

## 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.

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<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

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<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:**

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<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.