

Jurisdiction Subgroup Questionnaire Response Summary and Analysis			
Administrative Questions	Name and Affiliation of Respondent		Just Net Coalition
	Name of Reviewer, Date:		Greg Shatan May 29, 2017
	Link to Response:		
		Summary	Reviewer's Discussion and Analysis of Response
Question 1	Summary of response to Q1 ("Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction in any way?")		No response.
	For Q1, did respondent provide any specific cases, situations or incidents in which respondent was involved? (If yes, include the date, parties involved, a summary of the event and links to any relevant documents provided by respondent.)		N/A
Question 2	Summary of response to Q2 ("Has ICANN's jurisdiction* affected any dispute resolution process or litigation related to domain names you have been involved in?")		No response.
	For Q2, did respondent provide any specific cases, situations or incidents in which respondent was involved? (If yes, include the date, parties involved, a summary of the event and links to any relevant documents provided by respondent.)		N/A
Question 3	Summary of response to Q3 ("Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above?")		No response.
	For Q3, did respondent provide copies or links to reports of third party experiences?		N/A N/A
	Summary of response to Q4a ("Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?")		
Question 4	<p>1. Application of the jurisdiction of the US (or any country's jurisdiction) over ICANN results in a prioritization of the (or that country's) law and public interest over those of other countries, which interferes with the ability of ICANN to pursue its mission "for the benefit of the Internet community as a whole."</p> <p>2. The US has a "high enforcement capacity" to ensure that US laws and executive, legislative and judicial powers, which apply to people and organizations in the US, are "normally respected" and that "all the subject actors" act in accordance with those laws and powers.</p> <p>3. JNC asserts that "Many in the ICANN community promote the illusion that ICANN's main reliance is on contractual law, where the venue and choice of law are indicated in the contract itself. And that this voluntary choice of venue and law by the contracting parties is the main or even the exclusive jurisdictional concern for ICANN's policy processes."</p> <p>4. JNC claims that that the "public law of the country of incorporation and location supersedes any contractual law," relying on a case that holds "where a non-U.S. law violates the forum state's public policy, that law will not be applied." (The case states that "the forum state will not apply the law of another state to enforce a contract if to do so would violate the public policy of the forum state."). Based on this, JNC claims that "US public policies supersede any non-US law that may be invoked by an ICANN contract," and that in turn US "public policies" "also supersede ICANN's own policies." JNC offers the conclusion that "this legal position should settle the matter of supremacy of</p>		<p>The gist of JNC's response is that it is a problem that ICANN has to comply with US law. Overall, JNC does not seem to view courts as forums for parties to settle grievances with each other, or as mechanisms to hold defendants accountable. Rather, JNC primarily casts courts as actors, and proactive ones at that.</p> <p>3. Note, however, that ICANN's registry and registrar contracts do not have a choice of law provision, though they do specify the place where a dispute will take place (venue).</p> <p>4. This is a subset of the "doctrine of public policy," which holds that certain acts or contracts are said to be against</p>

US policies and laws over ICANN actions, including its policy processes.”

5. JNC identifies a category of cases “where US courts have already exercised jurisdiction, by taking cognisance of a suit, giving interim/ final orders etc.”

6. JNC found it significant that in the cases it reviewed, ICANN never “contested the application” of California jurisdiction [presumably referring to venue], and California and US law, over “ICANN's policy [this assumes ICANN's “policy” was at issue] and related functions.” and that the courts never spontaneously challenge this either. JNC notes that this is logical, since ICANN is a California entity.

7. From this, JNC concludes that this “provides clear proof ... that the entire range of public law of the US, and the jurisdiction of every relevant US court, fully apply to ICANN functions and actions,” that ICANN has to follow US law, and therefore US law and courts “and generally, the US jurisdiction” limit ICANN's actions. Therefore, ICANN “cannot undertake any action in pursuance of the mission that is contrary to US law.” JNC objects to this constraint, stating that “ICANN's mission, and the actions flowing from it, are supposed to be determined by global community processes, and not by US law and its interpretation by US courts.”

8. JNC notes what it calls a “contradiction, hidden in plain sight” – that ICANN's actions were found by US courts not to violate US law, because ICANN and its “battery of lawyers” ensure that ICANN complies with US law. [Notably, this is also required by ICANN's Bylaws.] What JNC calls the “pre-configuring of ICANN's actions to US law” is believed to be a problem, “as much a problem as any subsequent action of a US court forcing ICANN's hand.”

9. As an example, JNC cites to one decision in the .Africa case, where the court granted Plaintiff's request for a temporary restraining order. JNC claims that “This prevented ICANN from pursuing its mission because it prevented ICANN from making a decision by applying its documented policies and remaining accountable to the Internet community through its own mechanisms.”

