



EN

AL-ALAC-ST-0118-04-00-EN

ORIGINAL: English

DATE: 14 January 2018

STATUS: Ratification Pending

AT-LARGE ADVISORY COMMITTEE

ALAC Statement on Recommendations on ICANN Jurisdiction

Introduction

Bastiaan Goslings, ALAC Vice Chair and ALAC Member of the European Regional At-Large Organization (EURALO), Hadia Elminiawi, ALAC Member of the African Regional At-Large Organization (AFRALO), Erich Schweighofer and Tatiana Tropina, members of EURALO, Stanley Osao, member of the Asian, Australasian, and Pacific Islands Regional At-Large Organization (APRALO) and Vanda Scartezini, member of the Latin American and the Caribbean Islands Regional At-Large Organization (LACRALO), developed an initial draft of the Statement on behalf of the ALAC.

On 11 January 2018, the first draft of the Statement was posted on its [At-Large Workspace](#).

On that same date, ICANN Policy Staff in support of the At-Large Community sent a Call for Comments on the Statement to the At-Large Community via the [ALAC Work mailing list](#).

On 13 January 2018, a version incorporating the comments received was posted on the aforementioned workspace and the ALAC Chair requested that Staff open an ALAC ratification vote.

In the interest of time, the ALAC Chair requested that the Statement be transmitted to the ICANN public comment process, copying the ICANN Staff member responsible for this topic, with a note that the Statement is pending ALAC ratification.

ALAC Statement on Recommendations on ICANN Jurisdiction

ICANN is responsible for globally coordinating the hierarchical distribution of a set of critical Internet resources. In its daily operations, local applicable law within a certain jurisdiction will preside over ICANN policies for end-users and business within that jurisdiction. But insofar as ICANN (i.e. the outcome of its multistakeholder policy making processes) determines the impact of decisions made within its remit, it is imperative that global interests are kept in mind and that no particular jurisdiction benefits over others because of what ICANN does.

The IANA transition ended the special role of the United States government vis-a-vis ICANN's role, which essentially provided a right of veto for the U.S. when it came to changes in the DNS root zone file and formalized ICANN's future accountability to the global multistakeholder Community. However, being a cooperation and inevitably based and headquartered in a particular jurisdiction left remaining challenges in terms of this accountability; as clearly stated in Annex 12 of the CCWG-Accountability's final report for Work Stream 1 (WS1), ICANN will stay incorporated under the laws of the U.S. State of California. Because of this, some feared the risk of U.S. federal government regulating ICANN activities to the detriment of the interests of other nation states and/or stakeholder groups. Which would mean the United States, because of "jurisdiction", would still have more power over ICANN than other nation states.

The ALAC very much appreciates the work done by CCWG-Accountability WS2 Jurisdiction Subgroup, and the recommendations it has published for public comment in November 2017 to tackle ICANN's jurisdictional challenges. And the ALAC agrees with all consensus recommendations as put forward by the Subgroup. The ALAC especially wants to highlight the following recommendations:

- ICANN should apply for and use best efforts to secure an Office of Foreign Asset Control (OFAC) license if the party from a sanctioned country is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar;
- ICANN should commit to applying for and using best efforts to secure an OFAC license for all new gTLD applicants from sanctioned countries if the applicant is otherwise qualified (and is not on the specially designated nationals (SDN) list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant;
- ICANN should clarify to registrars that the mere existence of their Registrar Accreditation Agreement (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;
- ICANN should take steps to pursue one or more OFAC "general licenses", initially by prioritizing a study of the costs, benefits, timeline and details of the process: these licenses would have to be developed in conjunction with the U.S. Department of the Treasury. They would 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.

The ALAC trusts that these recommendations will help ICANN in taking further steps to reduce and hopefully eliminate the effect U.S. sanctions against foreign governments can inadvertently have on Internet users and businesses in those sanctioned countries.

As reflected by the size of the draft report, the Jurisdiction Subgroup's work is impressive: identifying the different "layers of jurisdiction", attempting to determine the influence of ICANN's existing jurisdiction(s) relating to the resolution of disputes (i.e. governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms, involving the community with a Questionnaire to provide factual information, comprehensively reviewing the litigations in which ICANN has been a party, and much more.

The ALAC is convinced the comprehensive findings of the Subgroup will assist further work that needs to be done, especially when it comes to 'discussions of limited, partial, relative or tailored immunity for ICANN that did not come to conclusion'.

As proposed by the Subgroup and which the ALAC fully supports:

"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."



Comment on Work Stream 2 Recommendations on ICANN Jurisdiction

Status: FINAL

Version: 3

14-Jan-2018

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

Mandate for Work Stream 2 (WS2) Recommendations on ICANN Jurisdiction

The CCWG-Accountability, Work Stream 2 (WS2) project on jurisdiction was created as a result of consensus recommendations in the CCWG-Accountability's Work Stream 1 final report, Recommendation 12:¹

As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.

This was further explained in Annex 12 of the WS1 final report:

At this point in the CCWG-Accountability's work, the main issues that need be addressed 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.

BC General Comment

The BC has reviewed the Recommendations on ICANN Jurisdiction posted for public comment on 14-Nov-2017.²

As a general comment, we believe that the recommendations properly address the scope that was established in the CCWG-Accountability's Work Stream 1 final report, Recommendation 12 (shown above).

¹ Feb-2016, CCWG-Accountability's Work Stream 1 final report, at <https://community.icann.org/pages/viewpage.action?pageId=58723827>

² ICANN public comment page at <https://www.icann.org/public-comments/recommendations-on-icann-jurisdiction-2017-11-14-en>

We therefore do not agree with the noted minority view that 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.”³

In the BC's view the draft report meets the objectives set forth for this WS2 project in the CCWG-Accountability's Work Stream 1 final report.

Below, we comment on the specific recommendations on sanctions and choice of law/choice of venue.

BC Comment on Recommendations Relating to OFAC Sanctions

The BC supports the recommendations to address issues relating to U.S. government trade sanctions administered by the Office of Foreign Asset Control (OFAC).

In order for all global internet users to participate in ICANN processes and contracts, ICANN should increase its commitment to seek and obtain appropriate sanctions relief. The recommendations include affected interactions with ICANN, such as:

- ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses
- Approval of gTLD Registries
- Application of OFAC Limitations by Non-US Registrars
- General Licenses, for entities “such as registries and registrars entering into RAs and RAAs, Privacy/Proxy Accreditation, support for ICANN funded travelers, etc.”

In particular, the BC supports the 4th recommendation, so that ICANN will commit to apply its best efforts to support participation in ICANN meetings by business users and registrants from countries that are subject to sanctions. That should be interpreted to commit the ICANN legal team to vigorous pursuit of relief, whether through specific or general licenses or waivers.

These recommendations should be implemented *regardless of whether the current US administration seems disinclined to approve OFAC license requests*. What's important is for ICANN to be consistent and persistent in applying for sanctions relief – no matter what government is in place at the time.

BC Comment on addressing non-OFAC sanctions

In addition, sanctions are often applied by non-US governments, such as the European Union's Common Foreign and Security Policy (CFSP).⁴

The BC therefore asks whether the recommendations could be generalized enough so that ICANN would take steps to obtain relief for participants affected by any or all sanctions – not just OFAC sanctions from the US government.

