § 16–544.  There was a long discussion in the cases regarding which attachment law (state) applied – DC or Virginia <sup>20</sup> , but DC Law was applied.
Date Case Began:	24 June 2014
Date Case Ended:	27 September 2016
Causes of Action:	Writs of attachment (seize an asset) of .ir ccTLD
Issues Presented:	ccTLDs are / are not attachable property ; FSIA Exceptions
Preliminary Relief?:	No
Outcome:	Writs of attachment quashed (motion denied)
Was Jurisdiction Contested? <sup>21</sup>	No
Did the case have an impact on ICANN’s accountability or the operation of ICANN’s policies ? <sup>22</sup>	The case would have over-ruled ccTLD policy and operations. As ICANN stated in one of its briefs “it would wreak havoc on the DNS system”.

<sup>20</sup> <https://www.icann.org/en/system/files/files/icann-reply-support-motion-to-quash-writs-10oct14-en.pdf> page 5 for instance

<sup>21</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

<sup>22</sup> Indicate whether the case had or will have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies..

1) What relief was requested by the plaintiff from ICANN (or ICANN from defendant if ICANN was a plaintiff)?	The plaintiff requested ICANN to seize the .ir ccTLD from the Islamic Republic of Iran
2) What relief, if any, was granted to the plaintiff?	None
3) Did the Court in its decision offer any conclusion as to the lack of merit/frivolity of the plaintiff's claim?	No
Key Documents:	

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY

Name of Case:	Verisign, Inc. v. ICANN
Parties: <sup>23</sup>	Verisign, Inc (P) ICANN (D) Does 1-50 (D)
Citizenship of Parties:	USA

<sup>23</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Court/Venue:	United States District Court for the Central District of California, United States Court of Appeals, California Superior Court, and before the International Chamber of Commerce
Choice of Law/Governing Law:	Sherman Act, Clayton Act (Federal Law) / breach of contract (California Civil Code) <sup>24</sup>
Date Case Began:	26 February 2004
Date Case Ended:	22 December 2006
Causes of Action:	Violation of the Antitrust Laws (Sherman Act), breach of contract, interference with contractual relations
Issues Presented:	Prohibition, restrictions and delays to Verisign's ability to offer services to Internet users (SiteFinder, IDN, WLS...) Regulation of prices, ICANN would assume "regulatory power" over Verisign business
Preliminary Relief?:	Requested, not granted
Outcome:	Plaintiff claims DISMISSED 21 Sep 2004 Appeal voluntarily dismissed 22 Dec 2006
Was Jurisdiction Contested? <sup>25</sup>	No
Did the case have an impact on ICANN's accountability or the operation of ICANN's policies ? <sup>26</sup>	Potential impact on the operation of ICANN's Policies : The Plaintiff was challenging ICANN's ability to enforce its contracts, by challenging the scope of Registry Services as defined in the .com agreement (which could also happen to new gTLDs). ICANN's demands were made at the behest of various ICANN constituencies.

<sup>24</sup> No mention of Virginia State Law in the case.

<sup>25</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>26</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies..

	It could however be argued that policies on the matter were not as clearly defined at the time (RSTEP is now in place).
1) What relief was requested by the plaintiff from ICANN (or ICANN from defendant if ICANN was a plaintiff)?	Cancel a decision from ICANN related to contract enforcement
2) What relief, if any, was granted to the plaintiff?	None
3) Did the Court in its decision offer any conclusion as to the lack of merit/frivolity of the plaintiff's claim?	No
Key Documents:	Complaint 26 Feb 04 Revised Final Judgment 21 Sep 04 VS opening brief (Appeal) 17 dec 04 <a href="#">Order Dismissing Ninth Circuit Appeal</a> 22 Dec 2006

**JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY**

Name of Case:	State of Arizona vs NTIA
---------------	--------------------------

Parties: <sup>27</sup>	State of Arizona (P), NTIA (D), DoC (D); Secretary of Commerce (D); Assistant Secretary for Communications and Information (D) ; Internet association; I2C; Internet Society; CCIA; Netchoice; Mozilla; PCH; ACT; ARIN; ITIC; Access Now, Andrew Sullivan ; Ted Hardie; Jari Arkko; Alissa Cooper (AC)
Citizenship of Parties:	Plaintiff and Defendants : USA AC : USA, one individual from Finland
Court/Venue:	US District Court, Southern District of Texas, Galveston Division
Choice of Law/Governing Law:	Federal Law: Property Clause of the U.S. Constitution and the First Amendment, as well as the Administrative Procedure Act, 5 U.S.C. §§ 551 <i>et seq.</i>
Date Case Began:	Sep 28, 2016
Date Case Ended:	Sep 30, 2016
Causes of Action:	Violation of the Property clause of the US Constitution and the First Amendment, as well as the Administrative Procedure Act, while letting the IANA contract expire.
Issues Presented:	ICANN could take unilateral actions adversely affecting .gov (even delete it) Possible interference in States property interest from foreign governments Possible violation of the First Amendment by ICANN
Preliminary Relief?:	Declaratory and Injunctive Requested, not granted

---

<sup>27</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Outcome:	Injunction DENIED
Was Jurisdiction Contested? <sup>28</sup>	<p>Yes</p> <p>Defendants argued that the Court had no subject matter jurisdiction over the Plaintiff's claims. "The Contract Disputes Act ("CDA"), 41 U.S.C. § 7101-09, assigns to the Court of Federal Claims, and not to the district courts, exclusive jurisdiction over claims relating to CDA contracts".</p> <p>Court seems to have taken jurisdiction over the case.</p>
Did the case have an impact on ICANN's accountability or the operation of ICANN's policies ? <sup>29</sup>	If the injunction had been granted, the "IANA Stewardship Transition" may not have been able to proceed, and the associated mechanisms (including all of WS1) would not have been in place.
1) What relief was requested by the plaintiff from ICANN (or ICANN from defendant if ICANN was a plaintiff)?	The plaintiff's request aimed at stopping the IANA Stewardship Transition.
2) What relief, if any, was granted to the plaintiff?	None
3) Did the Court in its decision offer any conclusion as to the lack of merit/frivolity of the plaintiff's claim?	No.
Key Documents:	Application to injunction

<sup>28</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>29</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies..

	<p>Opposition to injunctions by defendants</p> <p>Amici Curiae opposition to injunction</p> <p>Order denying injunction</p>
--	---

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY

Name of Case:	Pool.com vs ICANN
Parties: <sup>30</sup>	Pool.com (P) ICANN (D)
Citizenship of Parties:	Plaintiff is an Ontario (Canada) corporation Defendant is based in the USA
Court/Venue:	Superior Court of Justice, Ontario, Canada
Choice of Law/Governing Law:	“Plaintiff proposes that this action be tried in Ottawa” Choice of Law seems to be Canadian civil Law
Date Case Began:	July 8, 2003
Date Case Ended:	Last document available May 2004
Causes of Action:	Challenge of ICANN’s decision regarding Verisign’s Wait List Service (interference with trade and commercial prospects of the Plaintiff)

---

<sup>30</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).



Issues Presented:	Plaintiff considers that ICANN : <ul style="list-style-type: none"> <li>- Has violated Consensus Policy</li> <li>- Has breached its Bylaws by failing to allow for an IRP</li> </ul>
Preliminary Relief?:	No
Outcome:	Case dropped, the Court never reached a decision.
Was Jurisdiction Contested? <sup>31</sup>	Defendant ICANN asserted that the Court lacked jurisdiction because (quoting the argument): <ul style="list-style-type: none"> <li>- ICANN is not resident in Ontario</li> <li>- The Action has no real or substantial connection to Ontario</li> <li>- Virtually all the evidence and witnesses are in California</li> </ul>
Did the case have an impact on ICANN's accountability or the operation of ICANN's policies ? <sup>32</sup>	No.
1) What relief was requested by the plaintiff from ICANN (or ICANN from defendant if ICANN was a plaintiff)?	Essentially an injunction restraining ICANN to authorize the WLS and damages
2) What relief, if any, was granted to the plaintiff?	None
3) Did the Court in its decision offer any conclusion as to the lack of merit/frivolity of the plaintiff's claim?	The Court never issued a decision

<sup>31</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>32</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies..

Key Documents:	

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2

Reviewed by:	Raphael Beauregard-Lacroix
Name of Case:	Employ Media LLC v ICANN
Parties: <sup>33</sup>	Employ Media LLC (Claimant) ; ICANN (Respondent)
Citizenship of Parties:	USA (Employ Media LLC is incorporated in Delaware, its main office is in Ohio; ICANN is incorporated and has its main office in California)
Court/Venue:	International Chamber of Commerce (Arbitration rules) Los Angeles, California (Arbitration seat)
Choice of Law provision in contract; if so, which jurisdiction?:	None
Law used to determine conflict of laws issues (i.e., which law applies)	In the context of commercial arbitration: absent a choice of law, the decision on the applicable conflict of law rules is usually up to the Arbitral Tribunal’s appreciation. ICC Rules go in that direction (Art.21). The Arbitral Tribunal is not bound by the conflict of laws rules of the arbitration seat, which here was California.
Substantive Law Governing the Dispute:	Unresolved (According to Claimant, either Ohio, California and/or “relevant principles of international law”, although Claimant does not rely on any such principles in its actual statement of claims; according to ICANN, California)

---

<sup>33</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Date Case Began:	3 May 2011 (Request for Arbitration submitted to ICC)
Date Case Ended:	11 December 2012 (Settlement)
Causes of Action:	Breach of registry agreement for .jobs
Issues Presented:	<p>It was claimed by ICANN that certain .jobs registrants did not comply with the requirements set out in the registry charter and that Employ Media, the registry, has proceeded with a unilateral broadening of the charter. Boiling it down, the dispute focused on how to interpret the list of requirements set out in the charter, as they were not all factually mutually exclusive (it was eventually possible to imply the satisfaction of some requirements from the satisfaction of some others)</p> <p>ICANN subsequently served Claimant with a "Notice of Breach:" "because .jobs is a sTLD, Employ Media must amend its Charter through a proper PDP and get ICANN approval..." (ICANN's answer to request for arbitration, par. 50)</p>
Preliminary Relief?:	None (settled)
Relief Requested by Plaintiff	Among others, a declaration that Claimant did not violate the registry agreement and that the Notice of Breach is invalid, in addition to costs and "any other relief the Tribunal may consider appropriate"
Outcome/Relief Granted:	Settled: ICANN and Employ Media settled on the basis of representations made by the sponsor of .jobs (the Society for Human Rights Management), to the effect that, among others, it would ensure that registrants provide the necessary representations with regards to their own compliance with the requirements of the charter. The letter provided by SHRM states that it believes all currently registered names comply with the charter.
Was Jurisdiction Contested? <sup>34</sup>	The parties had diverging views on applicable law. According to ICANN it was limited to California, while claimant asserted it could also be Ohio or "relevant principles of international law"

---

<sup>34</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

Relevance to WG mandate	<p>It is interesting to note that registry agreements do not contain a choice of law provision. This raises the question regarding other standard form agreements entered into by ICANN or imposed on downstream providers.</p> <p>Not putting a choice of law in standard form contracts is peculiar and undeniably represents a <i>jurisdictional</i> risk, although it might be justified by other considerations; we can assume that there must a good reason (?) for not having a choice of law clause.</p>
Impact on ICANN accountability/operations: <sup>35</sup>	From the substantial elements of the case itself, none that is in the purview of this WG; otherwise see previous and next point.
Impact if case were decided for the other party?	Regarding choice of law, we can imagine that claimant might have been successful in its claim that Ohio contract law applies. The practical consequences of that would be small in that case, but could have been bigger had the claimant been in a more “exotic” jurisdiction. It is worth noting that the claimant here relied on Ohio and California contract law (more precisely, the doctrines of “laches” and “estoppel”) to assert that ICANN’s Notice of Breach was invalid. These doctrines may or may not exist in other contract laws of other jurisdictions.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claim?	No (settled)
Key Documents:	<p>ICANN’s answer to Request for Arbitration (22 July 2011)</p> <p>Terms of Reference (9 May 2012)</p> <p>Employ Media Statement of Claims (6 August 2012)</p> <p>Settlement Agreement (11 December 2012)</p>

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

---

<sup>35</sup> Indicate whether the case had or will have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies..

Reviewed by:	Greg Shatan
Name of Case:	<b>Commercial Connect, LLC v. ICANN and International Centre for Dispute Resolution (ICDR)</b>
Parties: <sup>36</sup>	P = Commercial Connect, D = ICANN and ICDR
Citizenship of Parties:	Commercial Connect (CC) is incorporated and headquartered in Kentucky, USA. ICANN is a California corporation. ICDR is a subsidiary of the American Arbitration Association, a non-profit New York corporation
Court/Venue:	US District Court for the Western District of Kentucky. CC argued that W.D. Kentucky was the proper venue, because that is allegedly where “a substantial part of the events or omissions giving rise to the claim occurred. At all relevant times, the Plaintiff has conducted business and interacted with the Defendants from its principal place of business Louisville, Kentucky.”
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	Yes – the 2000 Application and the 2012 Application. Neither had a choice of law provision.
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	The question of which law applies did not arise in this case.
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	ICANN cites to both Kentucky law and California law. ICANN tends to cite to W.D. Kentucky and Sixth Circuit cases, but cites to other courts as well.
Date Case Began:	January 6, 2016
Date Case Ended:	April 28, 2016

---

<sup>36</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

Causes of Action: <sup>37</sup>	(1) Breach of contract, (2) fraudulent misrepresentation and (3) breach of the covenant of good faith and fair dealing.
Issues Presented/Brief Summary of Case:	<p>CC applied in 2000 for the .shop TLD, paying \$50,000. CC claimed that ICANN neither approved nor rejected the application in 2000, instead allegedly informing CC that it would be held for consideration for the next round, in 2004. CC alleged that in 2004 ICANN told CC they lacked the necessary “significant community sponsor” to be considered and CC would have to wait for the next round, which was supposedly to be in 2006. “Despite assurances to the contrary,” there was no 2006 round; instead “ICANN commissioned its GNSO to overhaul the TLD process.”</p> <p>CC applied in the 2012 round, paying the \$185,000 fee, but was granted an \$86,000 refund as a 2000 round participant, which required CC to sign a release. Its .shop application was a community application, which was not granted community status. As such, it was placed in a Contention Set. In May 2012, CC allegedly filed 21 String Confusion Objections. The String Similarity Disputes commenced in 2013, and CC paid \$179,850 in fees (\$6000/expert mediators and \$2850/admin fees x 21). CC claimed ICANN retained unqualified evaluators who failed to apply objective criteria, including ICANN’s pre-published criteria. CC also claimed that it should have had \$60,000 in fees refunded to it by ICDR where CC was the prevailing party. CC claimed that ICDR did not apply the proper criteria, which presumably would have resulted in more favorable decisions for CC. ICANN designated .shop for auction in January 2016.</p> <p>CC claimed that ICANN made claims in the AGB that were false and misleading, and which induced Plaintiff to apply in reliance on those claims. These claims were set forth in the Complaint, which was never served on ICANN.</p>

<sup>37</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

	ICANN cites 3 releases signed by CC as the basis for denying the motion for a TRO. ICANN also argues that CC has submitted no evidence to support its motion and thus has no likelihood of success. ICANN cites to the <i>Name.Space</i> case, which upheld these releases.
Was Preliminary Relief Requested (and if so, was it granted)?:	On January 6, 2016, CC filed a motion for a Temporary Restraining Order (TRO) and a Preliminary Injunction requiring ICANN to postpone or cancel the .shop auction, scheduled for January 27. In the Complaint, CC demanded a preliminary and permanent injunction prohibiting ICANN from selling the rights to operate the .shop registry at auction. The Court denied CC's motion and granted CC's counsel's motion to withdraw as counsel (because CC was pursuing a strategy counsel fundamentally disagreed with).
Relief Requested by Plaintiff:	For justifiable reliance on ICANN's misrepresentations, "significant economic damages in excess of \$200,000." For breach of contract and the covenant of good faith and fair dealing against ICANN, no separate claim of damages. For breach of contract by ICDR, damages in excess of \$170,000. Injunctive relief (see above). Costs.
Outcome of Case and Relief Granted (if any):	After denial of CC's injunction motion and grant of CC's counsel's motion to withdraw, CC was given 30 days to find a new lawyer. It did not. At that point, ICANN requested dismissal of the case, citing both this failure and the failure to properly serve the papers on ICANN [perhaps CC wanted to serve ICANN in Kentucky if it could find some ICANN employee passing through]. A few weeks after this, with the 90 day deadline to serve papers past, the Court issued an Order to Show Cause why the case should not be dismissed. CC failed to respond to the Order to Show Cause, nor did it get a new lawyer. ICANN made a "special appearance" (preserving its argument that the court does not have jurisdiction over ICANN) to file a document in support of dismissal. That same day, the Court dismissed the case without prejudice (i.e., CC could refile).
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>38</sup>	CC argued that subject matter jurisdiction was founded on diversity jurisdiction, and that personal jurisdiction over ICANN and ICDR was based on "minimum contacts" and the "effects

<sup>38</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

of Defendants' conduct in the forum." CC based the latter on (i) ICANN "advertising its domain name application system and contracting with prospective registry operators in Kentucky," and on ICANN conducting business via a "highly interactive website;" and (ii) ICDR contracting with ICANN to provide ADR services to applicants and claims that ICDR "transacted with those parties [i.e., applicants] via its website," which is also noted as "highly interactive, requiring [applicants] to conduct any and all of its business with ICDR through its web-portal.

