

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

## Answers provided by:

### ".swiss" domain registry

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### 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.) However, the Government of Switzerland was not readily determined to enter into a Registry Agreement with ICANN, particularly in light of 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.