³ Dissenting Statement of Brazil, 24-Oct-2017, at page 170 of the CCWG-Accountability WS2 Jurisdiction Sub-group Recommendations, at <https://www.icann.org/en/system/files/files/ccwg-accountability-ws2-jurisdiction-14nov17-en.pdf>

⁴ European Union Common Foreign and Security Policy (CFSP), at https://eeas.europa.eu/topics/common-foreign-security-policy-cfsp_en

BC suggests Stress Testing for Recommendations Relating to Sanctions

BC members observed and participated in the work group that drafted these recommendations. BC member Steve DelBianco drafted three ***Stress Tests*** to assess how sanctions recommendations would improve ICANN's accountability when faced with plausible scenarios that impose stress on the ICANN organization and community. These stress tests are shown in the annex to this comment.

An improvement in accountability can be seen when comparing the status quo with the structures and processes that would result from implementing the WS2 recommendations.

BC General Comment on Recommendations relating to Choice of Law and Choice of Venue Provisions

The recommendations identify appropriate jurisdiction issues that ought to be addressed in ICANN's contracts and agreements with registrars and registries. Recommendations suggest "possible changes to the RA and RAA for study and consideration by ICANN the Organization, the GNSO and the contracted parties. "

The BC has previously noted that the process for amending the base registry agreement for new gTLDs needs to add explicit mechanisms so that the non-contract community can advise ICANN about priorities and issues to be used in negotiating with the contract parties. This principle applies to these recommendations, and we suggest that the working group add explicit reference to contract amendment procedures and assess whether these procedures give the ICANN community adequate leverage to press ICANN to negotiate on behalf of the community.

BC Comment on Recommendations relating to Choice of Law and Choice of Venue Provisions

The recommendations set forth 5 alternative approaches for community consideration, regarding Choice of Law and Choice of Venue for Registry and Registrar agreements:

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., New York) 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.

Of the alternatives recommended, the BC opts for Alternative 5, the **Status Quo Approach**, which would retain the current practice of having no “governing law” clause in the RAA.

The Status Quo is the result of over a decade of negotiation and amendments agreed to by ICANN and contract parties, so it presumably represents an appropriate balance. Moreover, the status quo agreements and contracts are also apparently acceptable to many new entrants who have recently become registries and/or registrars.

And on principle, the BC favors retaining the status quo in order to maintain certainty and predictability for businesses.

Conclusion

The BC applauds the WS2 Jurisdiction chair and project team for their determination to stay within the limited scope for this project per the Work Stream 1 Final Report and the ICANN bylaws, and for reaching consensus despite some divergent views.

--

This comment was drafted by Steve DelBianco, Claudia Selli, and Marie Pattullo.

It was approved in accord with the BC charter.

Annex

Stress Tests for Recommendations of Work Stream 2 Jurisdiction

‘Stress Testing’ is a simulation exercise where plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect an entity or system. In the financial industry, for example, ‘stress testing’ is routinely used to evaluate the strength of banks facing plausible scenarios of external crises.

As in Work Stream 1, CCWG-Accountability can use stress tests to assess how recommendations would improve ICANN’s accountability when faced with plausible scenarios that impose stress on the ICANN organization and community. An improvement in accountability can be seen when comparing the status quo with the structures and processes that would result from implementing the WS2 recommendations.

For the Jurisdiction track in Work Stream 2, the BC recommended three Stress Tests regarding the WS2 Jurisdiction recommendations to address sanctions:

Stress Test #1: A registrar or registry declines to accept a domain registration because they believe they are subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)	
Consequence(s): ICANN is failing to provide domain names to aspiring registrants from some countries.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>ICANN management is able to explain the extent to which sanctions affecting ICANN would also affect contract parties.</p> <p>The community has the ability to challenge ICANN inaction on this issue, via a Community IRP.</p> <p>If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.</p>	<p>One proposed measure is to have ICANN clarify to registrars that the mere existence of their Registration Accreditation Agreement (RAA) with ICANN does not require the registrar to comply with sanctions that apply to the ICANN corporation.</p> <p>This clarification, if credible and legally substantiated, should allow registrars to accept domain registration requests from citizens of any country.</p>
CONCLUSIONS:	
Existing measures may not be adequate.	Proposed measures are an improvement in helping ICANN be accountable to global domain registrants

Stress Test #2: ICANN declines to enter into a Registration Accreditation Agreement (RAA) with an aspiring registrar from a country that is subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)

Consequence(s): ICANN is failing on its Core Value “promoting competition in the registration of domain names”, with respect to aspiring and qualified registrars from some countries.

EXISTING ACCOUNTABILITY MEASURES

PROPOSED ACCOUNTABILITY MEASURES

For ICANN to enter an agreement with a party from a sanctioned country, it will need an OFAC license. Currently, “ICANN is under no obligation to seek such licenses...”

The community has the ability to challenge ICANN inaction on this issue, via a Community IRP.

If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.

One proposed measure is for ICANN to pursue one or more OFAC “general licenses” to cover transactions such as registry and registrar contracts, Privacy/Proxy Accreditation, ICANN funded travelers, etc. A general license would enable these transactions without the need for specific licenses.

If a general license is not possible, another proposed measure is to amend ICANN stated policy to require ICANN to apply for and use best efforts to secure a specific OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions).

ICANN should be helpful and transparent about the licensing process, including ongoing communication with the potential registrar.

CONCLUSIONS:

Existing measures may not be adequate.

Proposed measures are an improvement in helping ICANN meet its Core Values and be accountable to global domain registrants.

Stress Test #3: ICANN fails to provide services to a new gTLD registry applicant from a country that is subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)

Consequence(s): ICANN is failing on its Core Value “promoting competition in the registration of domain names”, with respect to aspiring and qualified registry operators from some countries.

EXISTING ACCOUNTABILITY MEASURES

PROPOSED ACCOUNTABILITY MEASURES

For ICANN to enter an agreement with a party from a sanctioned country, it will need an OFAC license. Currently, “ICANN is under no obligation to seek such licenses...”

The community has the ability to challenge ICANN inaction on this issue, via a Community IRP.

If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.

One proposed measure is for ICANN to pursue OFAC licenses for all registry applicants otherwise qualified.

ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

CONCLUSIONS:

Existing measures may not be adequate.

Proposed measures are an improvement in helping ICANN meet its Core Values and be accountable to global domain registrants

**Statement of the Non-Commercial Stakeholders Group on
the November 2017 Recommendations of the
CCWG-Accountability Work Stream 2 Subgroup on Jurisdiction**

1. The Non-Commercial Stakeholders Group (NCSG) appreciates the opportunity to comment on the report of [the CCWG-Accountability Work Stream 2 Subgroup on Jurisdiction](#) ('the subgroup'). The subgroup has put forward recommendations related to two sets of issues: Firstly, issues related to government-imposed sanctions; namely, those administered by the US government by the Office of Foreign Asset Control (OFAC). Secondly, issues related to Choice of Law and Choice of Venue Provisions in ICANN Agreements. In short, we are supportive of the recommendations, however we offer some pragmatic amendments that we believe deserve further consideration by ICANN.
2. The NCSG is the most diverse body in the Generic Names Supporting Organization, with individual and organisational members from 128 countries. As a network of individual and organisational academics, Internet end-users, and civil society actors representing the interests of non-commercial registrants, we represent a broad cross-section of the global Internet community.