ICANN opposed jurisdiction in the W.D. Ky. and any other court in Kentucky. ICANN notes that it has no facilities, assets, real estate, phone number or mailing address in Kentucky, does not sell goods or services or have bank accounts or employees there. The only contact is the same as with the rest of the world – ICANN operates a few websites providing information on ICANN. None are on servers in Kentucky and ICANN does not sell anything on its websites (or anything at all).

"For personal jurisdiction to exist in a diversity case, "two factors be satisfied: the forum state long-arm statute, and constitutional due process." Here, the forum state is Kentucky. CC did not say what subsection of the Kentucky long-arm statute applies, and ICANN argues that a brief review shows that no subsection does. Specifically ICANN doesn't "transact" any business in Kentucky or "engage in any other persistent course of conduct" in Kentucky. ICANN cites W.D.Ky. cases to show that a contract with a Kentucky company does not alone support long-arm jurisdiction over a non-resident defendant, that no negotiations took place in Kentucky (or elsewhere) nor was there any subject matter connection to Kentucky. ICANN goes on to argue that its website does not justify jurisdiction, noting that ICANN obtains no revenue from the site and does not advertise goods and services to Kentucky residents (citing



a W.D.Ky. case where even significant revenue did not justify jurisdiction) (also citing two cases involving ICANN: *Economic Solutions* and *Moore v. Econ, Inc.*, as cases where ICANN's websites were insufficient to establish jurisdiction.

ICANN goes on to show that it does not meet Subsection (2) of the long-arm statute because ICANN has not contracted to supply goods and services in Kentucky, or Subsection (3) as ICANN has not committed a tort through actions or omissions in Kentucky

ICANN then argues that CC has not demonstrated that the court's jurisdiction meets the Constitutional test in the Due Process clause – that ICANN has sufficient “minimum contacts [with Kentucky] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” ICANN first demonstrates that the court does not have general jurisdiction over ICANN, which would require contacts in Kentucky so continuous and systematic as to render ICANN essentially at home in Kentucky. ICANN then demonstrates that the court lacks specific jurisdiction over ICANN, which would arise from ICANN activities in Kentucky “that are related to the cause of action alleged in the complaint.” The Sixth Circuit (which includes Kentucky) applies a three prong test for specific jurisdiction: (1) defendant must “purposefully avail” itself of the privilege of acting in the state or cause a consequence in the state; (2) the cause of action must arise from defendant's activities in the state; and (3) defendant's acts or their consequences must have a “substantial enough connection” with the state to make jurisdiction “reasonable.” Where contact is through a website, the website must be “interactive to a degree that reveals specifically intended interaction with residents of the state.” ICANN's website is primarily informational and fails to meet that test, nor are any other parts of the test met.

	It should be noted that the Court’s decisions relied on the failure to meet the preliminary injunction standard, primarily due to the releases ICANN put in the Applications, and on CC’s failure to serve papers on the defendants. It should also be noted that ICDR apparently did not appear at all.
Relevance of the case to the Jurisdiction Subgroup mandate:	This case demonstrates that a court may find it does not have personal jurisdiction over ICANN where it does not have operations in the state or otherwise satisfy the applicable long-arm statute and the Constitution’s Due Process clause.
Impact of case on ICANN accountability/operations: <sup>39</sup>	This case upheld and protected the operation of ICANN’s policies as embodied in the AGB. This case also shows that a plaintiff needs to either seek to litigate with ICANN in a forum where personal jurisdiction is not likely to be an issue or be prepared to argue over personal jurisdiction. In this case, plaintiff did neither. However, this did not affect the outcome of the case, which was decided on other grounds.
Impact if case were decided for the other party?:	If the motion had been decided for plaintiff that would almost certainly have meant that ICANN’s releases in its contracts with TLD applicants were found to be unenforceable. This would have opened the floodgates to litigation, or at least resulted in a conflict with other decisions. If the injunction had been granted, the .shop auction would have been blocked. The larger impact would be a finding that ICANN did not properly carry out its obligations under the AGB.
Did the Court comment on any jurisdiction-related matters?:	No.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claims?:	In the Order granting counsel’s motion to withdraw, the Court noted that “good cause” is required to withdraw, and that “Good cause exists where an attorney’s continued representation of a client could subject counsel to Rule 11 sanctions,” e.g., where plaintiff was pursuing a course of action that counsel deemed “imprudent.”

<sup>39</sup> Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.

Key Documents:	CC's Complaint and Motion for TRO/PI, ICANN's Special Appearance in Opposition to Motion, Court's Order denying CC's motion and allowing CC's lawyer to withdraw as counsel.
----------------	--

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2

Reviewed by:	Raphael Beauregard-Lacroix
Name of Case:	Schreiber v Dunabin et al
Parties: <sup>40</sup>	<p>Graham Schreiber (Plaintiff)</p> <p>Defendants:</p> <p>A: Lorraine Dunabin (main defendant)</p> <p>B: CentralNIC (registry   .uk.com)</p> <p>C: Verisign (registry   .com)</p> <p>D: ICANN</p> <p>E: eNOM/Demand Media (registrar)</p> <p>F: Network Solutions (registrar)</p>
Citizenship of Parties:	<p>Plaintiff: Canada</p> <p>Def. A, B: UK</p> <p>Def. C-F: US</p>
Court/Venue:	US District Court (Eastern District of Virginia)

---

<sup>40</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Choice of Law provision in contract; if so, which jurisdiction?:	Unknown/not relevant in this case
Law used to determine conflict of laws issues (i.e., which law applies)	Not relevant in this case
Substantive Law Governing the Dispute:	US Law
Date Case Began:	31 July 2012
Date Case Ended:	5 October 2015 (writ of mandamus denied following refusal by the Court of Appeal to hear the appeal, as the notice of appeal was filed too late.)
Causes of Action:	Primary and contributory trademark infringement of <i>Landcruise Ltd.</i> , a Canadian company. However these claims are moot, since what Schreiber actually asserts is trademark infringement by a UK company. All the US defendants are contributory defendants. Neither him nor Lorraine Dunabin have recognized trademarks in the US at the time of the complaint, hence the dismissal of the complaint for failure to state a claim and lack of subject matter jurisdiction (extraterritorial application of the <i>Lanham Act</i> is denied)
Issues Presented:	Extraterritorial application of the <i>Lanham Act</i> . US Trademark law may be applied extraterritorially. However, the following test must be satisfied: "(1) the defendant's conduct has a significant effect on United States commerce; (2) the defendant is a citizen of the United States; and (3) issuance of an injunction would interfere with trademark rights under the relevant foreign law, making issuance of the injunction inappropriate in light of international comity concerns." Neither of these are satisfied in this case.
Preliminary Relief?:	None
Relief Requested by Plaintiff	Unclear; injunction against Dunabin and the other defendants.
Outcome/Relief Granted:	Dismissal of all claims (including "remaining state law claims,") for lack of subject matter jurisdiction and failure to state a claim.

	<p>-“The Court grants Defendants' Motions to Dismiss Plaintiffs Complaint for lack of subject matter jurisdiction against Dunabin because Dunabin's alleged infringing acts occurred outside of the United States and concern marks that have not been used or registered in the United States.” (p.7)</p> <p>-the Court grants Defendants' Motions to Dismiss Plaintiffs Complaint for failure to state a claim because Plaintiff fails to plead facts that plausibly establish he has recognized trademark rights in the United States that can be infringed, either directly or contributorily. (p.7)</p>
Was Jurisdiction Contested? <sup>41</sup>	Yes (subject matter)
Relevance to WG mandate	None, to the extent that the petition was borderline frivolous
Impact on ICANN accountability/operations: <sup>42</sup>	None
Impact if case were decided for the other party?	It is hard to imagine it would ever have been, as there are many legal hoops one must go through before managing to make ICANN liable for contributory trademark infringement in domain name matters, including clear statutory provisions in favour of ICANN (including the “Safe Harbour” of the Lanham Act)
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff's claim?	Yes (see above)
Key Documents:	District Court decision, 24 March 2013 (Case No. 1:12-cv-852 (GBL-JFA), not on ICANN's website but available online)

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2

---

<sup>41</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

<sup>42</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies..

Reviewed by:	Raphael Beauregard-Lacroix
Name of Case:	Eric Bord v Banco de Chile
Parties: <sup>43</sup>	Eric Bord (Plaintiff) ; Banco de Chile, US DoC (Defendants)
Citizenship of Parties:	Eric Bord: USA Banco de Chile: Chile US DoC: USA (Gov't agency)
Court/Venue:	US District Court (Eastern District of Virginia)
Choice of Law provision in contract; if so, which jurisdiction?:	No contract, but: Banco de Chile (Chilean entity) accepted jurisdiction of the court; Court (Eastern District of Virginia specifically) has jurisdiction over US DoC by virtue of location of the "property subject of the action"
Law used to determine conflict of laws issues (i.e., which law applies)	Not applicable in this case
Substantive Law Governing the Dispute:	US Law
Date Case Began:	27 December 2001
Date Case Ended:	15 May 2002 (As far as DoC is concerned)
Causes of Action:	(Plaintiff had its domain name bancodechile.com taken away after UDRP process initiated by the Bank of Chile)

---

<sup>43</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

	<p>Against DoC:</p> <ul style="list-style-type: none"> <li>-Legal wrong pursuant gov't agency action (5 USC 702): "DOC's promulgation of the UDRP through ICANN was not in accordance with law, and Mr. Bord was adversely affected and aggrieved thereby; The adjudicatory decision rendered by DOC / ICANN delegates under the UDRP awarding the Domain Name to Banco De Chile was not in accordance with law, and Mr. Bord was adversely affected and aggrieved thereby"</li> <li>-Unlawful delegation to a private entity of the "authority to make policy and exert control over protected property"</li> <li>-Requiring an arbitration procedure without authorization (5 USC 575)</li> </ul>
Issues Presented:	A general challenge of UDRP and DoC's alleged "delegation of powers" to ICANN in light of US administrative law
Preliminary Relief?:	None
Relief Requested by Plaintiff	Injunction against DoC's "delegation," declaration stating that plaintiff is "entitled to possession of domain name," damages of more than 1M USD+attorney fees
Outcome/Relief Granted:	Against DoC: Dismissal of Plaintiff's claims
Was Jurisdiction Contested? <sup>44</sup>	No
Relevance to WG mandate	Plaintiff's cause of action was based on a topic that has been discussed since the creation of ICANN and the UDRP. Considering that more than 15 years have elapsed since that case, such challenges against ICANN are not new, and given the successful completion of the IANA Transition, most likely not relevant anymore.

---

<sup>44</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

Impact on ICANN accountability/operations: <sup>45</sup>	None
Impact if case were decided for the other party?	Had UDRP and the delegation of powers to ICANN been deemed illegal in light of US administrative law, then the impact could have been large, but such matters now belong to the past.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff's claim?	The Court dismissed plaintiff's claim on the basis of lack of standing. The Court uses a cumulative three-pronged test and the plaintiff fails on all counts
Key Documents:	First amended complaint (27 December 2001) Opinion dismissing claims (15 May 2002)

### **JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1**

Reviewed by:	Avri Doria
Name of Case:	KARL AUERBACH v. ICANN
Parties: <sup>46</sup>	Karl Auerbach (P) ICANN (R)
Citizenship of Parties:	USA
Court/Venue:	SUPERIOR COURT FOR THE STATE OF CALIFORNIA

<sup>45</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies..

<sup>46</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).



Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	No contract
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	Case involved California Corporations Code § 6334 and rule governing relationship between directors and the Corporation regarding transparency. There was no conflict of jurisdiction
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	California Corporations Code §§ 5110 et seq.
Date Case Began:	18 March 2002
Date Case Ended:	August 2002
Causes of Action: <sup>47</sup>	Petitioned Court for a peremptory Writ of Mandate or other extraordinary Writ or Order to the Respondent, ordering and directing Respondent immediately to make available to Petitioner for inspection and copying all corporate records.
Issues Presented/Brief Summary of Case:	“Rather, this is an age-old tale of a California corporation refusing access to corporate records to a member of its Board of Directors, or seeking to impose improper and unlawful conditions on the Director before allowing such access.”
Was Preliminary Relief Requested (and if so, was it granted)?:	No
Relief Requested by Plaintiff:	N/A

---

<sup>47</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

Outcome of Case and Relief Granted (if any):	P was granted the access to the documents requested,. Essentially both the P & D were deemed to be partially in error. Some document were restricted to inspection while others were provided to the P who was ordered to respect ICANN’s confidentiality rules.
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>48</sup>	No
Relevance of the case to the Jurisdiction Subgroup mandate:	Case was about adherence to CA law for Director access to corporate documentation.
Impact of case on ICANN accountability/operations: <sup>49</sup>	Relates to accountability in that Corporation was controlled by California statute.
Impact if case were decided for the other party?:	It was essentially a tie.
Did the Court comment on any jurisdiction-related matters?:	Do not have court comment, only ICANN report on that comment.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claims?:	Unknown
Key Documents:	<ul style="list-style-type: none"> <li>• <a href="#">Petition</a> (18 March 2002) [PDF, 81 KB]</li> <li>• <a href="#">Answer</a> (17 April 2002) [PDF, 64 KB]</li> <li>• <a href="#">Amended Answer</a> (1 May 2002) [PDF, 68 KB]</li> <li>• ICANN's Motion for Summary Judgment (21 May 2002):</li> </ul>

<sup>48</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

<sup>49</sup> Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.

	<ul style="list-style-type: none"> <li>• <a href="#">Memorandum of Points and Authorities</a> [PDF, 96 KB]</li> <li>• <a href="#">Declaration of Vinton Cerf</a> [PDF, 430 KB]</li> <li>• <a href="#">Declaration of M. Stuart Lynn</a> [PDF, 3.87 MB]</li> <li>• <a href="#">Declaration of Louis Touton</a> [PDF, 5.33 MB]</li> <li>• <a href="#">Separate Statement of Undisputed Material Facts</a> [PDF, 55 KB]</li> <li>• <a href="#">ICANN's Reply Memorandum</a> (15 July 2002) [PDF, 52 KB]</li> <li>• <a href="#">Advisory on Court Ruling in Auerbach v. ICANN Lawsuit</a> (29 July 2002)</li> <li>• <a href="#">Advisory on Documents Provided to Karl Auerbach</a> (4 August 2002)</li> <li>• <a href="#">Additional Documents Provided</a> (8 August 2002)</li> </ul>
--	---

### JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	David McAuley
Name of Case:	<a href="#">Yeager</a> v. Go Daddy et al (including ICANN)
Parties: <sup>50</sup>	Ann. M. Yeager (Plaintiff).  Defendants: Go Daddy Group Inc.; GoDaddy.com; ICANN; Ibrahim Kazanci; and Unknown registrant(s) - Kazanci appears to be latest registrant of contested domain name.