10. JNC also cites to the Weinstein (.ir) and C. Itoh (.cg) cases, where plaintiffs sought to attach ccTLDs. [Attachment is a legal process by which a court of **law**, at the request of a creditor, designates specific property owned by a debtor to be transferred to the creditor, or sold for the benefit of the creditor.] JNC states that this is equivalent to requesting redelegation. JNC finds it “significant” that the US courts “accepted their jurisdiction in the matter of ccTLDs of sovereign nations,” and believes that this “points to a clear possibility that ... a US court might force ICANN to interfere with another country's ccTLD.”

11. JNC also cites to two cases where the courts were called on to decide antitrust (competition) claims. JNC described this as “US courts tested ICANN's policy processes and their operationalisation against public laws of the US, in the area of economic regulation, especially as related to competition.” JNC cites this as another example where US courts applied US law to ICANN's actions, “which leaves the possibility very much open of interference in these areas.” Since ICANN prevailed in both cases, these are also cited as examples of ICANN abiding by US law “in making its policies and their operationalisation, which violates its mandate of serving the global “Internet community as a whole”.”

12. JNC then identifies a category it calls “Cases where executive agencies of US impinge upon ICANN's actions.” JNC notes that ICANN must obtain OFAC clearance to “interact” with [actually, to exchange funds with] any entity, including any individual, from a country that is under OFAC sanctions. JNC notes that ICANN needs clearance where it pays for such an individual to attend an ICANN meeting, and for ICANN's engagement with agencies running

public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens, and therefore such contracts will not be enforced by the courts. The doctrine of public policy is narrowly exercised, since the courts favor the enforcement of contracts. It would be interesting to know if other countries' courts enforce agreements that are contrary to public policy. An example commonly given of a contract that is void as against public policy is a contract to perform cannibalism.

5. US courts (other than the Supreme Court) have to take every case that is filed unless the defendant contests jurisdiction.

6. ICANN would have no basis to challenge the application of US and California law or the venue of a court located in California.

9. The .Africa TRO was granted because Plaintiff raised “serious questions going to the merits” of the case and the balance of hardships tipped sharply toward plaintiff, since it was trying to prevent the delegation of .Africa to ZACR, which ICANN had already decided was proper. JNC seems concerned here that the Court held ICANN back from delegating .Africa while it considered a case seeking to hold ICANN accountable, and seems concerned before that courts generally allow ICANN to move forward because its actions do not violate applicable law. This apparent contradiction is not explained.

<p>ccTLDs of the concerned countries. While no party from any of the sanctioned countries have applied for gTLDs, JNC claims that “the problems that such an application will run into are obvious.” [JNC does not state what these problems are.] JNC speculates that OFAC is the reason that no entity from these countries has applied.</p> <p>13. From this, JNC argues that “ICANN's global governance functions stand on extremely shaky grounds, when one government, whenever it wants, can decide which country(ies), and its residents, to exclude from the benefits of such governance.”</p> <p>14. JNC next cites cases where the US has ordered Verisign to shut down domains engaging in illegal activity. JNC claims that “There is no question that ..., sooner or later so will ICANN be forced [by US agencies to disable domain names], which would be “a constraint on ICANN's responsibility to act in the interest of global Internet community.”</p> <p>15. JNC next provides what it calls a “suggestive list of regulatory bodies that can direct ICANN on matters under their purview, which is very likely as ICANN allocates new sectoral gTLDs.” [sic] JNC claims that ICANN is “under [an] ever-present threat that it can be pulled into being regulated by the FCC wherever the latter decides it fit to do so.” JNC goes on to state that “the mandate of practically every US regulatory agency could impact ICANN's functions.” JNC argues that “sector-based gTLDs” (e.g., .pharmacy) and gTLDs granted to “entities that are key players in different sectors” will lead to the FDA, the FTC, FERC, etc. will lead “to very possible US jurisdictional incursions upon ICANN's functions.” JNC theorizes that a “sector regulator” could “find issues with the registry agreement” for a gTLD in its sector and that the “sector regulator might be able to force ICANN to either rescind or change the agreement, and the conditions under it.”</p>	<p>10. It should be noted that in both cases, the courts found it improper to transfer the ccTLD. As noted above, US court generally must take all cases before them and rely on the parties to raise jurisdictional issues. Also, courts generally must hear any claim or argument a plaintiff can raise unless the defendant objects.</p>
<p>For Q4a, did respondent provide any relevant documentation?</p>	
<p>JNC argues that “all evidence of existence of [US] laws, and [executive, legislative and judicial powers], which have incidence upon ICANN's policy and implementation role, and are thus able to constrain them” are “documentation” of instances where ICANN has been unable to pursue its Mission because of its jurisdiction.</p> <p>JNC goes on to state that “The actual number of US laws and state powers having some incidence on ICANN's work of global governance is endless. We are, therefore, unable here to prepare a list of them, doing which will also be inadequate since new laws can be made any time.” What we provide below are the more immediately visible instances of US jurisdiction’s influence, or even interference with ICANN's global governance functions.</p> <p>JNC did provide citations to various ICANN cases, and to various blogs and articles. However, JNC did not provide any specific documentation of any instance where ICANN was unable to pursue its Mission.</p>	<p>It is not entirely clear to me what “have incidence upon” or “have incidence on” means in these references.</p>
<p>Summary of response to Q4b (“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?”)</p>	
<p>JNC suggests three alternative jurisdictional arrangements where it claims that “ICANN will not be prevented from pursuing its mission of serving the global Internet community as a whole, as it is so prevented in its current jurisdictional status.”</p> <p>1. <u>Incorporation under international law</u> JNC calls this the “best and most sustainable arrangement.” JNC notes this “will need to be negotiated specifically for this purpose among countries.” JNC argues it “can be done without touching the current multistakeholder governance structure and community accountability mechanisms of ICANN.” JNC cites two Red Cross “organizations</p>	<p>As JNC notes, this would require a “new international law” (i.e., a treaty, presumably of every country that has Internet connectivity).</p>