Recommendations related to US government sanctions

3. As the global coordinator of the Domain Name System (DNS), ICANN should serve DNS users and domain name registrants globally, regardless of where it may be incorporated or domiciled. As the issues reported by various groups in response to the questionnaire of the subgroup illustrate, there are documented instances where ICANN's jurisdiction has prevented ICANN from carrying out its functions. For example, sanctions imposed by the US government affected domain name registrants and users in certain countries.
4. The NCSG strongly agrees with the proposals of the subgroup to overcome the accessibility issues that US sanctions create, and support measures being taken to provide relief for those who are not on the US government's Specially Designated Nationals (SDN) list. We support all of the recommendations related to OFAC sanctions. However, we believe that the following improvements could significantly increase the value and clarity of the OFAC-related recommendation in the report:
 - ICANN should prioritize obtaining one or two General OFAC licenses. Therefore, we suggest that the recommendation to obtain General OFAC licenses be more clearly prioritized in the report; and
 - As, in our view, this is one of the most important recommendations that ICANN should act upon, we believe that the report should propose a detailed timeline for the implementation of this recommendation by ICANN.

Recommendations on the Choice of Law and Choice of Venue Provisions in ICANN Agreements

5. The NCSG believes that, as it has been highlighted in the report, the recommendations on the Choice of Law should be discussed with the ICANN organization, Generic Names Supporting Organization, and the contracted parties.

Need to discuss jurisdictional issues further

6. Given that the jurisdiction subgroup has indicated that there is no support for moving ICANN's place of incorporation out of California, the NCSG supports further discussions of jurisdiction-related concerns, as the Recommendations propose. We acknowledge that the remit of the subgroup was limited, and that Work Stream 2 could not address all the possible issues due to time constraints. For example, ICANN's jurisdiction might have actual implications on the operation of gTLDs and ccTLDs, yet the subgroup did not discuss these implications within Work Stream 2 since the ccTLD community saw such discussions as within its remit. While some have argued that recent court cases in the US might have resolved some of the jurisdictional issues that were raised for certain ccTLDs, there may be a need to further elaborate on possible jurisdictional challenges, not only within the ccTLD community, but among the ICANN community as a whole.
7. Thank you very much for considering our comments. We are at your disposal should you require clarification on our recommendations.

Joint Registries/Registrars Stakeholder Group Statement

Issue: **Recommendations on ICANN Jurisdiction**

Date statement submitted: **10 January , 2018**

Reference URL: <https://www.icann.org/public-comments/recommendations-on-icann-jurisdiction-2017-11-14-en>

Background

The CCWG Accountability (Work Stream Two) subgroup has issued a report with recommendations on ICANN Jurisdiction. (subgroup [wiki page](#))

The report contains recommendations regarding (1) possible application of US sanctions under the Treasury Department's Office of Foreign Assets Control (OFAC), (2) choice of law and venue clauses in registry/registrar agreements with ICANN; and a suggestion for consideration of another multistakeholder process of some kind to allow for further consideration, and potentially resolution, of jurisdiction-related concerns that were raised but not resolved by the subgroup. I have summarized the recommendations in the attached document.

The report is 29 pages, with the executive summary on pages 3 to 8. In addition, there are six annexes comprising another 238 pages:

- Annex A – Subgroup-created public questionnaire and responses;
- Annex B – Questions to and Responses from ICANN Legal;
- Annex C – ICANN Litigation Summaries;
- Annex D – Proposed Issues List;
- Annex E – Dissenting Statement from Brazil; and
- Annex F – 27 Oct. 2017 Transcript - CCWG Accountability Plenary Discussion on Jurisdiction.

Summary of the CCWG report on Jurisdiction:

<https://docs.google.com/document/d/140hksqnXVB8KGvMe88UINqo2USbPhw63StAgnk5kRyg/edit>

Draft RySG and RrSG comment

The Registries Stakeholder Group (RySG) and Registrar Stakeholder Group (RrSG) welcome the opportunity to comment on the proposed Recommendations on ICANN Jurisdiction. The RySG and RrSG want to express their appreciation for the work and commitment of the members of the CCWG Accountability Work Stream Two on this issue.

The RySG and RrSG wish to make the following comments on the proposed recommendations.

We welcome the subgroup's effort to investigate issues between ICANN's goal of administering the Internet as a neutral global resource and the possible imposition of sanctions by the US or other countries. We support the report's recommendations with regard to OFAC licenses and the suggestion to provide clear information about the limited applicability of OFAC restrictions for non-US based parties under contract with ICANN.

The RySG and RrSG appreciate that the recommendations respecting choice of laws and choice of venues clauses (in form registry/registrar contracts) with ICANN are presented as suggestions for consideration by ICANN and the CPH and acknowledge the particular importance of allowing registries and registrars to have direct influence over changes with the potential to introduce broad changes to their contractual frameworks.

With respect to the suggestion for another multistakeholder process to discuss unresolved jurisdiction issues, the RySG and RrSG do not support such a proposal.

Jurisdiction has been a topic of discussion within the CCWG Accountability for over three years, culminating in recommendations respecting OFAC and governing law/venue clauses that have the potential for yielding positive results for the overall ICANN community.

But further discussions regarding jurisdiction in an ICANN context seems unwise. Three years is more than enough time to develop proposals that have a reasonable chance of gathering community support, and indeed that appears to be exactly what has happened. Sufficient time, attention and community resources have been given to the topic.

Cross Community Working Group (CCWG) on Accountability WS2

December 14, 2017

Case no.:

/

Danish comments regarding the document titled “CCWG-Accountability WS2, Jurisdiction Sub-group, Recommendations, November 2017”

Denmark welcomes the opportunity to comment on the recommendations contained in the above-mentioned document. We would like to thank all participants in the sub-group and in the CCWG for their dedication to developing recommendations on this difficult and important subject on jurisdiction.

Denmark supports the proposals contained in the document. We attach specific importance to the recommendations regarding choice of law and choice of venue provisions.

We favour a menu approach composed of a small number of countries from each ICANN Geographic Region concerning the governing law of contracts, as this will be a benefit for registries and registrars in concluding contracts with ICANN. In this way, it will contribute to ICANN accountability and in ICANN serving global internet community. The same goes for the choice of venue in registry agreements.

In the document on page 24, it is stated: “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.”

Denmark finds that if a menu approach is implemented, it is important that the weak party, i.e. registry or registrar, freely can choose the applicable law and venue, and that it is not left to the parties to negotiate since ICANN is the only one that registries and registrars can enter into contract with.

We suggest that this will be reflected in the final recommendation on jurisdiction.

Denmark is committed to participating in the continued work of the CCWG Accountability and its sub-groups. ,

Yours sincerely,

Finn Petersen
Director of International ICT Relations

**DANISH BUSINESS
AUTHORITY**

Dahlerups Pakhus
Langelinie Allé 17
DK-2100 København Ø
Denmark

Tel +45 35 29 10 00
Fax +45 35 29 10 01
VAT no. 10 15 08 17
erst@erst.dk
www.erst.dk

**MINISTRY OF INDUSTRY,
BUSINESS AND FINANCIAL
AFFAIRS**

Gouvernement français

Commentaires du gouvernement français sur les recommandations de la piste de travail 2 – première consultation publique

Le gouvernement français remercie le sous-groupe en charge de la juridiction pour les nombreux efforts consentis pour faire avancer cet enjeu crucial pour renforcer l'*accountability* de l'ICANN envers l'ensemble de la communauté multipartite.