<sup>50</sup> Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

Citizenship of Parties:	All appear to be US citizens except Kazanci who appears to be Canadian. Kazanci did not appear in the case.
Court/Venue:	Court of Common Pleas, Franklin County, Ohio, USA
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	N/A
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	N/A
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	Laws of the state of Ohio and US Constitution cited on jurisdiction – dismissal based on Ohio rules.
Date Case Began:	April 7, 2011
Date Case Ended:	October 11, 2011
Causes of Action: <sup>51</sup>	The plaintiff represented herself without legal counsel. The claims appear to amount to copyright infringement, torts, and defamation-related claims – by allowing the term “aypress” (plaintiff said this was made up of her initials – “AY” - and the word “press”) to be used in registering a domain name (that she had previously registered through an agent prior to the registration lapsing).
Issues Presented/Brief Summary of Case:	The plaintiff claimed loss by the fact that another person(s) was able to register her “copyrighted” term “aypress” as a domain name. For our purposes, what matters is that ICANN moved to dismiss based on lack of personal jurisdiction.

<sup>51</sup> For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

Was Preliminary Relief Requested (and if so, was it granted)?:	N/A
Relief Requested by Plaintiff:	Plaintiff asked for \$1 billion.
Outcome of Case and Relief Granted (if any):	<p>Case <a href="#">dismissed</a> Oct. 11, 2011 – without prejudice to plaintiff refiling an amended complaint. (None appears on ICANN litigation page.)</p> <p>The court had previously (June 20, 2011) ordered plaintiff to file an amended, more specific complaint and she had not done so despite an extension of time within which to do it.</p>
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>52</sup>	<p>ICANN <a href="#">moved</a> to dismiss on basis of lack of “personal jurisdiction” and failure to state an actionable claim. With respect to personal jurisdiction, ICANN said that: it has no office, facilities, assets, or other presence in the state of Ohio; it does not conduct business there; and, it does not have sufficient contacts in the state to allow it to be sued there. ICANN cited plaintiff’s failure to satisfy Ohio’s “long arm” statute for exercising personal jurisdiction over non-resident defendants. (ICANN’s jurisdictional argument is on pages 3 to 11 of its motion.)</p> <p>Plaintiff <a href="#">opposed</a> ICANN’s motion to dismiss. She said ICANN does conduct business in Ohio and met the requisite threshold of “substantial contacts” in the state by means of its “established superintending control of all domain names[.]” – including through its contacts with registries and registrars. (Plaintiff said in a <a href="#">supplemental</a> document that ICANN has at least one registrar in Ohio.) She illustrated ICANN’s “active controlling role” over domain names by citing the GNSO’s IPC (starting on page 3 of opposition).</p> <p>ICANN <a href="#">replied</a> to plaintiff’s arguments and basically said that the arguments that ICANN’s website and business dealings with an Ohio registrar were sufficient for jurisdiction were too attenuated to confer personal jurisdiction in this case (see pages 2-5). And plaintiff also gave further argument in a later <a href="#">filing</a>.</p>

---

<sup>52</sup> For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

Relevance of the case to the Jurisdiction Subgroup mandate:	Even though the case was dismissed on non-jurisdictional grounds, ICANN’s arguments on personal jurisdiction are informative of how it viewed personal jurisdiction in this case – an issue argued mostly on the basis of conduct/website/business-relationships potentially related to the location rather than a presence in the location that might confer “general” jurisdiction.
Impact of case on ICANN accountability/operations: <sup>53</sup>	N/A, in my opinion.
Impact if case were decided for the other party?:	I could comment when we cover this case on a call but think this area is too speculative to be helpful.
Did the Court comment on any jurisdiction-related matters?:	No.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claims?:	To a degree, yes. In the court’s June 20, 2011, <a href="#">order</a> requiring plaintiff to file a more definite statement of her claims, the court criticized the complaint as rambling and disjointed – so much so that it did not give adequate notice to the defendants of what they had to defend against. These comments went to the merits of the claims – not to the arguments over jurisdiction.
Key Documents:	Links provided in text above. The key documents relate to arguments on motion to dismiss for lack of personal jurisdiction.

**JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY**

Reviewed by:	Vidushi Marda
--------------	---------------

<sup>53</sup> Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.

Name of Case:	Ruby Glen LLC v. ICANN
Parties: <sup>54</sup>	Ruby Glen LLC (P)  ICANN (D)  Defendants 1-10 (those who instigated, encouraged, facilitated, acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible in some manner or degree for the breaches and wrongful conduct averred herein)
Citizenship of Parties:	USA
Court/Venue:	United States District Court for the Central District of California
Choice of Law/Governing Law:	United States Code
Date Case Began:	22 <sup>nd</sup> July 2016 (date of the First Complaint by Ruby Glen)
Date Case Ended:	Appeal pending before the US Court of Appeals in the Ninth Circuit
Causes of Action:	(1) Breach of contract (2) Breach of the implied covenant of good faith and fair dealing. (3) Negligence (4) Unfair competition pursuant to California Business and Professions Code section 17200 (5) Declaratory relief
Issues Presented:	<ul style="list-style-type: none"> <li>● Legality of the Covenant Not To Sue,</li> <li>● Auction held based on inadequate information and hence unfair and not transparent,</li> <li>● Change in the ownership and management of NDC,</li> <li>● Potential for VeriSign to dominate the market on domain names.</li> </ul>
Preliminary Relief?	Plaintiff requested a Temporary Restraining Order – not granted
Outcome:	Plaintiff's claims were dismissed on November 28 <sup>th</sup> , 2016.  Appeal has been filed on 20 <sup>th</sup> December 2016.

<sup>54</sup> Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae (AC).

Was Jurisdiction Contested? <sup>55</sup>	Yes, initially, in the first complaint. The court said that jurisdiction had not been established by the Plaintiff, and hence they couldn't grant the temporary restraining order. However, upon filing of the amended complaint, jurisdiction was established, and the court went ahead with the case. Hence, initially yes, eventually no.
Effect on our Work <sup>56</sup>	<p>In this case, the jurisdiction question revolved around that of diversity jurisdiction of Federal Courts under 28 U.S.C. § 1332. This section talks about the diversity jurisdiction, which basically means that the Federal courts have jurisdiction to decide disputes between parties that belong to different states i.e. are citizens of different states. Further, this section also extends to the Court's jurisdiction in matters relating to amounts more than \$75,000.</p> <p>In the original complaint, the Plaintiff had not established their citizenship. Hence since jurisdiction was not made out under this section, the court rejected the temporary restraining order. However, in the amended complaint, both the elements of diversity jurisdiction were adequately established by the Plaintiff, and hence the case was proceeded with by the court.</p> <p>Parties must make sure they are establishing that they satisfy the requirements of jurisdiction under particular sections of the U.S.C., since petitions are sometimes rejected by the courts based on lack of technical clarity alone.</p>
Key Documents	<ul style="list-style-type: none"> <li>- Plaintiff's Ex Parte Application for a Temporary Restraining Order (d. 22/07/16)</li> <li>- Court Order denying Plaintiff's Ex Parte Application (d. 26/07/16)</li> <li>- First Amended Complaint (d. 08/08/16)</li> <li>- ICANN'S Motion to Dismiss First Amended Complaint (d. 26/10/2016)</li> <li>- Plaintiff's opposition to ICANN's motion against First Amended Complaint (d. 07/11/2016)</li> <li>- <a href="#">Court Order Granting Motion to Dismiss First Amended Complaint</a> (d. 28/11/2016)</li> <li>- Judgement (d. 28/11/2016)</li> </ul>

---

<sup>55</sup> For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

<sup>56</sup> Indicate whether the case had or will have an effect on ICANN's accountability mechanisms or the operation of ICANN's policies.





Was Preliminary Relief Requested (and if so, was it granted)?:	Yes. ICANN sought a copy of RegisterFly’s registry data. A Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction mandating production of the data were all entered. RegisterFly was held in contempt for failing to provide the data.
Relief Requested by Plaintiff:	Termination of contract; copy of registry data; monetary damages
Outcome of Case and Relief Granted (if any):	Termination of contract; mandate for production of data; damages and attorney fees.
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>3</sup>	No
Relevance of the case to the Jurisdiction Subgroup mandate:	Case resolved expeditiously to allow ICANN to enforce RAA terms in face of a rogue registrar. Enforceability of contract.
Impact of case on ICANN accountability/operations: <sup>4</sup>	None
Impact if case were decided for the other party?:	None
Did the Court comment on any jurisdiction-related matters?:	No
Did the Court comment on the merit, lack of merit and/or frivolity of	ICANN, as plaintiff, won a default judgment

For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.  
Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies

the plaintiff's claims?:	
Key Documents:	Complaint: <a href="https://www.icann.org/en/system/files/files/complaint-29mar07-en.pdf">https://www.icann.org/en/system/files/files/complaint-29mar07-en.pdf</a> Permanent Injunction: <a href="https://www.icann.org/en/system/files/files/perm-injunction-findings-12jun07-en.pdf">https://www.icann.org/en/system/files/files/perm-injunction-findings-12jun07-en.pdf</a>

## JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	Paul Rosenzweig
Name of Case:	Martinez v. RegisterFly
Parties: <sup>1</sup>	Ann Martinez (P); RegisterFly.Com (D); Unified Names Inc. (D); Hosting Services Group, Inc. (D); Kevin Medina (D); ENOM (D); and ICANN (D)
Citizenship of Parties:	US
Court/Venue:	US Federal District Court for the Middle District of North Carolina (i.e. Greensboro, NC)
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	The RAA between ICANN and the Registrars provided for exclusive venue and jurisdiction in the Central District of California (i.e. Los Angeles). However, the contract did not have a substantive Choice of Law provision.
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	US
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	US
Date Case Began:	13 March 2007
Date Case Ended:	7 May 2007
Causes of Action: <sup>2</sup>	Breach of Contract
Issues Presented/Brief Summary of Case:	Plaintiff Martinez filed a class action suit against RegisterFly and affiliated entities alleging damages from RegisterFly's failure to adequately register and manage its domain name services. ICANN was named as one of those affiliated parties.
Was Preliminary Relief Requested (and if so, was it granted)?:	Yes. Martinez requested a Temporary Restraining Order. The request was denied.

\_\_\_\_\_

1. List each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC). For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

Relief Requested by Plaintiff:	Class certification; damages
Outcome of Case and Relief Granted (if any):	ICANN was voluntarily dismissed from the case before it was resolved.
Was Jurisdiction Contested, and if so, what was the outcome?: <sup>3</sup>	Yes. ICANN sought dismissal as a defendant on the ground that it had no contact with North Carolina, no contract with Martinez, and that its RAA limited jurisdiction to California.
Relevance of the case to the Jurisdiction Subgroup mandate:	Expeditious resolution of suit in which ICANN was improperly named as a defendant. Enforceability of contract.
Impact of case on ICANN accountability/operations: <sup>4</sup>	None
Impact if case were decided for the other party?:	Significant exposure of ICANN to multiple jurisdictions – increased expense and litigation risk
Did the Court comment on any jurisdiction-related matters?:	No. Plaintiff voluntarily dismissed ICANN.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff's claims?:	No.
Key Documents:	Brent Declaration: <a href="https://www.icann.org/en/system/files/files/brent-declaration-06apr07-en.pdf">https://www.icann.org/en/system/files/files/brent-declaration-06apr07-en.pdf</a> Dismissal of ICANN: <a href="https://www.icann.org/en/system/files/files/notice-dismissal-07may07-en.pdf">https://www.icann.org/en/system/files/files/notice-dismissal-07may07-en.pdf</a>

For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provision. Please describe the outcome as well as the challenge.

Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies

**Annex D – Proposed Issues List**

**Annex D: Master List of Proposed Issues Submitted by Subgroup Participants**

Proposed Issues: Major Topics	Individual Proposed Issues	Submitted by	Notes
OFAC	<ul style="list-style-type: none"> <li>● ICANN contractual language in RAA relating to OFAC licenses</li> <li>● Applicability of OFAC to Non-US Registrars</li> <li>● Application of OFAC restrictions by Non-US Registrars</li> <li>● Approval of gTLD registries</li> <li>● Cancellation by some registrars of domain name registrations owned by registrants in countries subject to OFAC</li> </ul>	Farzaneh Badii, Kavouss Arasteh	Context: Study of general licenses, ICANN's response to need for specific licenses with registries and registrars will be discussed as potential solutions
Provisions relating to choice of law in certain ICANN Agreements	<ul style="list-style-type: none"> <li>● Registry Agreements do not have a provision stating the governing law of the agreement</li> <li>● Registrar Agreements do not have a provision stating the governing law of the agreement</li> <li>● Arbitration of Registry Agreement: Lack of choice in arbitral body and jurisdiction of arbitration</li> <li>● Lack of governing law provisions could lead to courts more likely choosing their own law as governing law</li> <li>● provisions regarding the <b>venue</b> for hearing disputes in registry agreements are limited to one specific venue, with flexibility allowed only in contracts with Governments and other special cases</li> </ul>	Raphael Beauregard-Lacroix, Jorge Cancio	<p>[Jorge Cancio]:</p> <p>see: - flexibility for IGO/public authorities/other special circumstances in allowing to choose between Geneva and L.A. (section 5.2. ALT registry agreement) and</p> <p>Judge/judicial disputes: registries:</p> <ul style="list-style-type: none"> <li>• court in L.A.</li> <li>• flexibility for IGO/govt entities: court with jurisdiction in Geneva, unless agreement (ALT 5.2. registry agreement)</li> </ul>
U.S. court jurisdiction over ICANN activities	<ul style="list-style-type: none"> <li>● Jurisdiction over ICANN's activities that (1) comply with GAC advice or (2) are otherwise based on powers recognised onto Governmental authorities according to ICANN Bylaws</li> <li>● ICANN policy development and policy implementation activities</li> </ul>	Thiago Jardim	ICANN activities "based on powers recognised onto Governmental authorities according to ICANN Bylaws" may relate mostly to ccTLDs and if so it should be considered as part of those potential issues.

Proposed Issues: Major Topics	Individual Proposed Issues	Submitted by	Notes
	which ICANN performs in the global public interest are subject to litigation in US courts		
Non-interference of international actors in ICANN's core activities	<ul style="list-style-type: none"> <li>● States (and International Organizations) should refrain from exercising concurrent jurisdiction respecting ICANN's special role and governance model.</li> </ul>	Erich Schweighofer	Raised in the context of "the issue on partial immunity"
US's executive, regulatory, legislative and judicial jurisdiction over things ICANN and the unique solution of general immunity under the US International Organizations Immunities Act	<ul style="list-style-type: none"> <li>● US executive and regulatory powers over ICANN</li> <li>● Domain seizures by US executive agencies like US customs: Could these potentially be applied to gTLDs?</li> <li>● US legislature's unlimited power over ICANN</li> <li>● US's courts' judicial writ over all aspects of ICANN: Almost any US court can take up for its judicial consideration whether ICANN works within each of such applicable law or not.</li> </ul>	Parminder	Discussed in the context of general immunity, as follows: "The only solution there is a general immunity under the US International Organizations Immunities Act, with proper customization and exceptions for ICANN to enable 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."
US Courts may hear disputes regarding Community TLDs	<ul style="list-style-type: none"> <li>● US Courts may hear disputes regarding the management of a community TLD (not only Community-based applications (e.g., .swiss, .music., .gay) but all TLDs that "serve a community") which should be dealt mainly under the relevant local laws and by the relevant local authorities</li> <li>● US Courts may hear disputes relating to community TLDs (as defined above)</li> <li>● Decisions affecting fundamentally the global community as a whole, or specific local communities, should be protected against undue interference by the authorities of one specific country</li> </ul>	Jorge Cancio, Thiago Jardim	At least partially related to choice of law issue. Subset of potential issue of US Courts jurisdiction generally



Proposed Issues: Major Topics	Individual Proposed Issues	Submitted by	Notes
Making sure that the hearings of the IRP are location-neutral		Jorge Cancio	Majority of "meetings" of the IRP are virtual. In person meetings would be rare and at the discretion of the panel - No explicit solution proposed
Non-interference of States in ccTLDs of other States	<ul style="list-style-type: none"> <li>● Courts overriding ccTLD delegations</li> <li>● "In Rem" jurisdiction of US courts over ccTLDs</li> <li>● Jurisdiction of US courts and enforcement measures by domestic agencies in respect of activities relating to the management of ccTLDs of other countries.</li> </ul>	Kavouss Arasteh, Farzaneh Badii, Thiago Jardim	First bullet point is subset of potential issue of US Courts generally. The overall proposed issue has also been stated as: "US organs can possibly interfere with ICANN's ccTLD management, regardless of whether that has already happened." There appear to be no examples of this. The ccNSO will have a PDP on developing a dispute resolution system, which could address this as these are excluded from IRP as requested by the ccNSO (similar to ASO). However, it has been asserted that the proposed issue would not be resolved by such a dispute resolution system and that immunity from US jurisdiction should still be recommended.
California not-for-profit incorporation and headquarters location have a positive effect on ICANN accountability mechanisms and operations.	<ul style="list-style-type: none"> <li>● Questioning and attempting to limit ability of third parties to litigate against ICANN in US courts undermines Work Stream 1 accountability mechanisms</li> <li>● Work Stream 1 mechanisms take advantage of specific aspects of California law</li> <li>● Questioning and attempting to limit ability of third parties to litigate against ICANN in US courts and use previously existing ICANN mechanisms has a negative effect on the perception of these accountability mechanisms.</li> <li>● Application of US law to ICANN's actions controls ICANN and subjects it to the rule of law: limiting this makes ICANN less accountable</li> </ul>	Brian Scarpelli	Related to US court issues, also legislative and regulatory issues.