	<p>[that] are not intergovernmental organizations” ICRC and FRCRSC. JNC concedes that “most international organizations have intergovernmental governance mechanism,” but claims that “it is up to the enabling international law to decide the governance mechanism.” JNC claims that “A new international law could mandate ICANN to keep running as it does currently, in a multistakeholder fashion” and that ICANN could then have “a host country agreement with the country of its physical seat” and that ICANN “accordingly [would] not be subject to any of the jurisdictional problems [JNC] described above,”</p> <p>2. <u>Obtaining immunity under US International Organisations Immunity Act</u> JNC claims that “It is possible for ICANN to seek immunity from US jurisdiction under the US International Organisations Immunity Act.” JNC theorizes that “This can be done in a partial manner so that ICANN retains its nexus with California non profit law, to enable its internal governance processes, including the newly instituted Independent Review Panel.” JNC claims that the International Fertilizer Development Center is an instance of a “US [non-profit] having been given immunity under this Act, even as they continue to be registered as US non profit and rely on US law for their overall governance.” JNC again claims that this could be done “in a manner that excludes from the immunity California non profit law (or any other laws that ICANN's effective working requires to be excluded from the immunity)” and that “Such an exclusion can be a part of the US government order providing immunity, or ICANN itself can waive its immunity to that extent.” JNC again claims that “the above listed jurisdictional issues ... could be avoided.”</p> <p>3. <u>Keep a standing back-up option to move out in case of US jurisdiction intervention</u> JNC suggests that ICANN can adopt a fundamental Bylaw that “its global governance processes will brook no interference from US jurisdiction” and that if pre-defined instances of “interference” are encountered, “a process of shifting of ICANN to another jurisdiction will automatically be set into motion.” JNC envision a second “full set-up – with registered HQ, root file maintenance system, etc – will be kept ready as a redundancy in another jurisdiction for this purpose.” JNC speculates that “Chances are overwhelming that” under these circumstances “no US state agency, including its courts” will “try and enforce its writ.” JNC claims that this would “act in perpetuity as a guarantee against jurisdictional interference without actually ICANN having to move out of the US.”</p>		
For Q4b, did respondent provide any relevant documentation?			
	<p>For #2, JNC states that “A useful discussion on such circumscribed immunity can be found in pp. 90-100 (waiver by governing instrument is discussed in pp. 86-97) of this report: https://gnso.icann.org/en/issues/igo-ingo-crp-access-initial-19jan17-en.pdf.” JNC also offers links to certain Red Cross-related documentation: https://www.icrc.org/en/document/statutes-international-committee-red-cross-0, http://www.ifrc.org/Global/Governance/Statutory/2015/Constitution-2015_EN.pdf, https://www.admin.ch/opc/fr/classified-compilation/19930062/index.html and https://www.admin.ch/opc/fr/classified-compilation/20002706/index.html</p>		
Relevance to Subsequent Work	Did any specific case, situation or incident mentioned by respondent raise a “Proposed Issue” that could be considered by the Subgroup?	Yes.	
	If yes, briefly restate the case, situation or incident.	Court jurisdiction issues raised above. OFAC concerns noted above. Regulatory agency concerns noted above	
	Briefly state the Proposed Issue.	1. Whether ICANN’s ability to sue and be sued in California courts under California and US law prevents ICANN from	N/A

	carrying out its mission. 2. Whether OFAC laws prevent ICANN from carrying out its mission. Whether US regulatory agencies prevent ICANN from carrying out its mission.	
Did respondent provide any case or situation that could be used as a “Stress Test” by the Subgroup?	Several of the theoretical situations described above could be considered for possible use as Stress Tests.	N/A
If yes, briefly state the “Stress Test”.	See above.	N/A
Did respondent mention anything else relevant to the Subgroup’s work?	Up to the Subgroup to decide.	N/A