Depuis son lancement en juin 2016, le sous-groupe juridiction a connu de profonds désaccords parmi les membres qui témoignent d'une importante divergence de vues sur le mandat du groupe, ses objectifs et le périmètre des solutions envisageables.

Bien que les propositions du rapport sur la juridiction de l'ICANN aillent dans la bonne direction, le gouvernement français estime qu'elles ne seront pas suffisantes pour véritablement apporter une solution aux problématiques soulevées par l'exercice unilatéral d'une juridiction particulière sur une organisation dont le mandat est de gérer un bien commun mondial, le système des noms de domaine.

Actuellement, l'ICANN est une entité de droit américain, ce qui comporte de nombreuses conséquences quant à la redevabilité de l'ICANN vis-à-vis de l'égalité entre les différentes parties prenantes. En effet, ce statut induit que les activités de l'ICANN restent encadrées par le droit d'un seul Etat, celui des Etats-Unis, et que les juridictions américaines ont une compétence de droit. Or, l'objectif d'amélioration de la redevabilité de l'ICANN envers toute la communauté Internet induit que sa responsabilité juridique le soit envers toutes les parties prenantes sans qu'aucune ne soit favorisée par rapport à une autre et qu'aucun pays en particulier ne puisse intervenir, directement ou indirectement, dans la pleine réalisation par l'ICANN de ses missions d'intérêt public mondial.

Compte tenu des fortes divergences au sein du sous-groupe de travail, le gouvernement français encourage les membres à explorer de nouvelles pistes, en particulier proposant d'instaurer des immunités, notamment partielles, de juridiction à l'ICANN afin de garantir son autonomie et sa redevabilité envers l'ensemble de la communauté Internet mondiale.

Note – This is not an official translation. This is simply a machine translation which is provided for information purposes while the official translation is being completed.

French Government

Government comments on the recommendations of the work track 2 -First public consultation

The French government thanks the sub-group in charge of the jurisdiction for the many efforts made to advance this crucial issue to strengthen the *Accountability* Towards the entire multiparty community.

Since its inception in June 2016, the jurisdiction sub-group has experienced profound disagreements among members that demonstrate a significant divergence of views on the mandate of the Group, its objectives and the scope of possible solutions.

Although the proposals in the report on ICANN's jurisdiction are moving in the right direction, the French government believes that they will not be sufficient to genuinely provide a solution to the issues raised by the exercise Unilateral of a particular jurisdiction over an organization whose mandate is to manage a global common good, the domain Name System.

Currently, ICANN is a United States entity, which has many implications for ICANN's accountability for equality between the various stakeholders. Indeed, this statute induces that ICANN's activities remain framed by the law of one State, that of the United States, and that the American courts have jurisdiction over the law. However, the goal of improving ICANN's accountability to the entire Internet community induces that its legal responsibility is to all stakeholders without any advantage over another and that no country in Individual may not intervene, directly or indirectly, in the full implementation by ICANN of its global public service missions.

In view of the strong divergences in the sub-working group, the French Government encourages members to explore new avenues, in particular proposing to introduce immunities, including partial, of jurisdiction in ICANN in order to To ensure its autonomy and accountability towards the entire global Internet community.



Ministero dello Sviluppo Economico
Istituto Superiore delle Comunicazioni e delle Tecnologie dell'Informazione

Italian Comments on CCWG-Accountability WS2 Jurisdiction Sub-group Recommendations

Italy welcomes the possibility to provide comments in response to the Jurisdiction Sub-Group Recommendations and wants to thank the Jurisdiction Sub-group members for their valuable work.

Italy reaffirms that all Governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet (Art. 68 of Tunisi Agenda). Conflicts of jurisdiction on the Internet might have implications with respect to the “EU acquis”, e.g. as regards data protection and geographical indications.

ICANN is the administrator of a global resource, so we will support any solution that ensure that its functioning should not be biased by the jurisdiction of the hosting country.

Furthermore, we believe that the future jurisdiction and applicable laws should safeguard the application of principles enshrined in the international conventions in Private International and Procedural Law.

Concerning the draft recommendations please find below our comments:

- We believe that the “status quo” option will not be a proper solution for the future, given the past experiences with regard to the New gTLDs Program.
- Implementing the “California approach” could eventually create a sort of undesirable hierarchy among jurisdictions.
- We express some concerns regarding the other three options too. A system with a clear legal framework is needed to implement them which has not been defined properly yet.

Special reference also need to be made to Child Protection. There is a concern about any move away from the present arrangements if that would permit or encourage future Registries to engage in “venue shopping” in search of a jurisdiction with materially lower standards of child protection laws or regulations, or materially weaker mechanisms to enforce compliance of hitherto widely accepted standards. Therefore, ICANN should make clear that, irrespective of the choice of jurisdiction, in all relevant circumstances the terms of the UN Convention on the Rights of the Child must be met or exceeded.

In conclusion, Italy believes that further considerations and discussions are required before the approval of any options.

Yours sincerely,

Rita Forsi

Italian GAC representative
Director General
Ministry of Economic Development
ITALY

Comments of the Ministry of Telecom and Mass Communications of the Russian Federation on the Cross-Community Working Group on Enhancing ICANN Accountability (WS2) draft recommendations on jurisdiction.

Russian Federation welcomes the opportunity to comment the report “[Draft Recommendations on Jurisdiction](#)”. We would like to thank all participants of the Subgroup for their efforts and inputs to the report.

First of all, we would like to notice support of recommendations related to the choice of law and venues, which provide flexibility of law provisions in registry and registrar contracts. Recommendations that are to make ICANN to take any steps to reduce the effect of OFAC sanctions against foreign governments are noted with appreciation as well, but can be recognized only as a first attempts to handle the multi-layer objective of ICANN jurisdiction challenges.

We support the inclusion of Annexes with the dissenting opinion of Brazil and the proposed issues list, which was supported by stakeholders during ICANN 60 and provide rich food for further work.

At the same time we would like to express our major concerns, which have been early presented during broad discussion of ICANN jurisdiction issues, including public session at ICANN 60. We believe that report falls short of the objectives envisaged for Work Stream 2, and that its recommendations only partly mitigate the risks associated with ICANN’s subjection to U.S. jurisdiction, which makes the adoption of the report unacceptable. This is the position of several governments reflected in [GAC Communique \(ICANN 60, Abu-Dhabi\)](#)¹.

Taking in account the high risk that OFAC sanctions against foreign governments would harm large number of ordinary Internet users and businesses in sanctioned countries, we consider the recommendations proposed by the Subgroup for the corresponding ICANN actions are limited in the ability to tackle possible negative effects since the principle of «best efforts» provides no guarantee that ICANN would be able to adequately address the problem.

Russian Federation would like to suggest the Subgroup to continue to engage with development of relevant recommendations including broader types of immunity from US jurisdiction that could prevent ICANN from being subject to unilateral political or regulatory interference.

As well as to consider the option of withdrawing ICANN from US jurisdiction either partially or completely, including Brazil proposals on the issue of partial immunity as a solution when all issues relating to the national interests of States and interstate issues are addressed in the event of a conflict in international jurisdiction.

¹https://gacweb.icann.org/download/attachments/27132037/GAC%20ICANN60%20Communique_Final.pdf?version=5&modificationDate=1511302067000&api=v2

We believe that if the Subgroup did not constrain the proposed recommendations due to restrictions of US jurisdiction as a basic condition, it would allow to work out a more comprehensive solution for jurisdiction issues based on more options, which can possibly find wider choice of solutions, taking into consideration that larger number of issues been identified by the Sub-group in the [List of Proposed Issues for Jurisdiction Subgroup Consideration](#)². It would be useful to continue the work of the Subgroup or other appropriate group or process that should be established for continuation of this work with analysis of these issues.