**Annex E – Dissenting Statement from Brazil**

**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."<sup>1</sup> 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."<sup>2</sup>

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]".<sup>3</sup>

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."<sup>4</sup> To address these concerns, we believe that the subgroup could have expressly called upon ICANN to maintain and further develop

---

<sup>1</sup> 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.

<sup>2</sup> 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."

<sup>3</sup> 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."

<sup>4</sup> 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.<sup>5</sup> 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.

---

<sup>5</sup> "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.<sup>6</sup>

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.

---

<sup>6</sup> 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",<sup>7</sup> 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.<sup>8</sup>

#### 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.

---

<sup>7</sup> 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>)

<sup>8</sup> 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.

**Annex F – 27 October 2017 Transcript of Plenary Discussion on  
Jurisdiction**

# EN

---

ABU DHABI - CCWG Accountability WS2 Face to Face Plenary Session @ ICANN60

Friday, October 27, 2017 - 08:30 to 17:30 GST

ICANN60 | Abu Dhabi, United Arab Emirates

JORDAN CARTER: And now I'll hand the chair to Thomas for the simple and quick issue of jurisdiction.

>> [Laughter].

THOMAS RICKERT: Thanks very much. Let's just check that we have Greg on the phone line.

GREG SHATAN: This is Greg, I'm here.

THOMAS RICKERT: Greg, great to have you. So I think that we can start this session with the Rapporteur being on Board in the first item and this is sort of following up to what I said at the beginning of this meeting is the presentation, discussion of minority opinions. And for that, I would like to invite the colleagues from Brazil to make the first intervention. Again, the report, as was discussed and presented to the Plenary does not go far enough for some in the sub team. We do want to make sure

---

*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

# EN

---

that these views are not being ignored, but just the opposite, that these views are properly recorded and archived because jurisdiction related debates will surely continue beyond the life of this Work Stream 2 or even the CCWG as such, and, therefore, we want to make sure there is a repository of the various views that have been held so that future debates can be informed by those views.

And I would like to acknowledge and thank Brazil for refining their minority position. As you will have noted, the process related points have been removed, which I think is great because even though not everyone might agree with the substance of the work products of the CCWG, what we should all take care of and be responsible for is the process. Because following the process for coming up with our recommendations is actually giving legitimacy to the recommendations and the multi-stakeholder model as such. And, therefore, thanks again for refining your minority opinion. And as promised, we want to give you ample opportunity to make your views heard. And this does not only go for Brazil, but also for Parminder who has asked for a dial out and I would like to remind the operator that Parminder wanted a dial out ready for the jurisdiction session, so we will be sure to make sure to put Parminder's views on the record as well.

# EN

---

But before we do that, let me hand over to Benedicto, is it going to be you to make that intervention? If so, the floor is yours. Please.

**BENEDICTO FONSECA:** Thank you, this is Benedicto Fonseca from Brazil. Thank you, Thomas, for this. I would like to take this opportunity to thank you and the Co Chairs for offering us the opportunity to speak to our minority opinion. We have since you guys have indicated revised version focusing on the substance of our concerns, I'd like to also take this opportunity to thank all those who have been participates in these jurisdiction subgroups. We understand there have been very complex and sometimes difficult discussions. We understand we have been working under severe pressure of time, dealing with issues that are in itself complex, that relate to different areas of work within ICANN. So I'd like to take this opportunity to thank all those and to acknowledge the good work that has been done. Although not exactly addressing some of the issues I would like to have addressed, but I would like to acknowledge the impressive amount of work of time, of manpower, that has been invested in this process.

With this, I'd like to state that the I would not like to try to reformulate what we have stated in our document. We think we have been, as I have said, the process of further refining the idea to make sure we have a very clear message in regard

# EN

---

to what are the important points for us and why we cannot accept the document, although we viewed the document and the process that lead to it, we cannot accept it because we do not consider it to address adequately the some of the main areas of concern to us and others, I assume. So I would like, with your indulgence to talk to my colleague, Thiago to make a very short presentation of the document. As I have said, I think the documents speaks for itself. We would not like to reformulate, but just highlight those areas the document would like to take advantage of this opportunity to have it on record. And maybe on that basis, to elicit some discussion and have some feedback from other colleagues that might also illustrate us and further provide some input in our thinking. Thank you. So with this I turn to Thiago.

THOMAS RICKERT: Thanks very much, Benedicto. We do not have a two minute timer running, so Thiago, please take the time that you need in order to convey the message and bring the points across.

THIAGO JARDIM: Thank you, Thomas. This is Thiago Jardim speaking for the record. I was about to say just that I would perhaps probably go over the two to three minute time limit to present the position on this issue. I think it's perhaps appropriate for us to

# EN

---

go through the document that we submitted as a dissenting statement for those who have not had an opportunity to have a look at it, to be familiar with it. And as Ambassador said, perhaps this will instill some discussions.

In the [indiscernible] statement, the revised version that we submitted, we maintained the substantive points and we started the document I'm not sure whether there's a PDF version that could be displayed on the screen for the remote participants to follow it as well. In any case, I'll start by mentioning the introductory points of the dissenting statement. In the introduction, we recall what we understood was a principle endorsed by the Subgroup on how we would proceed when drafting recommendations and that principle was brought to our attention by Bernie. And I thank him for that. And the principle is that the Subgroup would be drafting policy recommendations, which is to be distinguished from implementation recommendations. I think this is point is very important because it sends a clear message that the Subgroup doesn't have to get into too much detail when providing for guidance for ICANN to proceed when perhaps implementing measures and when considering the measures that were recommended by the Subgroup.

Let me then quote what was said at that point in time, referring to that principle. The Subgroup should be looking at the

# EN

---

outcomes they are looking for and less trying to be specific about what is implemented. Having that in mind, we would like to recall what was discussed and eventually decided at ICANN 59. The concept of immunity during that meeting featured prominently as an indispensable condition as we understood it at that time for the CCWG to, as a whole, to accept the proposal that you would not pursue recommendations to change ICANN's jurisdiction of incorporation or Headquarters location. This was fine. This was fine for the CCWG as a whole on the condition that immunities would be discussed and eventually feature in the recommendations.

Subsequently at the Subgroup level, those who follow the work of the Subgroup will recall that there was in our view some room for agreement to discuss immunities and there was a legitimate concern expressed by many Subgroup members that U.S. [indiscernible] could possibly interfere with ICANN's core function in the management of DTMS. So we thought the immunity aspect shouldn't have been discussed and we regret that in the final recommendation it was not discussed and it did not appear as one of the issues that should be should have a recommendation about.

We'll also share the concerns expressed by some members of the Subgroup on the need to design immunity in a way that



# EN

---

did not or does not immunize ICANN from arbitrary lawful actions. And to address these concerns, we believe ICANN could have [indiscernible] alongside a recommendation on immunities, a detailed set of exceptions to make sure ICANN is not immunized from lawfully actions. So there can be a set of ICANN activities that would still be subject to laws of tribunals and laws of configuration. And we continue to believe even for those activities that would be immunized from U.S. jurisdiction, those immunities would be subject to accountability mechanisms devised by the ICANN community itself. This is particularly the case, for example, if you think of the IRP tool that currently exists. And there could be other mechanisms to make sure that ICANN remains accountable, even for those activities that are immune.

In point two then of dissenting statement, we expressed the fundamental aspect that we think should have guided the work of the Subgroup and that is that the Subgroup should be trying to recommend measures that will make ICANN accountable towards all stakeholders. And we recalled into that effect the net [indiscernible] stakeholder statement which [indiscernible] that the process of globalization of ICANN speeds up, leading to a truly International and global organization, serving the public interest with clearly implement and verifiable accountability and transparency mechanisms to

# EN

---

satisfy requirements from both internal and emphasize the global community.

So in this connection, let me recall you that the charge of Work Stream 2 expressly relied on the [indiscernible] statement in order to define ICANN as accountability course, to our understanding, ICANN's accountability mechanisms currently do not meet all stakeholder expectations because ICANN, again, is more accountable to the country of incorporation and its citizens because it is subject to the country of incorporations jurisdiction more than it is to the jurisdiction of other countries.

Again, we would have hoped the draft report would have recommendations aiming to increase ICANN's accountability as defined in the multi-stakeholder statement, accountability towards all stakeholder, by recommending that steps be taken to recommend that no single country individually can possibly interfere with the policy development and policy implementation activities ICANN performs in the global public interest.

Moving on to point three, and then there's a brief explanation of why, we consider ICANN is more accountable towards the country of incorporation than it is to other countries. We explain very briefly that the country of incorporation has a superior, and in many respects, exclusive claim to jurisdiction

# EN

---

over the activities of ICANN. One example of is that it is the territory state with the necessary authority to enforce legislation, court rulings against the entity that is based in that territory. So ICANN, in that sense, is subject to more jurisdictional authority of the United States than it is subject to the jurisdictional authority of other countries.

I think this is borne out by the fact that the draft recommendation, and I think this is a plus aspect that should be praised, recommends measures in relation to OFAC sanctions. The fact that the Subgroup on jurisdiction singled out OFAC sanctions is an indication that the measures adopted by the United States are a reason of concern other than the measures adopted by other countries. So we would have liked that the Subgroup on jurisdiction recommended wider measures, not just OFAC measures, are taken care of, but the U.S. regulatory bodies and that they continue to have the possible to continue to interfere with ICANN's function.

Moving to point four. The measures recommended by Subgroup and jurisdiction, which to give this one example, targeted OFAC sanctions, are insufficient in our understanding because again it leaves uncovered the other measures. The current legislation that exists in the United States that can be applied and enforced against ICANN in ways that will effect ICANN's development and core functions.

# EN

---

So there are other legislations and measures that can still be adopted and will possibly be adopted in the future is a matter of concern.

I think it's important in this respect to highlight that our understanding is that the Subgroup should have recommended not just specifically that measures start against specifically and currently known regimes that exist and that currently effect ICANN. It would have been an incremental gain, if you will, if the Subgroup had recommended measures that could be used in general and would make sure that ICANN is aware that it needs to take steps to obtain exemptions from unknown interference on the part of the country of incorporation.

This would explain, therefore, the need for ICANN to have immunity from the United States jurisdiction, which is point five.

And just one brief word in relation to immunities before I move to the conclusion. We have, from the beginning, reiterated the concern that ICANN must remain accountable for its actions. And immunity doesn't equal impunity because, one, for the actions that are covered by an immunity regime, it's possible and there will be an internal accountability mechanisms devised by the community, but also there could be exceptions to immunity regime. And it's important to understand that

# EN

---

exceptions to organizations immunity, something that is not necessarily the rule and International practice, if you look at the U.N. for example, it's the understanding that organizations have absolute immunity and here we were willing to accept that exceptions be crafted, that there is a regime carved out making sure that some of those ICANN activities that do not interfere with ICANN's global management of the [indiscernible], those activities would still be subject to the normal laws and tribunals of the incorporation, which is the United States. I think that shows the willingness on our part to listen to concerns of the community and make sure that those concerns are taken care of, taken on board.

Having said that, we would have hoped that the draft report would have had recommendations and I'll ask perhaps to the last page of our document to be shown on screen, we would have hoped that the recommendations would have included at least two recommendations that we included in our dissenting statement. They are, again, reflecting the spirit that the Subgroup providing for policy recommendations, not too much concern with the details, which would be left and could be left if the Subgroup so wishes to the implementation stage. We also could have recommended the setting up of a team to discuss how to implement those recommendations. But here they are, those two first recommendations. First, that ICANN should retain jurisdiction in the United States under the

# EN

---

[indiscernible] immunity act except for such ICANN activities that do not directly interfere with the management of the Internet's global resources, which exceptions would, for example, enable U.S. adjudication of claims related to ICANN's Governmental functions, for example, employment disputes, contracts that ICANN concludes with local service providers.

And the second recommendation typed into the first would be that ICANN shall maintain and further develop accountability mechanisms not subject to the jurisdiction of any single country for appropriate bottom up multi-stakeholder processes to ensure that ICANN can be held liability especially for [indiscernible] immune from jurisdiction.

Because these two recommendations did not appear in the draft report, not just as recommendations, but it did not appear not even in the text, so we believe that particular failure leaves out many concerns related to jurisdiction that lead to the establishment of that workforce 2 and because of that, unfortunately Brazil cannot support the draft report. Thank you.

THOMAS RICKERT: Thank you very much, Thiago. Are there any questions for Thiago? Or Benedicto? That does not seem to be the case. I would like to Kavouss, I apologize. I'm sorry, I oversaw overlooked your raised hand. The floor is yours.

# EN

---

**KAVOUSS ARASTEH:** Thank you. Thank you, Thiago, for the very comprehensive understanding of the situation. It's not a question to you, but just a clarification. Do you mean by perusal of the matter of the recommendations of this implementation to have something similar to the implementation oversight group or team to review the matter after Work Stream 2 to understand how it should be implemented and if there is any shortcoming, this shortcoming could be inserted? Is that the case you are referring to? Thank you.

**THOMAS RICKERT:** Please.

**BENEDICTO FONSECA:** Thank you. I'll take that. I think the main point we have raised is that we think the Subgroup should not be concerned too much with the implementation phase, but the Subgroup should have looked into the issues and to the [indiscernible] importance of the issue to try to come up with the appropriate recommendations without at this point in time being concerned too much about implementation. So we thought it was not requested from the group to engage into that. We tried more to advise and to on the basis of the issues, what should be done in that regard. So we think that maybe one

# EN

---

thing that constrained too much the group was the concern to make sure or even to have some kind of political assessment of what was viable or not and that I think the group itself, imposed itself too many constraints and that impeded the issues. I think this is basically what we are saying when we talk about implementation, that should not have been the focus of the work of the group. It was more trying to come up with kind of policy recommendations and the whether those and what would be required and if any, the timing or the political timing was right or not, I think this was not something that should have been addressed. It has consumed and constrained and guided the work of the Subgroup so much. I don't know if I have an answer to Kavouss's question.

THOMAS RICKERT: Thanks very much, Benedicto. Are there any more questions for Benedicto or Thiago?

THOMAS RICKERT: Steve had a question in the chat which I'm going to read out for you. Is it realistic to say ICANN shall obtain jurisdictional immunities with sanction relief our report recommendations that ICANN use best efforts to obtain, but we are not able to guarantee the result?

Thiago, would you care to respond to that?



# EN

---

**THIAGO JARDIM:** Yes, thank you. Thank you, Thomas. Thank you, Steve, for the question. This is Thiago for the record. I think the Subgroup is in the business of making recommendations toward ICANN. And I understand that there might be problems for ICANN to implement those recommendations. But then it could come down to how we craft those recommendations. Recommendations could be worded, for example, recommended that ICANN take steps to obtain. It is in itself a recommendation that would impose a soft obligation, an obligation of conduct rather than an obligation of result. And then we could also ask for ICANN to come back to the community to seek more guidance on the issue. But at the end of the day, I think the problem with the draft report as it is currently drafted, it doesn't even take into account the need to discuss those issues the way we are discussing it now and I thank you for that.

**THOMAS RICKERT:** Thanks very much. So can I ask those who want to make statements, I know that Parminder wanted to speak, so can you please put yourself in the cue so that we can see how many interventions we can hear before we break for lunch? But in conclusion with respect to the statement from Brazil, you might remember that when we issued the Co Chair statement on the way forward for the jurisdiction recommendations, we reserved the right to publish a statement responding to the minority statement. And given the

# EN

---

version that we discussed a minute ago, the Co Chairs do not see the need for any clarifying response to your minority statement. So unless the Plenary suggests otherwise, there will be no reaction to the minority statement, but we will just attach it to the report on a [indiscernible] basis.

THOMAS RICKERT: So there are two hands raised, or three hands raised, so it's good there's a cue forming. And just as a heads up, this is not to limit your ability to speak. What we should be doing is get a quick reaction from the group where there are whether any of those hands raised are related to my statement i.e. there will be no Co Chair response to the minority statement. If there were the case, then I'd like you to just make yourself heard. So that does not seem to be the case. So we can now move to the other interventions, so Parminder is first. Then Kavouss. Then Sebastien. Then Greg. Parminder, let's do a little audio test whether you can be heard. Welcome to the meeting.

PARMINDER SINGH: Thank you, Chair. I'm Parminder. Am I audible?

THOMAS RICKERT: You are audible and the floor is yours. Please go ahead.

# EN

---

PARAMINDER SINGH: Thank you so much, Chair. And thank you for giving me this opportunity to [indiscernible] our views speaking on behalf on a lot of organizations and groups we work with. So thank you for that.

First of all, I would start by completely agreeing about [indiscernible] statement and would not repeat its point that were already said in the statement that we start with [indiscernible] points and the fact that we would like the recommendations which have been suggested to be the ones which should have been part of the report and [indiscernible]. And also, other statements or clarifications which [indiscernible] statement carries.

After that, I would come to the additional point that we would like to make. And the reason that we do not agree or reject the statement, the report as it stands, is both because of the content and the process. And I would speak about the two sequentially.

About the content, we do agree that [indiscernible] among the few who first read this demand, but you think it addresses a part of the problem and the problem is conjoined. It is one problem [indiscernible] very well that one country is able to exercise jurisdiction over a very important global Government

# EN

---

function, which leads people from other countries in an unequal position. And it is not just a political statement, but these developments are real and factual. And the kind of sanctions which effect [indiscernible] are not very different from the kind of things that many of the [indiscernible] Government [indiscernible] and so on can put on the main policies of ICANN which is something that is not acceptable. And, again, even some kind of political statement that all countries should have an equal rule and no country should be able to exercise no jurisdiction and extract more accountable from ICANN than others should have been part of this report because are the kinds of things which have been said earlier in many global texts. And we are also the mandated of this group to do, which somehow it was not considered the mandate. So at least make some operational, some political statement about equality between countries and people of the world is important within this jurisdiction. And none of that was done, which is a problem.

And also the third problem which is going to come from the process, in the discussions, they were not even acknowledged. Not acknowledged officially when the process was on and I will give instances of that, and not acknowledged in the final report even as something important, which was discussed, which was the position of many participants and

# EN

---

very passionate and the [indiscernible] position of many participants.

Now do please note that the immunity under the [indiscernible] act was a compromised position because after all, this immunity, which is customized immunity under U.S. law is subject to U.S. legislative and residential executive accountability and it can be [indiscernible]. And, therefore, it is not the perfect solution we would we agree to because we do not want to be subject to [indiscernible]. But this wasn't a compromise, it was a climb down [indiscernible] we are ready to do it, we are ready to take immunity as many NPOs or NGOs in the U.S. already have and we were ready to give examples of that, we were ready to consider that. And we were ready to carve out any areas other people may not want to get immunized, get ICANN immunized against. But none of this was even a consideration. And that is a major problem with this report.

And to say why these issues are important because going into the future and [indiscernible] is utilized and this dominates all factors, [indiscernible] and factors GTID and business are going to be important and this puts [indiscernible] from other countries at great disadvantage [indiscernible] subject to U.S. rules. And [indiscernible] is dealing with the [indiscernible] is one of the most hotly contested political areas. And this

# EN

---

conversation, the fact that there's the only [indiscernible] list, the fact of the U.S. jurisdiction is going to be a continuing problem. And we don't see the problem solved at all and these are actually practical reasons and not just political ones that we oppose the report about.

Now having said it, our main position on the action content, we would briefly speak about the process. The problem has been noted and can be noted from two day proceedings that this is the statement, this is the position which is very passionate and practical measures, too, we very strongly associate with. [Indiscernible] being the case from the [indiscernible], if you look at the kind of public comments, I mean, we have participated in many meetings among stakeholders and all of them said jurisdiction was the most important. [Indiscernible] of the world's population. And I know in developing countries every year this was a very important issue.

But the problem was that even when we came up with a compromise which was under the U.S. law and we were ready to carve out exceptions to immunity, this was not given an official space in the year and a half to be discussed at all. And that really [indiscernible] the process and because of that the legitimacy of this report.

# EN

---

Now many processes were kind of proposed by the groups, too. The initiative said you cannot talk about solutions, you can only talk about issues, and at that time we kept on coming out with the customized immunity discussions, but whenever we give that particular proposal, people said, no, no, jurisdiction issue is something that we know is a problem, but whatever you do with it, the problem will remain. And then we say, no, we have a solution because that's how we can show that what you are arguing is wrong and we would give the solution of customized immunities and they would say, no, you can't discuss solutions. It was a very difficult situation. Really nothing was being done over month base things were stalled, people wanted to discuss the political thing and we were not allowed to discuss.

I will fast forward and come to Johannesburg meeting where suddenly it was decided by [indiscernible] and the CCWG chair that certain solutions are out of mandate. Now this is very strange that while we are not allowed to discuss solutions and we are at the issue stage how solutions disappeared from our table or our mandate. Anyway, there were again talks around it and people said at least customized immunity should be stripped from that particular [indiscernible] and people agreed it could be in this draft and it looked like it implied [indiscernible] that this would be discussed.

# EN

---

Now we went along with this promise and the process again meandered in many different directions and for them there was another process position, which was the [indiscernible] which said that everyone can suggest clear issues with clear solutions in an e mail with a clear header and we can combine them. And we, of course, did give this as one of the issues and the solution being customized immunity. And excuse me to go into details because I think these details need to be recorded and [indiscernible] available here.

At that point when people gave these specific issues and specific solutions and [indiscernible] was done to [indiscernible] into a few set of issues, which we found was fine because we don't repetitions or overlaps and we came up with six other [indiscernible] that would then be discussed. And for some reason, number 1 and 2 were [indiscernible] and Choice of Law issues and the discussion started. And while the discussion was going on on [indiscernible] and Choice of Law, we were not bringing up immunity discussions because we thought that was not proper because there were two types of recommendations being drafted right now. And it is the chair's job to see that the deadline is coming and we have this problem, so what to do about it? It seems that was taken [indiscernible] and people were not the process minder have a different responsibility than the workers as minders. And once the working group's job is done, these are the



# EN

---

recommendations. Now this is complicated and appropriate and obviously as we have been saying and [indiscernible] has said, the most important issues were not even in a year half discussed.

We are happy to have that discussion done, for other people to come and see that these are the reasons we don't agree with customized immunities, for us to say we probably can meet the concerns in this manner, and then people say, [indiscernible] and honestly say, well, this was done and this was discussed and this was the status of consensus of of our lack of consensus of this issue. This did not take place. And this is a fact and I would like that fact to be contributed by the people that are chairing this meeting. And if this is accepted, then it should be explained why, when the most important issues are brought up by an important part of the group was not recognized and taken up.

Really, unfortunately, not only was it not recognized, it was said that the talk which some people are doing is about change of place of incorporation of ICANN or change of location of ICANN. This was done in an official document including a final report which said we suggested change of [indiscernible] and then was never discussed. One thing is to show the discussion that some people are trying to do and which is being refused and the discussion on change of

# EN

---

location and incorporation, which was not. And this includes, it has nothing to do with the proposal which was one of the most important proposals for part of the group. This does not happen. I would like a statement and explanation of that.

Now we do [indiscernible] as we said and try to meet the concerns of other people and we had not met consensus. It is possible then through the report, in this final report, that this happened and we did not get the consensus, but advantaged and disadvantages were discussed. But this was not done. In fact, the report did not say we discussed immunity. It says we discussed change of incorporation. It does not say we discussed advantages and disadvantages.

Now let me briefly say the Board does say about some issues where they [indiscernible] as part of the report like the four or five choices of option issues which are not recommendations, but they were just a reflection of discussions.

Now if you ask me, I was there most of the time in the group, I do not recommend discussions on fixed law approach, which I'm sure it would have been discussed in some of those calls which I was not there, but these were major discussions about the possibility that fixed law should replace the Choice of Law solution, which is fine. But this talks about the advantages and disadvantages in one part of the report, the same report which refuses to acknowledge, much less talk, about the issue

# EN

---

about customized immunity which [indiscernible] is not putting an objection against, which I'm objecting against and many people here wanted to be brought up. We would like to know where the report can talk about certain discussions even if they are not recommendations, but not other issues.

So that finishes my intervention on the customized immunity. Very briefly, if you would allow me to talk for about four minutes? Okay, by silence, I take it that I can. These are the two particular determinations I had asked for before the first reading which the chair and the Subgroup Rapporteur were kind enough to explain in the first reading which I could not attend because it was very late hour in India. But I have a brief comment on those clarifications.

I would first go to the one on Choice of Law. The issue here, I was told that it is clear that the group is recommending a [indiscernible] based approach. That recommendation and the rest of the discussions of other options do not constitute recommendations, but are merely [indiscernible] discussions or the kinds of things the group considered.

Now if this is so, my first question is to let the report make it clear as it is present that the recommendation is only that we would like to see a [indiscernible] based approach. And the rest of it, in the report, if at all, needs to be in a manner which does not imply that it's probably also the options being offered

# EN

---

to ICANN. I agree that there is some [indiscernible] which says this is the recommendation, but there is also not enough clarity. So please be clear with me about the recommendation being clear that we would like a [indiscernible] based approach. And the others are not our recommendations because of discussion. And I'm sorry, but I refer back to the call of the discussion which area which was very briefly discussed by the group, why can't the discussion of immunity, which were tried to be brought in by many people, many times, and there's a lot of text there, could not also be regarded as part of the report. And this is a question I would like to be clarified about.

And even now, coming back to the new [indiscernible] based approach, I think it is not enough to recommend to ICANN that the [indiscernible] approach where one of the options could be a fixed law [indiscernible] which is not actually many options because fix law [indiscernible]. One of the options could be, of course, use of [indiscernible], which I agree would be part of a menu. And others could be probably the country of history and other could be [indiscernible] where it is not mentioned at all. I agree with that menu.

But I think unless we also make further recommendations because recommendations between ICANN and [indiscernible] is a very unequal relationship. ICANN is the

# EN

---

principle party which holds all the cards in its hands. Now if we just tell them that you can choose one of them and that's all, there's nothing stopping ICANN from consistently choosing [indiscernible] formula, for example, almost automatically every time. And I think we need to clearly see, if we don't want to make it compulsory that we don't use California law, we can just say, okay, use any of them, there's nothing from stopping them from using California law every time. So let's make some recommendation which is to give consideration to the fact that these are the problems that other countries may face and they may be better off if they have some Choice of Law which is closer to their country not affect their own country. And we would like to see at least a certain proportion of the contracts having a [indiscernible] region which is not California law or [indiscernible] and of other countries.

Unless you kind of nudge ICANN with some recommendation towards not automatically going for California law option, the recommendation model doesn't say anything because we can't be in compliance with this recommendation and consistently go for either California law or no Choice of Law.

So this is a change which I would request.

# EN

---

THOMAS RICKERT: Parminder, this is Thomas speaking. You asked for another four minutes and we are now past 4:30 local time, so the lunch break is waiting. And maybe you can speak for another one or two minutes and then you can resume after the lunch break. So it's perfectly possible for you to get back after the lunch break, okay?

PARAMINDER SINGH: Okay. I [indiscernible] more than two minutes. So I will briefly talk about the clarification which, Thomas, you gave about for the history changes to be changed or not. I will say that what I was talking about is there is not a change of contract and I understand the legal issues contract and we are to change from draft templates. And when I say [indiscernible], they mean template contract and we can always recommend template contracts so we change all [indiscernible] future contract and that's about the contract [indiscernible] can dually change. And I think we should not have language that we cannot [indiscernible] ICANN to be –

THOMAS RICKERT: We would like to see the center of the portion of the contract.

# EN

---

PARAMINDER SINGH: You have asked for another 4 minutes. Maybe you can speak for another one or two minutes. Then you can resume after the lunch break. So change contract and place. When I say out of here I think they know the contract and they can always recommend the template contract and change future contracts or that's about the contract and about the change in the manner in which that I can bow. I was disclosing and while I come back after lunch. So happy lunch. Thank you so much.

THOMAS RICKERT: Thank you very much Parminder. And thank for doing this mostly. It's certainly a challenge to follow these long meetings through the phone line and the remote participation room. It's 3 minutes over time. But I would really like to ask your patients. Because I think with a couple of process related points that Parminde made, we should give Greg as the remembertory of the team a opportunity to respond before we break for lunch. Then after lunch we will go back to Parminde then proceed with can calf. So Greg if you would like to make remarks in response to Parminde. This is the opportunity for you to do so?

GREG SHATAN: Thank you Thomas, Greg for the record. I want to reflect on the long and hard work on the subgroup and of course while we have a number of subgroup participants in the audience,

# EN

---

there are also members of the plenary who did not participate or did not follow the work of the subgroup. So, it's important to note that your hearing one side of the story. So, I would just like to point out that we discussed various points around immunity repeatedly and at great lengths. Often without regard to what was actually to agenda or the menu of the subgroup at the time. And I would say that there were a number of robust opinions expressed that were very different from those that you've heard today.

So, one shouldn't get the idea that these were unanswered points or unanswered opinions. It's not my place nor is it my place when lunch is awaiting to go over those other positions. But we have at least orally a minority position that has no majority opinion or other divergent opinions expressing other views. But though other views were amply expressed during the life of the subgroup. And I think that we just need to be cautious about identifying opinions as facts when they are opinions. As a wise man once said you are entitled to your own opinions but not your own facts. So I think that's what went on and I would have liked to have had more time. I would of also like to have had more are participation in the final weeks of the group. If you go back and look, some people were absent. I do not speak of Brazil in this case. They were fully engaged throughout. But sometimes things could of been brought up that weren't in the course of our time. Finally,



# EN

---

I would just like to underscore what Thomas said at the very beginning that this is not the last time. That issues that do fall under the heading of jurisdictions will be discussed. In the ICANN space or around ICANN. And I do note that the report indicates that there will be a number of annexes to it, which will include and supplements. And so a good number of the working documents and documents reflecting the discussions that took place, even if they did not come to a conclusion will be reflected in the full report as it's packaged up with its annexes. So there will be ample opportunity for others to see the course of our discussion. What was summarized were the discussions that led to the recommendations that were in the report primarily. That's why they are there.

So I won't keep you from lunch any further. I may come back after lunch if there's anything further for me to respond to. But I do want to thank everyone, even though I was holding the minority opinions for all their work in the subgroup and of course this will be this is an inflexion point and not the end of these discussions. And we will see where they are taken next.

Thank you.

# EN

---

THOMAS RICKERT: Thanks very much Greg. Thanks everyone for this good discussion which will continue after this lunch break. We will have a full hour for lunch. We will reconvene at 1314 local time which translates to 940 UTC. We will have a full hour then continue with the discussion. I will ask the staff not to clear the list of hands in the Adobe room so we can start with the same order of speakers that you see in the Adobe room now. Thanks very much and recording can be stopped.

THOMAS RICKERT: Thanks very much. This is Thomas Rickert speaking for the record and we would now like to resume our discussion on minority views or other expressions of thoughts on the jurisdiction topic. And we will now continue with the queue. So Sebastien will go first. Then Greg then Kavouss then we go back to Parminder. Those that want to be added to the list, and speakers please raise your hand or should you be on the phone line only give a signal so we can add you to the queue.

SEBASTIEN BACHOLLET: Thank you very much. I'm very honored to be the first speaker in this session.

I wanted to make three remarks or comments. So first one, it's regarding the discussion we have to see where we come from. And of course where we are going and what is the step we are doing here and what could be the next step.

# EN

---

I don't think it's the end of the journey and I don't think, if ICANN is still alive, we will have a long journey. And that's to be taken into account in our thinking.

Concerning the subgroup report, I would like very much to support it like it is today for to go for public comments. And I would like to add what else from my point of view, the next step possible. I suggest that during the discussion about the document gathering the work of all subgroups, we study how and where the next step regarding up the lives is very important. One about community. Beyond there is and push a step forward after the completion of the work of our Work Stream 2. Thank you.

THOMAS RICKERT: Thank you very much Sebastien, Kavouss is next.