Besides issues, referenced in this list, we recommend to examine the issue of sustainability of PTI being based in the same jurisdiction as ICANN, as a critical point for stability of Internet technical and operation system.

Russian Federation proposes to ICANN leadership and broader ICANN communities to support and encourage a wider participation of international legal teams balancing the formed majority of US-based expertise.

We believe that it would be useful if final recommendations will based on the following principles:

Independence: to exclude any unilateral interference with the functioning of the Internet critical infrastructure and/or the operating activity of ICANN and to prevent erosion of the rights and obligations defined by the mandate;

Sustainability: to have a high degree of stability and to eliminate the possibility of the impact by short-term international or national factors;

Trust: legitimacy of any legal governance and dispute resolution systems depends on the degree of trust of the participants for the process, decisions and outcomes, therefore, recommendations transparency, accountability, subsidiarity and impartiality of solutions suggested for ICANN jurisdiction should be ensured;

Universality: to incorporate international experience of regulation and enforcement in high level operation and management of Internet.

First of all, adequate mechanisms should be proposed to protect the interests of Internet users in case of sanctions.

Russian Federation realizes that the ability of ICANN to fulfill its mission as a global DNS coordinator and policy maker of the Internet potentially contradicts the need to follow the requirements of the national legislation of a single state.

We also see contradictions with major international consensus like for example Tunis Agenda for the Information Society, which have stated that countries should not be involved in decisions regarding another country's country-code Top-Level Domain.

Collisions could negatively affect the atmosphere of trust for DNS services as well as the security and connectivity of the global Internet.

²<https://docs.google.com/spreadsheets/d/1zAMj3Oz8TEqbjauOyqt09Ef-1ada9TrC7i60Mk-7al4/edit#gid=0>

Having a unique status, protecting public interests, ICANN can offer more acceptable mechanisms of immunity as a solution to this problem, more effective than working on the principle of "best efforts" in case of sanctions

Any participants of the ICANN work processes should not be obliged to follow OFAC sanctions only because they have a contract with ICANN.

ICANN should always commit to the policy of non-discriminatory attitude to all parties involved in the process of coordination and development of the world-wide Internet.



**Comments from the Internet Infrastructure Coalition (i2Coalition)
On CCWG-Accountability WS2 Jurisdiction Sub-group Recommendations
November 2017**

The Internet Infrastructure Coalition (i2Coalition) appreciates the opportunity to comment on Cross Community Working Group on Enhancing ICANN Accountability (Work Stream 2) Sub-group Recommendations.

The i2Coalition's diverse membership represents both large and small Internet infrastructure providers such as web hosting companies, software services providers, data centers, registrars and registries. The i2Coalition has several key goals within ICANN, but chief among them is continuing to build a voice for underrepresented parts of the Internet ecosystem – in particular web hosts, data centers and cloud infrastructure providers – and ensuring that accountability and transparency are paramount. The i2Coalition brings unique representation to ICANN as it is made up of companies representing the whole broad ecosystem of Internet infrastructure companies.

The i2Coalition appreciates the work of the sub-group, and we broadly support the proposal's direction. With that in mind, we offer general comments on the Draft Report.

Recommendations relating to OFAC sanctions

i2Coalition understands that codifying that the State of California in the United States of America is the permanent jurisdictional home of the nonprofit organization of ICANN brings with it some challenges. Key among these challenges is how ICANN can maintain its global mission while U.S. law requires them to obey OFAC sanctions. The recommendations proffered by the sub-group are sensible ways of approaching that difficult set of circumstances, and we support them.

Recommendations relating to Choice of Law and Choice of Venue provisions in ICANN agreements

i2Coalition agrees that the sub-group cannot demand changes to RA and RAA agreements, but thanks the sub-group for properly framing the conversation when RA and RAA agreements are revised. Though we are making no statement on preference to the approach that should be taken to address venue, we agree that addressing venue would both enhance ICANN accountability and decrease business uncertainty for contracted parties.

Regarding dissenting statements

i2Coalition wishes to respectfully disagree with the comments of Brazil and other dissenters, specifically when addressing frustration with the sub-group not putting the subject of ICANN's location of incorporation up for community discussion. It is clear that the IANA transition was predicated on the fact that ICANN is, and will remain, a California nonprofit. It is inappropriate and out of scope to attempt to change that at this time.

Concluding Comments

Again, we appreciate the work of the sub-group and believe it continues to build towards strong conclusions on jurisdiction that will significantly improve ICANN's accountability. We look forward to continuing to work with the group as it moves toward finalizing its work.

ICANN Board Inputs - CCWG WS2 Jurisdiction Report

Summary: The CCWG-Accountability provides a report on the topic of Jurisdiction with the following:

1. Recommendations relating to the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury.¹
2. Recommendations relating to the Choice of Law and Choice of Venue Provisions in ICANN Agreements.

The ICANN Board appreciates the opportunity to provide input to the CCWG WS2 Jurisdiction report. We provide these inputs to the Jurisdiction Subgroup, with a copy to the public comment for the wider community, to support further deliberations by the Subgroup and the CCWG-Accountability.

Several of the recommendations are actionable and implementable, and in some instances, codify current practice by the ICANN organization. There are other recommendations which may prove problematic to fully address, and we provide our input on those for further consideration. This input is not intended to interfere with this work, but rather to provide information to further the Subgroup and CCWG-Accountability's efforts as it finalizes its full report.

Regarding Recommendations concerning OFAC

There are four components to the recommendations regarding OFAC, where ICANN should:

1. Amend the terms and conditions for Registrar Accreditation Application related to OFAC licenses 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). The recommendation also suggests that ICANN should be more "helpful and transparent" in the licensing process and in communications with the applicant.

¹ The CCWG-Accountability noted at fn10: "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." ICANN organization requests the CCWG-Accountability to confirm that it is not recommending at this time that ICANN take any actions as it relates to sanctions regimes in other countries.

2. Commit to applying for and using best efforts to secure an OFAC license for all gTLD Registry applicants of sanctioned countries if the applicant is otherwise qualified (and is not on the Specially Designated Nationals (SDN list). The same transparency obligations are suggested here.
3. 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 is also recommended to “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.”
4. Take steps to pursue one or more OFAC “general licenses” with the U.S. Department of Treasury in connection with DNS-related transactions, beginning with ICANN producing a study of costs, benefits, timeline and details of the process. If it turns out that there are “significant obstacles” to pursuing general licenses, then “ICANN needs to find other ways to remove ‘friction’ from transactions between ICANN and residents of sanctioned countries.”

As ICANN organization has discussed with the group, ICANN has a regular practice of applying for specific licenses for proposed Registrars as well as Registry operators, except those subject to individual sanctions (if they are on the SDN list). These portions of the recommendations are therefore codification of existing practice, can be implemented.

ICANN organization also, as a regular practice, remains in contact with applicants for which a license is sought. The Subgroup provides commentary on the experience of new gTLD applicants for which ICANN needed to apply for an OFAC license, and even suggests that ICANN had not informed an applicant that an OFAC license was being sought. While the statements surrounding ICANN organization’s interaction with applicants may not be correct, we concur with the CCWG-Accountability on the broader issue that ICANN organization should strive for open communication with applicants on potential OFAC issues and license status.