KAVOUSS ARASTEH: Thank you Thomas. I have one comment and I have two short questions. I hope I don't go beyond two minutes.

THOMAS RICKERT: We don't have the clock running.

# EN

---

KAVOUSS ARASTEH: This time you are very generous and I thank you very much.  
Danke schon [speaking in Japanese]

Chairman or co chair or Thomas, distinguished colleagues. I'm not comfortable and even surprised to refer to the minority view and majority view. On this particular issue. Jurisdiction is in the governments is not within some private people or individual on one hand and government other hand.

So let us not refer to minority view and majority views. Let's say statement by colleagues that may not be comfortable with the results, but not minority.

An individual or someone representing 250 million people cannot be seen as minority, it's two or three individuals may represent themselves or represent some other people. So we cannot say that. The issue is between the governments.

I think I support the statement made by ambassador [indiscernible] indicating after all of this issues, discuss the union lateral governance of the jurisdiction remain within the hand of one single government.

During the final stage of the Work Stream 1 when the people wanted to justify that single government agree with the process of the transition, in particular during the testimony before the subcommittee of senate, it was several to mention that don't worry, we maintain the jurisdiction to remain within

# EN

---

hand of us. That means the government. So the issue was designed and [indiscernible] orchestrated as such. So we did not expect that this group doing more than they have done.

Because that was the situations.

And I think that what was said is exactly correct. That the jurisdiction remains within the governance and hand of that single country. So it is not majority, just minority. It's something that the beginning part of transition was more or less technical part, apart from some accountability which is very good now community has some actions to take. So our support to this statement made by ambassador and other colleagues may make it ever. My question, this is the comment, my question chair to you, question 1, how the course of action mentioned in the two recommendations will be carried out and is there any guarantee it will be carried out successfully. Saying irk can will do that and ICANN will take that. Apart from some words and wishful thinking whether in fact would have some reality. It may be some visions and whether in term of reactions, I don't know.

And the second question is that the statement made by ambassador and maybe by some other colleagues that joined him, what is the next step? To consider thousand follow up this course of action. I am not thinking of ART, ATRT procedure. I want a practical. How do we do that? We should

# EN

---

not take it on statement to be noted. Is cause actions it cause attentions. The issue stays there and must be continued to be resolved in one way or other. Thank you very much.

THOMAS RICKERT: Thank you very much Kavouss. Let me try to respond to the points you made. Firstly, the term minority report is used quite commonly in the ICANN processes. And as you well know everyone in this room as well as joining remotely is participating in this effort in the personal capacity. So as much as David is not here, Asvarson is here as David McAuley we are not here representing the people of our nations if we are government he representatives of our companies or of our associations. Nonetheless, I think it's an important point that you make that certainly governance if they speak in their capacities as governance have huge populations they represent and the term minority statement might suggest to somebody who is not familiar with the model that we are using to create policy, that populations or governance might be marginalized. So I don't have any issues whatsoever with calling this statement for dissenting opinion or some other term that Thiago or Bendict might find the nature of this paper.

You mentioned that things might be said during hearing in Washington and that the process was designed to make it stay within Washington. I have followed those hearings and to my recollection, there has been no statement made by a

# EN

---

CCWG representative. I do remember that Farzi testified on the hill so has Steve bee angle owe and others. But nobody has made any information on behalf of the CCWG precluding the outcome of the CCWG deliberations. And I think that our process was very open and I'm sure Greg will be in a position to speak to that as well. So the topic of changing jurisdiction or even changing place of incorporation was not out of scope. But it was just that during the course of the discussions in the sub team such ideas didn't get sufficient traction to be legible for consensus.

With respect to the question about the cause of action, as you know, our recommendations, once adopted by the plenary need to be approved by the courting organizations and by the board. And there will be enacted. To the extent that your question relates to the OFAC licenses that should be sought we certainly have no authority to OFAC to grant those licenses but what ICANN can do if our recommendations are adopted and if we get them through the second reading first which is an important prerequisite for that, then ICANN needs to use best efforts to get these licenses. But what is done by OFAC is not within our control.

With respect to the second question, and I hope I got the question right, I think it relates to the concrete actions that will be taken based on the Brazilian statement. And I think what

# EN

---

we should be doing is discuss this once we have the second reading. Now that the plenary has the opportunity to listen to all the arguments, there may be a change of positions in the plenary. So the plenary might raise substantial objections against the report. Right? So I think it's premature to assume that the second reading will be successful. But if it were, then our suggestion is to do two things. The first of which is to make more explicit reference to the points that have been raised in the documentation that has been developed in the course of the work of the sub team. And as Greg mentioned before we broke for lunch, he said that a lot of those points that have been mentioned by Benedict or Thiago and, also, Parminder have been subject of debate in the sub team. So we will highlight the reference to the appendices where these, can be found so it doesn't get sort of buried in the appendixes.

Second we suggest doing is actually creating a second document with the transcript of this very session and, also, make that part of our report. So that for everyone to see during further debates on jurisdiction, what points have been raised and how this interaction went on in the CCWG. So that we have a tangible take away for future jurisdiction related to debates to build on.



# EN

---

So I think that covers the four points in total that I have noted from your intervention. And now I think we can move to Parminder again. Parminder the floor is yours please.

PARMINDER:

This point was about when the report is that we cannot recommend changes to registry and [indiscernible] I will arguing that this agreement for me is the template contract and not the specific contract and therefore I do not want [indiscernible] statements to go in the name of CCWG in the final report this is up to you now to look at it whether this is a correct or not. I will close it at that.

Just add that [indiscernible] so much time to make these comments but I would regret that the questions and the proposals in these comments in which they respondents too. For example, I mentioned that the menu approach should be operated by saying we match ICANN to consider not automatically choose in California law or some such thing. And that part of the report. So please I would like you to consider those things. And I have to now the mic, respond to the statement which I will Greg made who said that indeed discussions took place between these points and then the quotations without regards to what was on agenda.

And that is true. That's what I have mainframe yes. We kept on trying to push these discussions the question however is what was it never on agenda? Never during the year and a

# EN

---

quarter was this issue on agenda. And that is the question, you're right Greg, they will discuss in on agenda. The question is why didn't it ever get to the agenda which is the problem. Even when there was six discussed it was not discussed.

One of the issues is we don't talk about it but to look forward in the positive manner. I feel a lot of mentioned including by Thomas and Greg that this is not the end of the road. There will be other forums. And an observation by George in the chat window if there's a way to reflect in the report whether we can make it clear that yes, again I go back to the report where Greg says that we could not discuss other issues because we were short of time. That's why we took two and not the other four. But these are important issues. Now I don't agree that this is okay to be done, but even if it was done it needs to be put on record that these were the issues, we could not include them, due to the range of loose and kind of combination that the value puts it was proposed. But there are advantages and disadvantages. And I again, I refer to the fact that advantages and disadvantages of options like 6 option in the choice of law section and other possible options have been put there which were actually only discussed but never recommended.

So records of important discussions and possible recommendations do exist in the report in the same way. Why

# EN

---

can't we put [indiscernible] discussions and one possible recommendation which is the current record recommendation by Brazil in the report saying we were rushed for time we could not either take it up fully or during taking it up we did not see there would be a consensus and it's a work in progress and fighter for them to look at it.

If this kind of thing can be considered as missing scope to agree to a few things though I keep saying the process has been initiated by the fact that this issue was never formally on the agenda for a very, very long time that the group met on the jurisdiction issue. Thank you very much Thomas.

THOMAS RICKERT: Thanks very much Parminder. I would like to briefly respond to a few points that you made. One is related to the change of contracts. Were you said you were asks for response, why those can't be changed. ICANN has contracts with hundreds, if not thousands of contracted are parties. And our group does not have any authority whatsoever to change those contracts or to force ICANN to change unilaterally it's contracts. The contracts with registries and registrars is through changing one is which through consensus policies, EDPDPs that go through GNSO. And the other root is contract negotiations and the process for contract changes is specified in the registrar accreditation and registry agreement. And therefore

# EN

---

our forces, our powers are limited to recommending to look to those issues and those contracts and change processes to come up with some amendments or changes to those contracts.

The second point is, the discussion of immunityies. I'm sure that Greg will be able to point to specific meetings where that has been discussed. So I think that can be clarified. And with respect to your point that the recommendations or the points that were discussed that didn't make it to recommendations should be referenced to better I think I said earlier in response to Kavouss intervention that we will make sure there's stronger links from the report to the the appendixes including the transcript from this very meeting so these few points and substantive discussions are visible.

Let's now move to farce they.

FARZANEH BADI: Jorge was before me actually.

THOMAS RICKERT: I don't mind. Jorge go ahead.

# EN

---

JORGE CANCIO: For the record. Thank you Farzi. That was actually expecting your intervention to response to it afterwards. But now that we can be the other way around.

Now seriously, I think that there have been many interventions in the direction of saying, okay we had substantive discussions on some issues. However those discussions for instance on the issue of limited tailor made be spoke immunities didn't really get to the final point be it for scheduling reasons for timing issues, for whatever reasons. But I think it would be kind of unfair to leave it by that. And I understand or I think I understand that you want to make some clearer linkages to the where we discussed that. But I think that it would probably make sense to describe this explicitly in the report. And, also, kind of agreeing because in the end it's not an agreement of on a specific recommendation but an agreement on a fact that we have these substantive discussions that we didn't get to a point of conclusion on them. And that probably it would make sense to have some sort of follow up, I don't know, in a Work Stream 3 or in a different kind of process on these issues. Because they are issues that are put on the table by different stakeholders. They are of course legitimate. We haven't discussed them to the end. And so I think it would make sense to include something in the report. Recommending or suggesting that there should be a way forward on them. Thank you.

# EN

---

THOMAS RICKERT: Thanks very much Jorge. Now Farzi.

FARZANEH BADII: Thank you very much. I'm astonished because it says a statement comes from a ghost it should be given more weight. We should know that the issues that were reported, the jurisdictional issues were reported by mostly non governmental people. People that faced jurisdictional problems. But when using the DNS. And I also liked to point out that I want to hear more about support for the process of this subgroup. And it's recommendations because until because it has been very criticized by some. I would frame as unfairly criticized and I don't think delegitimizing the process of the subgroup will benefit the DNS users that are facing sanctions.

And the recommendations of the subgroup will be fast if implemented will facilitate their access to the end and it's something that we have forgotten them for the past 19 years. So it is time now to set aside the political battle of jurisdiction and think about pragmatic solutions that can help DMNS access if DNS access.

So I do want to know that even without minority statement there is support for the recommendation. Especially for OFAC

# EN

---

recommendations. And I think that is very important thing for the for us for later to advocate for its implementation of the recommendation.

The other and another small point that I wanted to make, I do I have supported the discussion about partial immunity of ICANN. I think it's something that we should definitely discuss. We have been having problems with CCTLD delegation and I dot IR was as we know there was a case already about dot IR in the U.S. court about its attachment. I think for that reason we need to definitely look into partial immunity for ICANN. But I don't think this subgroup has demanded or can do it.

THOMAS RICKERT: Thank you very much Farzi since you also mentioned further debate and Jorge made the suggestion I think we at CCWG are not in the position to kick off a new process. We have been tasked to look into a limited number of issues for a limited period of time with a limited budget given. And with us coming up with proposals to come into existence with various reincarnations over and over again, I think can't be done procedurally. I think what we are doing is make the report very useful tool for further debates which will surely takes place but I'm not sure that we can really trigger this. Because we don't have the mandate to do so.

# EN

---

I think that if there shall be another course constituency effort or there should be that within ADRTs that something else would be decided but not by CCWG. I'm cautious about not creating expectations but what the group can and cannot do without over stepping over reaching or actually powers.

But more than happy to reassume the discussion on that for now with the minority statements once we get to the recommendations and the second reading.

I now have Greg then Olga they David. Greg.

GREG SHATAN:

Thank you Greg Shatan for the record.

A couple of quick points, first I would like to let the members of the plenary not in the subgroup not what our working method was and what we attempted to do over the longer period of our work. Was to identify issues before remedies. And immunity was identified as a remedy.

But throughout the conversation about immunity when it was brought up in the A group seemed to start with remedies without identifying the issue that it was intended to resolve until really kind of the very end of the process. So that's one reason why immunity didn't come up as often as it might in our formal agenda. The discussion seemed to start with the idea



# EN

---

that there was a remedy that was needed rather than with an issue that needed to be remedied.

Second, I would say that it was not only the lack of time that you would in some issues making it to consensus and some not, but there was also a lack of a clear path forward based on the views that were being expressed in the subgroup. And in the we didn't come to the end of the road on those, where that road led was at best unclear and I think for that reason rather than dwelling on what might have happened, because that's difficult to predict, the point that we need to look at is where these conversations might takes place next.

And the last thing is, the issue of immunity actually is extremely complex and multilayered. Indeed I was thinking about the very case involving dot IR that Farzi mentioned and ICANN was not a party to that case. So immunity as to suit, which is the type of immunity that is contemplated in the IOI, would not have shielded the dot IR consideration that took place in that particular case.

Would it be needed to be some other sort of immunity to have there. And of course in the end the decision of the Court was that it was beyond the reach of the Court to attach the dot IR CLD. So in that instance I think many of us would agree justice was served.

# EN

---

But, I think that only goes to point out how that subject is really a subject in and of itself and may not even fit quite so neatly into an accountability group, given that our predicate document for this entire CCWG accountability, when it lists existing forms of accountability, and I think its annex E or appendix E to the Work Stream 1 report, cite litigation and recourse to the courts as an existing form of accountability for ICANN. And I would note that we spent a considerable amount of time in the group, and I would not call it stalled. We spent a considerable amount of time in this group examining each litigation that ICANN was a party to. And what its ramifications were for the work of the group. It's interesting to reflect if immunity existed even the so called partial or tailored around that was referred to I don't believe any of those cases could have been brought because they did in fact relate to the core functions of ICANN and not things like employee disputes or whether the garbage was being put out improperly. So those cases which sought to be held to be barred at least from the courts. That's something to contemplate I know second recommendation in the dissenting opinion of Brazil is that there be a further multi stakeholder forum for those sorts of things to be adjudicated. But that is another thing that is way down the line, certainly beyond the line of Work Stream 2.

Thank you very much.

# EN

---

THOMAS RICKERT: Thanks very much Greg. Now we move to Olga please.

OLGA CAALLI: We like to support and concern the concerns about colleagues from Brazil in their minority statement. Perhaps we agree with our distinguished colleague from [indiscernible] that it may not be named minority statement perhaps dissenting opinion or what they think is best for this important opinion.

We would like to also support the idea from gore jay in Switzerland for the convenience of a follow up process on this important issue. We understand your concern Thomas we are not creating a new process that is not a mandate and I agree with you in that. And we would not be triggering a new process or creating a new one. We would like to have the concept in the report of having a follow up on this important issue. Thank you.

THOMAS RICKERT: Thanks very much Olga. David.

# EN

---

DAVID McAULEY: I Thomas. I wanted to make a brief statement. We talk about substance and I make my views clear that before and I'm not a supporter on a immunity idea but I appreciate the government of Brazil putting it on paper.

On process I've been involved in substance I don't think I missed a meeting and my assessment of the process has been that it's been extremely fair. It was a lot of work for one basically one repertoire to handle. A lot coming at the repertoire. The process was fair. It formed our direction, our direction coming out of Work Stream one 1 is this subgroup would consider you jurisdiction by focusing on the settlement of dispute jurisdiction that makes the litigation study that Greg mentioned critical. That was our remit and that was the primary focus and immunity wasn't. So I think I want to say I think the process has been extremely fair. Thank you.

THOMAS RICKERT: Thank you very much David. Andreea.

ANDREEA BRAMBILLA: For the record it was me speaking earlier in morning when person ear introduced me as Canada. I want to note that we support the multi stakeholder process where the multi jurisdictions were developed considering the divergence that the subgroup started with a lot of to come up

# EN

---

with concrete and practical solutions is that warrant solutions by the broader ICANN community. We certainly recognize that jurisdiction is a complex multidimensional issue and we are not opposed to continuing the discussion. In doing so we should not lose sight of our collective goal which is really to reinforce the accountability framework that was part of the stewardship transition and we believe the additional have been proposed in that respect. Thank you.

THOMAS RICKERT: Thank you very much Andreea.

Parminder.