On the recommendation for ICANN to confirm to non-U.S based registrars that OFAC rules do not apply to their operations solely by virtue of a contract with ICANN, the first portion of the recommendation does not appear to be an issue based on ICANN’s understanding. As noted in the recommendation, ICANN is not able to provide legal advice to registrars on which laws actually apply, and any confirmation would have to be provided alongside a note that this should not be considered as legal advice from ICANN. It is a registrar’s obligation to understand the laws to which they are subject and what is necessary to be in Registration Agreements, or what rules govern the registrar’s actions with parties other than ICANN.²

² ICANN organization has not and cannot in the future review Registration Agreements to determine if references to U.S. OFAC rules are appropriate. ICANN also does not have a position on whether the registrars cited in the report should or

For the portion of the recommendation that states “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,” it is not clear what other tools the CCWG-Accountability is considering outside of ICANN’s confirmation. Contracted parties already have this obligation. If further tools have already been considered by the CCWG-Accountability, it would be helpful to understand what those are.

Regarding the fourth component, pursuing OFAC “general licenses,” the Board appreciates the recommended approach of an initial step where the ICANN organization study costs, benefits, timeline and details of such a process. The Board also requests that opportunity costs be identified in that study. The study may also be aided by a further problem statement from the community to identify the scope of issues that the CCWG-Accountability believes will be solved through a general license.

During deliberations, details were provided by ICANN organization to the Subgroup regarding some concerns regarding seeking a general license. For example, there is no application process to seek a general license; a general license requires a change in regulation by the U.S. Department of the Treasury, or a change in legislation. As the report notes, the regulatory process may be a significant undertaking, with no guarantee of success from any such lobbying effort or expense.

The second part of that recommendation, regarding “removing ‘friction’” from transactions in the event that there are “significant obstacles” to pursuing general licenses, could be clarified. If the CCWG-Accountability has further recommendations beyond what is laid out in the report, those would be beneficial to state, as there is no basis against which to measure if ICANN can successfully implement this part of the recommendation.

Regarding recommendations relating to the Choice of Law and Choice of Venue Provisions in ICANN Agreements:

The Board agrees with the CCWG-Accountability’s clarification that it cannot make recommendations requiring ICANN to make amendments to the RA or the RAA outside of the contractually required amendment process. The Board looks forward to the broader participation of contracted parties in reacting to this recommendation, to better understand their views on the issue and paths forward.

The Board understands that there has not yet been an impact or feasibility assessment of any of the approaches presented by the CCWG-Accountability and

should not have referenced OFAC regulations, or whether the “cut and paste” was appropriate.

appreciates the broad range of approaches presented. In addition, the recognition that there are some portions of the agreement that are appropriate for uniform treatment is an important concept to provide for some level of predictability in practice and enforcement.

Any potential study of these ideas would need to assess the impact, as these scenarios could raise concerns related to potential loss of predictability in enforcement, or increased enforcement costs.

Acknowledgment

We thank the CCWG-Accountability and the Jurisdiction Subgroup for its work on the draft recommendations and look forward to providing further inputs as appropriate during the finalization of the recommendations by the community.



Etienne Sanz de Acedo
Chief Executive Officer

655 Third Avenue, 10th Floor, New York, NY 10017-5646, USA
t: +1-212-642-1776 | f: +1-212-768-7796
inta.org | esanzdeacedo@inta.org

Submitted to: comments-jurisdiction-recs-14nov17@icann.org

January 12, 2018

Patrick Dodson
Senior Manager, Strategic Initiatives
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: [CCWG-Accountability Work Stream 2 \(WS2\) – Recommendations on ICANN Jurisdiction](#)

Dear Mr. Dodson:

The International Trademark Association (INTA) appreciates this opportunity to comment on the Recommendations on ICANN Jurisdiction. INTA appreciates the work done by the participants in the sub-group, and acknowledges the difficulties they faced given the ambiguities in Annex 12 of the CCWG-Accountability, WS1 final report, which was meant to define the scope and mandate of their work.

INTA has reviewed the Draft Recommendations with a view to ensuring that they are consistent with the purpose of examining whether ICANN's accountability can be enhanced based on the laws made applicable to its actions. Given that the sub-group's recommendations were provided at a very high level, INTA's comments take a correspondingly broad view. Our comments are below

1. OFAC Considerations in Matters of Jurisdiction

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

The sub-group recommends that language in the Terms and Conditions for the Registrar Accreditation Application (RAA) providing that "*ICANN is under no obligations to seek such licenses and, in any given case, OFAC could decide not to issue a requested license*" 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)*" as well as be helpful to and transparent with the potential registrar applicant throughout the licensing process.

INTA generally supports the idea of promoting greater access to the Internet for citizens of sanctioned countries and greater transparency between ICANN and potential registrar applicants from such countries. Nonetheless, INTA has concerns about requiring ICANN to commit to both applying to the U.S. Treasury Department's Office of Foreign Asset Control (OFAC) for a license and using "best efforts", to secure it, particularly without the term "otherwise qualified" being

clearly defined. This is in recognition of the fact that there may have been valid reasons for ICANN having discretion to refuse to apply for an OFAC license. However, an OFAC license should not be pursued until all other criteria for registrar accreditation are met and ICANN has determined that it will enter into the RAA if the license is granted.

INTA therefore recommends that the “best efforts” standard be reconsidered and that a less onerous standard of “commercially reasonable efforts” or “reasonable best efforts” be recommended by the sub-group to ensure that ICANN may exercise reasonable judgment if pursuit of a license becomes unreasonably onerous for the organization in a particular case. As a matter of transparency, should ICANN exercise such judgment regarding an application for an OFAC license and terminate an application process, such reasoning should be well documented and available to the community on request.

INTA also recommends that the meaning of the term “otherwise qualified” be clarified. It is unclear whether an “otherwise qualified” applicant is one that would otherwise become a registrar or could still be rejected by ICANN on other grounds. INTA suggests using the term “otherwise approved” or “otherwise acceptable.” This will more clearly indicate that ICANN has decided that the applicant should become an accredited registrar but for the need for an OFAC license.

Thus, the language would read “*require ICANN to apply for and use **[reasonable best efforts OR commercially reasonable efforts]** to secure an OFAC license if the other party is otherwise **approved to become** a registrar (and is not on the SDN List)*”

b. Approval of gTLD Registries

The sub-group takes issue with language in the Applicant Guidebook for the New gTLD Program to the extent that it is similar to the above-discussed language from the RAA in that it provides that, “[i]n 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 again recommends that ICANN commit to applying for and using “best efforts” to secure OFAC licenses for all such applicants if they are “otherwise qualified” and are not on the SDN list.

INTA agrees that ICANN should not have unfettered discretion to refuse to apply for such licenses, but has concerns that ICANN not be hamstrung in its ability to carry out its other mandates. As above, INTA recommends that the term “otherwise qualified” be replaced by “otherwise approved” or “otherwise acceptable.” INTA further recommends that the “best efforts” standard be reconsidered and that a less onerous standard of “commercially reasonable efforts” or “reasonable best efforts” be recommended by the sub-group.

c. Application of OFAC Limitations by Non-US Registrars

The sub-group recommends that ICANN make non-US registrars aware that they may be erroneously prohibiting residents of sanctioned countries from using their services because of a mistaken belief that they are obligated to apply OFAC sanctions solely by virtue of having a

contract with ICANN.