PARMINDER: Thank you chair. I would first point I wish to make is about your observations that which follows from my and some other people's requests that can be effort to some follow up versus to which you said that it's not in our mandate to talk about these kind of follow up processes. I really do not agree with this conception of our mandate. Our mandate is to advise ICANN the do whatever is in the power of ICANN to do. Including to abolish itself. That's the what is authority. If I'm recommending authority to India I can recommend anything which is in the power of person who recommended too. It's not about my policy I have zero authority. Recommending

# EN

---

bodies don't have authorities. But when they recommend it to and they are supposed to recommending authorities I'm repeating the point this is becoming earlier [indiscernible] conversation so I agree to catch his attention. Yet Thomas initially said we started very open mindedly to Kavouss point that whether U.S. jurisdiction is required or whether we have to act within it. It's show that our mandate is whatever our mandate is within the jurisdiction question. So I don't accept that we cannot tell ICANN recommend to ICANN that we think that we need a singular process like ours to keep discussing the situation.

So the problem here is we may not agree the make that recommendation but I would request here to reclarify rather this is the situation. Because if we can ask ICANN to make PPIE as reorganization and do all those things we can ask it to do anything because after all it's up to it whether it wants to do it or not. That's the frustration that I want, again to get few the chair on that.

Second point when chair is pointed to one of my points, what I was asking for was to mention [indiscernible] recommendation inside the report and not as index. In the same manner as some choice of law options exist inside the report right now even though they are not agreed by

# EN

---

consensus. Many of them actually were not properly discussed here. For example, 6th California law option.

They are there just as things which could be possible with their advantages and disadvantages.

So please clarify my pure specific point which I'm now saying for the timer you I'm not talking about indexes being referenced there's a record choice of law in the part of the report already. Non recommendations why can't we have immunity in the same manner inside the report assured of immediate was discussed and recommendation that was provided focused by many but not reach consensus as we all said but review the fact that we did not have time. This is my proposal and not put it in annex.

Let me quickly also respond to what Greg said. He said immunity was shown as in remedy without showing the issues that it addressed. This is absolutely not a factual statement. And I would go on the A list to provide all of the evidence to prove that one of the first documents which was made regarding the influence of jurisdiction of ICANN, there was about 5 or 6 points put about whatever issues which create the problem to which the immunity discussion would try to solve. This happened from the start. It's public inputs also carry many examples and during my organization of all those issues and immunity was never shown as a remedy without

# EN

---

with the issues. Absolutely I would say absolutely a false statement on record. And I'm sure there's proof are false.

And the second thing I said was there was not a clarity on the part of [indiscernible] I have no idea what that means. Because I would think what needs to be done and how another proposal has been very clear. So I would like to get clarification of what was the non clarity in part forward. And here I would also mention that repeatedly I asked chair to speak ICANN legal's opinion and whether a carve out can be made from a possible immunity to enable ICANN to function under the nonprofit law of California. And this reference was never made. So we were ready for being very clear on all kinds of parts forwards and there was not a fact that there was lack of clarity on the part forward. Thank you very much.

THOMAS RICKERT: Thanks Parminder after Parminder we have Delila.

DALILA RAHMOUNI: Can you hear me?

THOMAS RICKERT: Yes, we can hear you. Go ahead. Welcome.



# EN

---

**DALILA RAHMOUNI:** Thank you so much. This is the French government. We would like to report the question raised by [indiscernible] it's minority statement. We need to support for your proposal to its abilities for the ICANN we think this is not a policy question but a legal question. And concerning the mandate of this specific jurisdiction. We think if it is not a mandate of the subgroup we think that in the Work Stream 2, the subgroup can work on the guidelines of the option of partial immunity. And we think this is really the are start of this option to explore within this group.

**THOMAS RICKERT:** Thank you very much let's move to Greg then Kavouss. Those that want to be added to the list please do so now. Other you wise I'll now close the queue and take stock so we can move to the next part of the agenda.

Greg?

**GREG SHATAN:** Thanks Greg Shatan for the record. First, just to be clear I stand by my statements and I believe they are factually correct.

With regard to the process and the past that took place. Second, in terms of process, would like to point out that the

# EN

---

second recommendation because one of our members took it on themselves to take the various pieces and put them together into a first a draft of that recommendation that was Raphael Boguardlaw. So I think we need to look to members of the subgroup in part when we think about why certain recommendations were more fully delated than others.

And not merely think about time and just to kind of refine the point about there not being a clear path forward, what I'm really referring to is the fact that there were significant and I think over all more objections to the concept of immunity even tailor immunity than there were those in support. I would not have used the word many to describe those in support. Which is not in any way to invalidate the opinions of those that did support that position. But it is being put forward as a descent or minority opinion in part because that support was not readily ascertainable. Nor did it become clear in any way there was any type of support for beyond the support that you have seen and heard today.

So I think that is what I'm saying when I refer to no clear path forward. It was clear there was strong support for the two recommendations that did ultimately gain the approval of the subgroup. And I'll leave it at that. Thank you.

# EN

---

THOMAS RICKERT: Thanks very much.

GREG SHATAN: One more sorry, one more point quickly.

The mandate of the subgroup [indiscernible] certainly not as broad as ICANN. And indeed there was quite disagreement about [indiscernible] our but tinge mandate as a whole I think really had a fair, very specific mandate. Thank you.

THOMAS RICKERT: Thank very much Greg. Last in the queue is Kavouss. And after that I'd like to close the queue and take stock. Kavouss, please.

KAVOUSS ARASTEH: Thank you Thomas. I think what was mentioned by Greg I have tracked. Perhaps he didn't mean that when he said there was no any support. I perhaps put it in a way that you always mention there was no sufficient traction but not any. When you say any that means no support at all. That was not the case. Just make it clear.

But I agree with some term you use no sufficient traction or no sufficient support. That is one thing.

Second point I want to make it clear that reference was made on to distinguished colleagues to political statement and to

# EN

---

fairness. No one in this conversation, this morning and this afternoon referred by any means to any political motivation nor fairness on the activities of the group.

When you say equal footing, it's not in government it's not political. You are talking equal footing you are talking gender equality. There's legal issue but not political. So I don't think people can tailor them and put them in the framework of political. And fairness I don't think anybody at this meeting talk about all fairness of the activities of the group. There auto for we should not refer to that. Thank you.

THOMAS RICKERT: Thank you very much Kavouss.

I think we should probably do two things. One is to again confirm that we were get the transcript which is currently in captioning format cleaned up. And tidied up so it can be made an appendix to our report the. And several of you have asked we establish stronger links between the report and the issues that did not make it to recommendation status. Including Parminder that said he wants the immunity topic to be explicitly mentioned in the report. And what I think that quite some sympathy and support was the proposal made by gore jay a little bit early your on which I'm going the paste into the

# EN

---

Adobe room chat again for everyone's review. I'm going to read it out for you.

Discussions in the jurisdiction subgroup were inconclusive on some issues. Again was the partial immunity for ICANN. It may be that ICANN community wishes to follow up discussions on these issues many of which are recorded in the annexes to this report. So we suggest that we use this language add that into the report and then as suggested add the transcript of this meeting to the report. But now, before we can actually move to making something in the appendix to report, we need to get the report adopted.

And that leads us to the next agenda item and that is the second reading of the jurisdiction subgroup report. And at the end of or after Greg has shown us through the recommendations, you need to make a decision whether you want to raise an objection to the report or not. In the absence of substantive objection we can call this a successful reading. Now you have heard all of the by those that were proposing to some or all recommendations in the report so all of the facts are at your fingertips. And I think we have done a much more thorough job on the second reading than we have done on any of the first readings. Because you got all the first handed information from those that don't like the recommendations.

# EN

---

Right? And I think we have never done such an can exercise before. So if you think that we can't proceed with a successful second reading, then you should object. If you think we should keep the report and that it should make its way into the final report then you should not object.

All the facts are on the table. We know the timing issues we cannot make substantive changes or any changes to the report. Otherwise we run the risk of not having anything on jurisdiction on our final packet. So with that I'd like to hand it over to Greg to show us through the latest findings of the jurisdiction sub team. Over to you Greg please.

GREG SHATAN:

Thank you Thomas, Greg Shatan for the record.

So, we will go back again through the report for the second reading. Once again, at the request of member of the subgroup we have this comment here. It's not part of the report. But just notes that we looked at various issues regarding a registrar that had was not doing business with people with Iranian passports and we included in if that was related to OFAC there was no clear showing that it was. That the recommendations that we have deal with it in deal with it in an adequate fashion. And noting again that subgroup will consider creating stress tests based on these scenarios. And

# EN

---

as Kavouss and Steve DeBianco both noted earlier Steve has created a three stress tests related to the group.

So if we go on to the next slide.

The this is the first of our set of recommendations regarding sanctions and specifically on OFAC sanctions.

We noted that before ICANN to enter into an RAA with a applicant from a sanction country it means to get an OFAC license. The terms of the application to become a registrar state that ICANN is under no obligation to seek such licenses and in any given case OFAC could decide not to issue a requested license.

The subgroup recommended that this sentence be amended to require ICANN to apply for and to use best efforts to secure an OFAC license rather than merely saying they are under no obligation the seek such a license.

This of course would only apply if the parties otherwise qualified to be a registrar.

And is not individually subject to sanctions.

We also recommend that during this licensing process ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing

# EN

---

communication with the potential registrar. That is the first of the OFAC recommendations. Next slide please.

Second, recommendation relates to the approval of GTLD registries to subgroup noted it was difficult for residents of sanctioned countries to file new are gTLD applications and make their way through the process.

The applicant guide book noted that ICANN sought and granted licenses as required in the past but OFAC could decide not to issue a requested license. The subgroup recommended that ICANN should commit to applying for any and best efforts to secure an OFAC license for all new gTLD registrants that fell into this category as long as they are otherwise qualified is can not individually subject to sanctions.

Again, we recommend that ICANN should be helpful and transparent with regard to the licensing process including ongoing communication with the applicant.

That's the second OFAC recommendation.

Next slide please.

Third OFAC recommendation, subgroup noted that some non U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants based on a mistaken



# EN

---

assumption that they must do so simply because they have the RAA contract with ICANN. Non U.S. registrars may also appear to apply OFAC sanctions if they cut and paste registrants agreements from U.S. based registrars that contain OFAC positions. We saw a couple of examples in the subgroup one of which was recommend identified by that registrar during the course of the group. May have been coincidental but in any case it was recommend identified.

We note that ICANN cannot provide legal advice to registrars but it can bring awareness of these issues to the registrars the.

So the sub group recommended that ICANN clarify to the registrars that the mere existence of RAA with ICANN does not require them to be required to comply with OFAC sanction we also recommend that ICANN should explore various tools to understand registrars the applicant laws by which they operate and accurately reflect those because e laws in the customer relationships including the customer contract.

I'll pause here and see if there are any remarks other questions?

We have one more OFAC recommendation.

Let's move on to the next I see a hand from Kavouss I don't know if that's a new hand?

# EN

---

THOMAS RICKERT: Kavouss if you have a question go ahead.

KAVOUSS ARASTEH: Yeah just a small question. In the two recommendations refer that ICANN use best effort wishful thinking to secure OFAC license. I'm not asking him, I'm asking ourselves, what is the degree of assurance that this sort of license be secured?

Thank you.

THOMAS RICKERT: Greg floor is yours.

GREG SHATAN: Thank you. First I would not describe best efforts as wishful thinking or any of this as wishful thinking. Indeed we have seen that in Work Stream 1 our recommendations, once approved by the board, after of course being approved by the charting organization were put into effect.

So I would expect that if these recommendations are approved all the way down the line, that they will be put into effect. And of course there's no assurance because we are talking about party under over which we have no control as to whether the licenses would be granted. I will note that with regard to the individual licenses, that ICANN seems to have a

# EN

---

perfect track record in secure these licenses when they have been applied for.

So, I think while past performance is no guarantee of future performance, one would generally expect the same degree of success in the future especially since we are asking ICANN to increase its commitment to getting these licenses. And even with their somewhat equivocal commitment they have in fact gotten the licenses that were sought.

That's I think as much as anyone can say about that. Or at least certainly as much as I can say.

Why don't we move on to the next slide he please.

The last of the OFAC recommendations relates to a general licenses. Not the specific licenses that we have been discussing so far.

OFAC general licenses cover particular classes of person and types of transaction.

ICANN could pursue general licenses to cover transactions integral to ICANN's role and managing DNS and contracts for Internet resources. This would enable individual transactions to proceed without needing specific license as long as they fell into the type of transactions and class of person that the general license covered.

# EN

---

A general license would need to be developed with the U.S. department of treasury, which is where OFAC sits within the structure. Which would then need to amend the OFAC regulations to add the new license or licenses. This regulatory process maybe a significant undertaking. With that in mind, the subgroup recommended that ICANN takes steps to pursue one or more general licenses. And that ICANN should first as a priority study the costs, benefits, timelines and details of the process. ICANN should then pursue the general licenses as soon as possible, unless it discovers significant obstacles are through the study. If they do discover significant obstacles ICANN should report this fact to the ICANN community. That's us.

All of us, even though it's not in the CCWG accountability. And seek the advice of the community on how to proceed.

If ICANN is unsuccessful in getting a general license then ICANN needs to find other ways to remove friction from transactions between ICANN and residents of sanctioned country.

Lastly, ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with effected parties.

That is the last of the OFAC recommendations.

# EN

---

Next slide please.

We move on to the set of recommendations regarding choice of law and choice of venue provisions in ICANN contracts.

The first of which relate to choice of law and venue provisions in the registry agreement.

We identified in the subgroups several alternative approaches for the registry agreement. And we also note these could also apply to the registrar accreditation agreement.

The menu approach, the fixed law or California approach. The carve out approach. The bestowing approach and the status quo approach. These are explained and discussed in the following slides. Next slide please.

First the menu approach. As it says here, the subgroup supports a menu approach. Where the governing law would be chosen before the contract is executed from a menu of possible governing laws. The menu needs to be defined, this could besting left to ICANN and the registries to define the menu.

The subgroup discussed the number of possible menus, which could include either one country or a small number of countries from each ICANN geographic region. In addition the menu could include the status quo which is no choice of law.

# EN

---

And or the registries jurisdiction of incorporation and or each of the countries in which ICANN has physical location and which thus have jurisdiction over ICANN.

Subgroup has not determined what the menu items should be. But believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA. This likely suggests having a relatively limited number of choices on to the menu.

The subgroup has not determined how options will be chosen from the menu e.g., the registry could simply choose from the menu or it could be negotiated with ICANN. In spite of what Parminder said in his remarks we do not identify, nor do we contemplate that it would simply be chosen by ICANN. If it's either a negotiation point or something that should be chosen by a the registry. But we did not make a determination.

So that in essence would need to be agreed on as part of the agreement as any agreement would be. But the question of how, if the registry gets to impose it on ICANN or whether it's a negotiated point is an implementation point that's beyond our subgroup's recommendations. Next slide please.

These are the remaining options. The California or fixed law approach which would make all contracts subject to California law.

# EN

---

And U.S. law as the governing law of the contract.

To be clear that's not the governing law of the parties to the contract. It's the law under which the contract is interpreted.

Next is the carve out approach. Where parts of the contract that would benefit from uniform treatment would be covered by uniform predetermined law. For instance California. And other parts perhaps those that relate more to the actions of the registrar within their own country would be governed by the law of the registries jurisdiction or by a law chosen using the menu approach.

Next is the Bespoke approach or the custom approach that would fit each contract to the country of of the registry operator. That would be the governing law essentially home law for the registry operator. Last of course is the status quo approach which is to retain the status quo of having no governing law clause in the RAA.

I see question from Steve in the chat.

Negotiate implies that ICANN would need to agree with whatever menu item selected by the contracting party right?

That is correct although we also contemplate the possibility that it would be selected by the registry operator without ICANN having the opportunity to object as long as it was on

# EN

---

the menu that had already been agreed toacy an overall concept.

Next slide please.

Next recommendation has to do with choice of law provisions and in are regular start accreditation agreements.

Here we simply note that the same approach should be taken for the RAA as for the RA.

The last choice of law approach this up with relates only to choice of venue and not to choice of law. So this is in registry agreements. Under the registry agreement disputes are resolved by binding arbitration pursuant on ICC rules. The RA base agreement contains a choice of venue choice provision stating the venue is Las Angeles California as both the physical place and the seat of the arbitration.

When entering into contracts with registries, we recommend that ICANN could offer a list of possible venues for arbitration rather than imposing Las Angeles California venue.