Understanding that ICANN cannot provide legal advice to registrars, INTA supports the recommendation that ICANN can nevertheless clarify to registrars that their RAA with ICANN does not in itself impose on them the obligation to comply with OFAC sanctions, and encourage registrars to gain a better understanding of the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

d. General Licenses under OFAC

The sub-group recommends that ICANN take steps to pursue one or more OFAC general licenses by “*first making it a priority to study the costs, benefits, timeline and details of seeking and securing such licenses.*” The sub-group then recommends that ICANN proceed to secure such licenses “*unless its study reveals significant obstacles, in which case the community should be consulted about how to proceed.*”

INTA supports the recommendation that the issue of general licenses should be studied. However, INTA does not support the recommendation that this study be “a priority.” Given ICANN’s current budget and funding concerns, ICANN should have greater discretion to set priorities, taking other potential priorities into consideration. Further, in INTA’s view, the reference to “*significant obstacles*” is ambiguous and the sub-group’s report should be amended to provide that ICANN shall not be required to take more than commercially reasonable efforts to obtain general licenses. In INTA’s view, ICANN should have the discretion not to pursue general licenses if the process is unreasonably onerous for the organization.

2. Choice of Laws and Choice of Venue Provisions in ICANN Agreements

a. Choice of Laws – The “Menu” Approach

After outlining several options for the choice-of-law approach to be used in the gTLD base Registry Agreement (“RA”) and the Registrar Accreditation Agreement (“RAA”), and for the venue approach to be used in the RA, the sub-group ultimately recommended that ICANN, the contracted parties, and the GNSO consider adopting a “Menu” approach for each one.¹ It is not clear what that means, or what options are going to be on each “menu” (or whether all three “menus” will be the same, for that matter). In theory, INTA could support at least some of the suggested menu options for example, the option that the menu be comprised of one country from each ICANN Geographic Region. But in the absence of further clarification as to what will be on each menu, INTA will withhold its judgment as to the overall merits of the “Menu” approach as compared to the other options that were contemplated by the Sub-group.²

¹ <https://www.icann.org/en/system/files/files/ccwg-accountability-ws2-jurisdiction-14nov17-en.pdf> (the “Recommendations”) at 28-29.

² For example: a very small menu may cause the “Menu” approach to function basically the same as the “Fixed Law” approach would. At the other end of the spectrum, a very large menu may cause the “Menu” approach to approximate the outcomes of a “Bespoke” approach. For that reason, trying to determine

That said, INTA also supports the reasoning of the sub-group that the “Menu” approach has important structural disadvantages and urges ICANN, the contracted parties, and the GNSO to only use a menu that mitigates the risks posed by those disadvantages. Specifically, the sub-group noted that certain governing laws may not be entirely compatible with the contents of the RA and the RAA such that some parts of the RA and RAA could be held invalid or unenforceable for some contracted parties (or at least interpreted differently for different parties).³ That could, in turn, mean that the RA and RAA could mean different things for different contracted parties which could ultimately lead to jurisdiction-shopping.

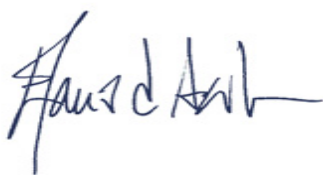
That is a significant risk for INTA and its members and, by extension, for all consumers who rely on trademarks to create accountability and to promote fair and effective commerce. Both the RA and the RAA include provisions that brand owners rely on to protect their marks (e.g., RA ¶ 2.8 and Specifications 7 and 11; RAA ¶¶ 3.7.7 and 3.18.1). Those provisions must mean the same thing for every contracted party. A regime where RAA ¶ 3.18.1 (for example) means one thing for one registrar but another thing for a different one (because the provisions may be interpreted differently under different laws) defeats the purpose of developing “consensus” policy in the first place. For that reason, INTA agrees with the conclusion of the Sub-group that avoiding such an outcome will likely require “having a relatively limited number of choices on the menu.”⁴

b. Choice of Venue

While the legal issue is a different one, INTA’s position is the same on the merits of a “Menu” approach for the venue provision of the RA as well. Specifically, while INTA cannot assess a menu of venue options without knowing what is on that menu, INTA will ultimately judge the merits of any venue menu through the same prism as it would a choice-of-law menu, namely, whether the options on the menu tend to promote uniformity of understanding of the relevant terms of the RA and RAA. If the answer is yes, or if the choice-of-law questions are settled in such a manner that the venue question is not as relevant to these contractual interpretation concerns, then INTA would support a “Menu” approach for venue as well.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA’s Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,



Etienne Sanz de Acedo
Chief Executive Officer

whether a “Menu” approach would work “better” than a “Fixed Law” approach or a “Bespoke” approach (among others) is almost impossible without knowing what is going to be on the menu.

³ Recommendations at 24-25.

⁴ *Id.* at 24.

About INTA and the Internet Committee

Founded in 1848, INTA is a global not-for-profit association with more than 5,700 member organizations from over 190 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last two decades, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 150 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.

**Comments from the ISPCP
On CCWG-Accountability WS2 Jurisdiction Sub-group Recommendations
November 2017**

The Internet Service Providers and Connectivity Providers (ISPCP) appreciates the opportunity to comment on Cross Community Working Group on Enhancing ICANN Accountability (Work Stream 2) Sub-group Recommendations. The ISPCP appreciates the work of the sub-group, and we broadly support the proposal's direction.

Our role is to support the global ISP community. ISPs must respect local laws, and must rely upon global standards bodies. Navigating conflicts between the two is of particular interest to us.

The ISPCP understands that the United States will remain the jurisdictional home of ICANN, and we see this as preferable to the alternatives of either moving jurisdiction, for which there is no public will, or becoming an NGO. ICANN only works if it has accountability, including legal accountability, and this runs counter to the role of an NGO. Therefore, this was the proper and just conclusion.

It is with that in mind that we wish to respectfully disagree with the comments of Brazil and other dissenters when they expressed frustration that a new path was not forged on jurisdiction. We believe that it is not the time to attempt a change of jurisdiction, and that the stasis of ICANN's residence in the State of California, on which the IANA transition was predicated and passed, should remain.

The jurisdiction group has done an excellent job of dealing with some of the challenges that come from U.S. jurisdiction. ICANN must maintain its global mission above all else. U.S. law makes that difficult in some circumstances, by placing sanctions on certain foreign governments, which ICANN is required to obey.

The sub-group has offered a set of recommendations are sensible ways of approaching that difficult set of circumstances, and we support them. In particular, we are supportive of ICANN actively engaging in the process of assisting contracted parties in seeking waivers from the U.S. Treasury's Office of Foreign Assets Control (OFAC). This seems to be a sensible way to uphold ICANN's mission despite the requirements of the United States government.

We appreciate the work of the sub-group and believe it continues to build towards strong conclusions on jurisdiction that will significantly improve ICANN's accountability. We look forward to continuing to work with the group as it moves toward finalizing its work.

Comments re: [Recommendations on ICANN Jurisdiction | ICANN.org](#)--CCWG-Accountability WS2 Jurisdiction Sub-group Recommendations

My comments are as follows:

1. General Comments:

The work of this subgroup, like many other working groups in ICANN, suffers from [Complexity Bias](#). I recommend ICANN institute the KISS system (“Keep It Simple Stupid”), to keep the special interests that dominate the “ICANN community” (lawyers, lobbyists, contracted parties, *etc.*), “in check.” A good example of this complexity bias at work within ICANN is the monstrosity developed by the CCWG with the help of three law firms and \$15 million in legal fees, known as [ICANN’s bylaws](#), complete with multiple annexes.