So there could be a venue menu. The registry that enters into the registry agreement could choose what venue it prefers at or before the time of execution of the contract.



# EN

---

If we take this menu approach. I see series of questions from Parminder in the chat. Little hard to wind back and see them all.

These options are listed as I said before because they were part of the discussion that led up to the recommendation that ultimately went there. So they are kind of fold in the recommendation itself as it goes. Immunity is not in the path of any of the recreations that were chosen. That's why it's not mentioned here. And is not does not fall within the discussion of any recommendations that were adopted that's why it doesn't appear in the main report.

So that concludes the second reading. Of the jurisdiction subgroups report. And I'd like to see if there's any questions?

THOMAS RICKERT: Thanks very much Greg. Now let me ask the floor whether there are any questions?

I see Parminder's hand is up. And since this is not the part where we all express our views to the extent required to make our views heard, we should go back to the two minute rule. So please make sure your intervention is not exceeding two minutes. Parminder the floor is yours please.

# EN

---

PARMINDER: Yes thanks I will not take that long at all. My question remains why the report carries a record of options which were actually not discussed at length they were never discussed on the maybe discussing some of the things that are missed. They are there in the report but why can't we do the same with immunity in the discussions which were put up in public inputs by many members repeatedly and asked for great thing that they do not connect to any particular recommendation that is not a very valid point but could effective also of a kind of immunity from one part of the whole machinery and here does connected to that part.

In any case it connects to the whole mandate. Why can't we have immunity options as part of the which we have other options which actually were discussed many times lesser than immunity issue. Thank you very much.

THOMAS RICKERT: Thanks very much Parminder in accordance with the usually work practices this report has reached consensus in the sub team. And therefore we are considering it as a plenary and for those who are think that their disliking of the recommendations go as far as objecting to the report as you such they should use that opportunity.

Anymore questions for Greg?

# EN

---

The line is now or the queue is now clear.

Now, we as a group now have the opportunity to get the report ready for public consultation to get some input from the community, whether they think we have done a good job with the recommendation and they support us in putting this into our final package or not. So I see that two hands are raised again. Can we keep this very brief since Parminder just spoke let's move to Kavouss or was that unrelated Kavouss? Kavouss go ahead.

**KAVOUSS ARASTEH:** Just a question when and how you treat [indiscernible] as related to the approval the recommendations and green light for the approval. Don't want we approve then the source remain and over. Please define a relation in them and take this reaction as we would not be for complete thank you.

**THOMAS RICKERT:** That's a good point Kavouss we can certainly go through the stress test now although they are not part of the recommendations I would suggest that we in pause this for a moment. Steve can I ask you to join us over here. Steve has not only volunteered to draft the test that has been communicated on the list but he's also volunteered to show

# EN

---

us through the stress test what they mean and whether they were successful.

So I he will review the results of your work in a moment right?  
Thanks so much Steve and for the others that will get back in the queue once we have gone over the stress test.

STEVE DELBIANCO: Thank you, Thomas. I assume you can take the PDF that was circulated this morning and just load pages 1, 2 and 3 and we can scroll through those. As you know you can click on the Adobe right hand corner and it will expand to the full screen if you want the read it in detail. Or you can refer to an email that Thomas sent 3 or 4 hours ago.

The stress test prepared at the request of Kavouss and I pulley supported the idea of doing a stress test instead of coming up with specific media reports and can examples. The facts of which are always open the dispute. When they are presented.

The elegance, the attractiveness of a stress test is to propose a plausible scenario that is not necessarily a probable scenario. But it's plausible and it's degree of abstraction the scenario where there doesn't need to be a debate about whether it did happen or whether it will happen. And there's to debate over the particles. It's stated in general terms which

# EN

---

are sufficiently general that enable us to focus not on which registrar did it, when did they do it and what was the reason, but instead focus on whether the accountability recommendations we come up with would actually improve the accident ability of ICANN and it's bylaws over what the status quo would be. There's three of them for the sanctions related recommendations and when I go through them I think you will quickly see we don't need to spend very much time on them in this group since they are very close what was used by the subgroup as they developed these three sanctions recommendations. In other words, the sanction recommendations include the stresses they sought to alleviate. If you recall the Greg led us through each of the sanctions anticipated the problem that occurred in the previous round or occurring today or could occur in the future.

First stress test number 1 is where registry or registrar would decline to the don't main registrations because they believe they are subject to sanctions that apply to the ICANN.

For example the U.S. has OFAC thanks this stress test should apply to any sanctions of any nation that could impair the ability of ICANN registrars to serve the community now the consequence of stress test is always listed as second. And it ICANN fail to provide the domain name in the bylaws. Left the

# EN

---

existing and right hand corner is how the proposed measures change that.

Under existing we noted the fact that ICANN management can at any point the legal or GTLD team could tell contract parties they are under no obligation to worry about sanctions the sanctions relate to their entity nobody is subject to a sanction just because it applies to ICANN and they are a contract party.

If ICANN failed to do this diligently, the community has the ability to challenge ICANN's inaction via a community IRP thanks to the work we did in Work Stream 1. Every five years a accountability and transparency team can make secondations and if they are rejected IRP can be brought to board to challenge that action by board.

Flipping to proposed measures we discussed what the proposed measures were in respect to clarifications and the clarifications conduct can which if it were credible and substantiated it should allow registrars to have the you insurance they need to go ahead and except registrations from the registrars that that country. So we prove that it's an a profit and ICANN is for the registrants. I can proceed I didn't care quickly to the other two Thomas.

# EN

---

THOMAS RICKERT: Let's check whether there are questions related to the stress test?

Okay.

Good to go Steve.

STEVE DELBIANCO: Thank you. The second one relates to a stress test of ICANN declining to enter into a registration agreement. Registration accreditation agreement or IRAA with an aspiring registrar a country that is subject to sanctions in a corporation. For example the United States applies sanctions through the on OFAC many European nations have sanction regimes of their own. I didn't think it was appropriate to focus only on OFAC by the stress tests are an example. The consequence of doing so ICANN failed on one of the core values that is "promoting con with the domain names with the respected qualified in the countries.

Today ICANN is under no obligation the seem a license to get around that sanction however one if the proposed measures in the right hand column is for ICANN to pursue general licenses to cover transactions and the general license would work but if a general license is not achievable another proposed measure is ICANN stated policy so ICANN is apply for and use best efforts to obtain a specific OFAC license for

# EN

---

that party. General OFAC license for all parties and specific license in respect to a single party. I note that the recommendations includes requests that ICANN can be transparent and interactive in had discussing with the community and the potentially registrar the progress of its infliction pore the license. The conclusion for this stress test is the proposed measures are an improvement helping ICANN meet I core value and be accountable to the domain registrants.

The third and final stress test is similar to that that we have a gTLD.

THOMAS RICKERT: Sorry Steve let's pause for a second to see if there's any questions relating to the second stress test?

Doesn't seem to be the case. Let's proceed.

STEVE DELBIANCO: Thank you. So a applicant in the next round or subsequent rounds of gTLD application, the applicant in entering into an agreement with ICANN, ICANN in a stress test number 3 would suggest that it might fail to provide sevens. Services lying excepting a application, processing the application doing the evaluate that if it failed to provide services to a new gTLD applicant for a country that is subject to sanctions that apply to the corporation. ICANN would again fail at the core values



# EN

---

same as the previous. And one is for ICANN to pursue, to be committed to pursue specific OFAC license for all specific applicants that are qualified to be a registry applicant. Under the previous stress test the recommendation for a general license for ICANN to obtain one eliminates the need for specific ICANN it's repeated here. The conclusion is that proposed measure would be an improvement with respect to accountability and serving the core values.

So Thomas those are the three stress tests. I think it's obvious that they don't add substantial incremental value to the work of the subgroup at this point because the subgroup considered these kinds of scenarios when they put together the recommendation. Nonetheless we recycled some methodology we achieved in Work Stream one where we came up with with plausible scenarios and ran them by existing and proposed measures to see if we achieving ability.

THOMAS RICKERT: Thank you very much Steve. Any questions on the third stress test?

There doesn't seem to be the case. So thank you again Kavouss for recommending that we do these three stress tests and Steve for drafting and explaining them. And since you know that the stress test which have been requirement for

# EN

---

Work Stream 1 are not a requirement for Work Stream 2, you know nonetheless we did them which I think was very helpful. So we again exceeded the expectations of the plenary didn't we?

He's smiling.

Okay, so we had a queue that was and those in the queue were patiently waiting to be heard. Thanks again Steve. Parminder the floor Parminder is now lowered his hand. Parminder did you still want the speak?

Okay that seemed to be an old hand to Tijani, please.

TIJANI BEN JEMAA:

Well on behalf of the government of Brazil liked to formerly object to both recommendations as read out by Greg stat an. As we consider they do not address adequately areas of key concern to us. As clearly indicated in our minority opinion or dissenting opinion. That we have filed. So in the light of the CCWG charter, we request that our document, minority opinion or dissenting statement to be attached to the report and be when it is submitted to for public consultation. And in that regard Mr. Chair I understand you are also proposing that a transcription of this session also included, attached we do not have any objection to that of course. We would like to just make sure that it will be identified in a distinct way from what

# EN

---

is requested per the charter which is the report itself in the minority opinions. And I'd like also to take the opportunity to invite subworking group participants the wider CCWG participants in the wider community to consider the all the elements that would be before them. Thank you.

THOMAS RICKERT: Thanks very much Tijani. Parminder your hand is raised again would you like to make a recommendation?

PARMINDER: Yes thank you. I would like it in the [indiscernible] but let me also speak that I do also object to the board as it stands and they associate for it to the reason it's very adequately addresses the mandated given to it and does not even fully explore the issues that were to its mandate. And because of that, because it was initiated by the small concentration of important issues considered by many but they would not put one of them in there and given adequate time.

And I also would like to at that if during the reading, and the recommend will not need to the obtain those would like to make a point in making this part efficient and time has really been the problem as it was said also in the last stages of subgroup then it should of been managed better because people wanted certain all times to discuss those issues. And

# EN

---

thank you so much. It was really to be [indiscernible] a lot of planning. Thank you for everything [indiscernible]

THOMAS RICKERT: Thanks for your kind words Parminder and thanks for all your contributions.

Let's now proceed to the second reading. So get ready for marking objections with a red flag in the Adobe room. We are using the Adobe room for this exercise. It makes it easier to capture what the plenary wishes including the remote participants. And Olga is asking how we include the stress test in the report? We make them an appendix to the jurisdiction sub team's report as well as the paper from Brazil, I intentionally did not call it minority statement now as you may have noticed and we will include the additional language as you have suggested by Jorge. With these qualifications, those that object to submitting the report for public consultation and deeming it a successful second reading please use the red flag in the Adobe room.

If you are support the recommendations there's nothing you need to do. Because we do the consensus test by just checking the level of objection.

So I sigh Parminder's objection and Brazil's objection is also noted.

# EN

---

We have Deliala and KavoussKavouss objecting.

Okay.

Thanks for this. And I guess with this level of disagreement the over all support level or objection level hadn't really changed from the second from the first reading, I apologize, so therefore let me congratulate Greg and his team for a successful second reading. Let's give him a round of applause.

[applause]

Great, so we can conclude that agenda item. Which now allows us to go to AOB. So can I ask when there's any AOB from the floor?

No. Actually I do have an AOB. And I need to look into my bag for it.

We have another transition in this group. As you know, our dear friend Leon is going to leave us at the end of this meeting. And he's going to move to the dark side as [indiscernible] just said. And I think it's now time for us to express our appreciation, not only have we found an excellent co chair but a great friend and personally not only did I enjoy Leon's professionalism and expertise but whenever I sort of started wishing to bite into the table because I was getting

# EN

---

nervous or something, Leon would always stay calm. You know nothing could bring him out of balance. And he would say moment it will be fine and moment can take 3 or 4 or 5 hours by mechanic can standards. But he always stayed calm and applied the magic do you know his name name? We call him Leon magic Sanchez he earns that named. Do you know the Ompamention. Those in Berlin may know they have traffic lights with a green man if you go and Redman stops you or you should be a good example for roll model for kids. And it's a good opportunity to hand this over to you it shows green light ahead for Leon. All of the best for board efforts and we have a Trojan horse in the board a second Trojan horse with Becky thank you very much and let me give you a hug.

[applause]

And having said that, let us whole hardly and warmly welcome to Johnny who is going to be Leon's successor and to Johnny so modest he said I'm not going to take the seat before Leon officially but you are very welcome to the team of co chairs. Let's give him a round of applause as well.

[applause]

Okay.

Annuity raised his hand. Annuity any last minute AOB?

# EN

---

Thomas. Let's let Leon go first.

LEON SANCHEZ:

I want to thank you for not only the T shirt but all of the work we have done together. It's been an amazing experience to work with these very diverse, very intense and very thoughtful group of people. I really have learned a lot from all of you from all and each of you. And I want to thank you all for your kind support, for having these battles together to get us across the different bridges that we had to cross and burn at the same time. And [chuckling]. And it's been quite rewarding. Now I have the opportunity to continue to serve the community in another role. I promise I don't let you down. Thank you very much again.

THOMAS RICKERT:

So you wanted to grab the mic?

NEILS TEN OEVER:

Thanks so much Thomas. So while we are now getting close to delivering the report, and only having spent so little money of our budget we could end as well having so much brain power and experience congregated within our work stream 12 is and 2 within CCWG that perhaps we could take the time, the last time we have together to take it to see perhaps what

# EN

---

possible horizons or advice could be for how to look beyond. So would it be possible to work in the subgroups a bit more on to see if there's a leeway or advice or some high level documents on how we can think about implementation. Because that way there would not be a hard cut between Work Stream 2 and implementation. Would that be a thing we could consider? Or is everything desired we want to see each other rather less than more.

THOMAS RICKERT: I guess that's a good points Niels. I think what we should consider, but that's may be for one of the next plenaries to discuss is actually to do implementation oversight or set a process up for implementation oversight as we usually do with PDPs and other recommendations that come out of the community. So that is perfectly possible. Let's consider how we can do that. Probably there's no budget for such initiative. But we can check that.

So that's good advice. So now let's move to agenda item 9 that's the co chair statement.

JORDAN CARTER: Before I do I want to mention a one of the point about his magic. A lot of work we do in this environment is important. It reflects deeply held values and passionate commitments



# EN

---

that many of us have. And temperatures can rise and things can get a bit heated and fears can be overly friendly expressed and the magic of humor is something that Leon brought to the situations in in a perfect and exemplary way more than once. As you have been the youngest of the co chairs standing in more Matthew Vay that vanished off earlier. Thanks from me also Leon.

In terms of co chairs write something to the list instead of make you wait while do this now. We might on did that.

But I think this key for this meeting is Work Stream on track and as of the two second readings today all of the parts of the project are pretty much ready to go. A sequence of public comments will be under way shortly. And the thing I urge you all to do in SO,s and ACs and the part of the community you are in is take the news of organizations out and see that your organizations have a chance to become familiar with them and understand them. As we already discussed a the the beginning of today the overall public and start?

[Music]

JORDAN CARTER: Resuming that verbal summary. As I was saying the approval produces next year doesn't give us a opportunity to have a full litigation of all of the issues in in the report. The public

# EN

---

comment is designed to identify inconsistencies that we can turn into consistencies through that process rather than have a full litigation. So the earlier SOs and ACs are familiar with all of the contents and better. So we will prepare a written statement on those lines noting the jurisdiction on the statement this morning and noting the second reading done for jurisdiction and transparency and noting the approval process to come and circulating that to the community and later on hopefully in the next day or so. So I think that's the sort of verbal report back. I'll hand it back to Thomas or Leon if any of you have anything to add and wrap up.

THOMAS RICKERT: We have another intervention from Kavouss.

KAVOUSS ARASTEH: The intervention is quite simple this platform was very sexist platform for launching we have two person moving to the board and two to the board. Who is the next thank you?

THOMAS RICKERT: If I move to the board it would raise the IQ both of the CCWGs as well as the board.

[Laughter].

# EN

---

LEON SANCHEZ: Standards of behavior Thomas, standards of behavior.

THOMAS RICKERT: Thank you so much Kavouss for that intervention. I think we can now adjourn and I would like to thank you all in the room and thank all of the tech Abu Dhabi tech staff that helped to make this work. And thank the remote participants our excellent staff and co chairs is and all we have forgot to mention. Now this meeting is adjourned thanks much the recording can be stopped.

[ END OF TRANSCRIPT ]