It is a real shame that this subgroup was unable or unwilling to address the real issue of “jurisdiction of ICANN,” *i.e.*, Los Angeles, California, United States of America, as was promised in Work Stream 1. But most now realize that delaying the “jurisdiction issue” to Work Stream 2 (WS2) was a subterfuge to “get the transition done” before any change in administration in Washington, and that the transition itself was a geo-political move by the Obama administration to counter the rising power of China and calls for multilateral internet governance on the international level.

I sympathize with Brazil (dissenting statement in Annex E), as well as those in India and elsewhere, who now recognize they were misled and lied to, to which I can only say, don’t take it personally. You can watch [this video](#) of the former ICANN CEO lying to the French Senate. ICANN has [lied to me](#) and a lot people; it is part of the ICANN corporate and organizational culture. Recognize and acknowledge it, don’t take it personally.

The **real problem** of ICANN’s U.S. jurisdiction was never raised nor addressed by the subgroup. The problem arises from the geo-political decision of the U.S. government which drove the IANA transition:

[DefenseOne.com](#): "In **2014**, the [U.S. cleverly announced](#) it would give control of the DNS database to a non-governmental international body of stakeholders, a process to be run by the **California-based Internet Corporation of Assigned Names and Numbers**, or ICANN. “Now, when China stands up and says, ‘*We want a seat at the table of internet governance,*’ the U.S. can say, ‘*No. The internet should be stateless.*’ They’re in a much stronger position to make that argument today than they were before,” Matthew Prince, co-founder of the company [Cloudflare](#), told *Defense One* at the time.”

To be the host jurisdiction of an organization like ICANN, is a burden on the host country's governmental authorities in policing and enforcing its laws upon the organization, its staff, officers, directors, and contracted parties, unless the host jurisdiction just takes a "hands off" attitude and allows lawless behavior. I fear the latter is now the implicit policy of the U.S. government as evidenced by the recent file closure by the United States Department of Justice Antitrust Division (see [Item 7.01](#)). If so, it may be in the best interests of the global internet community to move ICANN to another jurisdiction outside of the United States. Read more [here](#) and [here](#) (Question 12).

2. Comments as to this subgroup's "recommendations"

This subgroup's recommendations go on for 16 pages (pp.14-29) but really only cover 2 areas: (1) Recommendations regarding **OFAC** and related sanctions issues (pp.14-21) and (2) Recommendations Regarding **Choice of Laws and Choice of Venue** Provisions in ICANN Agreements (pp. 22-29).

(1) **I wholeheartedly agree** with the **OFAC recommendations**, all of which are only common sense and which ICANN org should have addressed long before this subgroup ever needed to address these issues. If these recommendations are implemented and the U.S. proves it cannot accommodate ICANN and its stakeholders, then ICANN will absolutely need to be relocated to another jurisdiction other than the U.S.

(2) **I totally disagree** with the **Choice of Laws and Choice of Venue recommendations**, which are a "*recipe for disaster*" for ICANN. I doubt [Jones Day](#) or any lawyer "worth their salt" would find merit in ICANN being subject to forum-shopping by its "contracted parties"—many of whom are just self-interested profit-seeking entities trying to exploit consumers (registrants) any way they can—or ICANN being subject to split decisions by legal authorities in multiple jurisdictions. Can you imagine the legal fees portion of future ICANN budgets if the "menu approach" was adopted? ICANN already has too many lawyers on its staff, and its legal costs are already too high. These recommendations should be relegated to [File 13](#). ICANN's jurisdiction for "choice of laws" and "choice of venue" is, and should remain, Los Angeles, California, U.S., until such time as ICANN is removed to another jurisdiction.

Respectfully submitted,

John Poole, domain name registrant and *Editor, DomainMondo.com*

Middle East Space

Abu Dhabi, UAE, 1 November 2017

Statement

We, the Middle East community members participating in the Internet Corporation for Assigned Names and Numbers' (ICANN) 60th international public meeting in Abu Dhabi, United Arab Emirates, and attending the Middle East Space session on Wednesday 1 November 2017, discussed ICANN's jurisdiction and access to the Domain Name System (DNS) in the Middle East.¹

We believe that ICANN, being the impartial coordinator of the DNS as a global resource, should serve the global community regardless of their nationality or their country of residence. Thus, while considering applicable laws, ICANN should prioritize interconnection and refrain from arbitrary and unilateral measures that affect access to the DNS. Moreover, ICANN's jurisdiction should not affect participation in ICANN policy processes nor the availability to the global community of DNS training and other capacity building initiatives provided by ICANN.

In consideration of the above, we appreciate the ongoing work of ICANN's Cross-Community Working Group (CCWG) on Accountability's Work Stream 2 Jurisdiction Subgroup (Jurisdiction Subgroup), which is addressing how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability, and more specifically, the issues that ICANN's jurisdiction might raise for DNS customers, including end users. Some of these issues relate to the registration of domain names, accreditation of registrars, approval of registries, and delegations of country code top-level domains (ccTLDs).

ICANN's jurisdiction may create an array of problems,² particularly for some countries in the Middle East such as Iran, Libya, Somalia, Sudan, Syria, and Yemen. These issues have been addressed neither by the ICANN organization nor the community over the past 19 years, and we are pleased that they are now being considered by the Jurisdiction Subgroup.

Several issues that ICANN's jurisdiction raises for DNS users and businesses, who are not on the specially designated nationals list provided by the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC), have been identified by the Jurisdiction Subgroup with the help of some of its members from the Middle East region. Most of these issues stem from United States-imposed sanctions.

As a community that is most affected by the U.S. sanctions regime, we support the recommendations of the Jurisdiction Subgroup that, within the framework of the OFAC's sanctions

¹ The Middle East-SWG's regional focus includes the 22 Arab States (as defined at: https://en.wikipedia.org/wiki/Arab_states), Iran, Afghanistan, and Pakistan.

² For a list of issues and problems please refer to this blog post: <http://www.internetgovernance.org/2017/01/13/icanns-jurisdiction-sanctions-and-domain-names/>. Also refer to the list of issues submitted by various groups to the jurisdiction group: <https://docs.google.com/document/d/1WNYj8jfau11OMUzvguZN8UE-fGos54m8XTYUTnROgBU/edit>

program, ICANN should seek ways to provide optimal access for DNS customers. We specifically support the following recommendations of the Jurisdiction Subgroup:

- ICANN should commit to applying for and using best efforts to secure an OFAC license for all applicants for registrar accreditation and/or generic top-level domain (gTLD) registries resident in countries subject to U.S. sanctions if the applicant is otherwise qualified (and is not on the Specially Designated National List). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process;
- ICANN should clarify to registrars that the mere existence of their registrar accreditation agreement (RAA) with ICANN does not cause them to be required to comply with OFAC sanctions; and
- 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. If unsuccessful, ICANN will need to find other ways to enable transactions between ICANN and residents of sanctioned countries to be consummated with a minimum of “friction.”

To restate, we support the abovementioned recommendations and we look forward to ICANN’s concrete actions for resolving the jurisdictional issues and implementing the solutions.