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Executive Summary

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

> *"Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:*
>
> - *Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.*
> - *Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.*
> - *Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.*
>
> *A specific Subgroup of the CCWG-Accountability will be formed to undertake this work."*

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

The sub-group proceeded to:

- Discuss the topics of "confirming and assessing the gap analysis" and of changing ICANN's headquarters or jurisdiction of incorporation.
- Work on refining the multiple layers of jurisdiction.
- Prepare several working documents. These included one exploring the question: "What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms?"
- Publish a questionnaire to allow the community to submit jurisdiction related issues for consideration by the sub-group.
- Develop a series of jurisdiction-related questions for ICANN Legal, which were formally answered.
- Undertake a comprehensive review of the litigations in which ICANN has been a party.

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

In summary, the recommendations are:

Recommendations Relating to OFAC Sanctions and Related Sanctions Issues

The sub-group considered issues relating to government sanctions, particularly[1] U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC). OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.

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

  For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license. Currently, "ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license."[2] This uncertainty could discourage residents of sanctioned countries from applying for accreditation.

  The sub-group recommends that the above sentence should be amended to require ICANN to apply for and use best efforts[3] to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

- **Approval of gTLD Registries**

  In the 2012 round of the New gTLD Program, it was difficult for residents from sanctioned countries to file and make their way through the application process. The Applicant Guidebook (AGB) states: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case,

[1] In the future, if ICANN's activities are affected by other similar sanctions (e.g., similar in scope, type and effect and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.
[2] Terms and Conditions for Registrar Accreditation Application, Section 4.
https://www.icann.org/resources/pages/application-2012-02-25-en
[3] The term "best efforts," as used throughout this Report, should be understood to be limited by "reasonableness," meaning that an entity (here, ICANN) must use its best efforts, except for any efforts that would be unreasonable. For example, the entity can take into account its fiscal health and its fiduciary duties, and any other relevant facts and circumstances. In some jurisdictions, this limitation is inherent in the use and meaning of the term. However, in other jurisdictions, this may not be the case, and thus it is necessary to explicitly state the limitation for the benefit of those in such jurisdictions.

however, OFAC could decide not to issue a requested license."

The sub-group recommends that ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

- **Application of OFAC Limitations by Non-US Registrars**

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

  The sub-group recommends that ICANN clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

- **General Licenses**

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

  A general license would need to be developed in conjunction with the U.S. Department of the Treasury, which must amend OFAC regulations to include the new license. This regulatory process may be a significant undertaking.

  The sub-group recommends that ICANN take steps to pursue one or more OFAC "general licenses." ICANN should first prioritize a study of the costs, benefits, timeline, and details of the process. ICANN should then pursue general licenses as soon as possible, unless it discovers significant obstacles. If so, ICANN should report this to the Community and seek its advice on how to proceed. If unsuccessful, ICANN needs to find other ways to remove "friction" from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN Community and with affected parties.

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

This sub-group considered how the absence of a choice of law provision in the base RA, the absence of a choice of law provision in the standard RAA, and the contents of the choice of venue provision in RA's could impact ICANN's accountability. These are standard-form contracts that are

not typically negotiated; changes are now determined through an amendment procedure (see, e.g., Art. 7.6 of the RA).

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

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

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

  The sub-group identified several alternative approaches for the RA, which could also apply to the RAA. The body of the report discusses the advantages and disadvantages of each approach.

  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 recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

  2. **"California" (or "Fixed Law") Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.

  3. **Carve-out Approach.** A third possible option would be a "Carve-Out" approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform, predetermined law (e.g., California) and other parts are governed either by the law of the registry's jurisdiction or by a jurisdiction chosen using the "Menu" approach.

  4. **Bespoke Approach.** In the "Bespoke" approach, the governing law of the entire agreement is the governing law of the Registry Operator.

  5. **Status Quo Approach.** A fifth possible approach is to retain the status quo (i.e., have no "governing law" clause in the RAA).

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

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

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

  Under the RA, disputes are resolved by "binding arbitration," pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat[4] of the arbitration.

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

[4] The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

Background

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

> ***Jurisdiction***
>
> *Jurisdiction directly influences the way ICANN's accountability processes are operationalized. The fact that ICANN is incorporated under the laws of the U.S. state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.*
>
> *The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight[5] of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.*
>
> *ICANN's Bylaws (Article XVIII) also state that its principal office is in California.*
>
> *The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":*
>
> - *Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.*
> - *Jurisdiction of places of physical presence.*
> - *Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.*
> - *Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.*
> - *Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or*

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

country and other geographic names, national security, etc.), privacy, freedom of expression.

- *Meeting NTIA requirements.*

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

- *Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:*
  - *Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.*
  - *Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.*
  - *Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.*

A specific Subgroup of the CCWG-Accountability will be formed to undertake this work.

Overview of the Work of the Sub-Group

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

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

1. Jurisdiction of incorporation.

2. Jurisdiction of headquarters location.

3. Jurisdiction of other places of physical presence.

4. Jurisdiction for the law used in the interpretation of contracts, etc. (choice of law), including contracts with contracted parties, contracts with other third parties, and actions of the Empowered Community.

5. Jurisdiction for the physical location of litigation of disputes (venue).

6. Relationships with national jurisdictions for particular domestic issues.

7. Meeting NTIA requirements.

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

The sub-group then prepared several working documents, including one exploring the following question: "What is the influence of ICANN’s existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN’s policies and accountability mechanisms?"; and another discussing a hypothetical case involving litigation challenging ICANN's actions (or inactions) involving actual operation of its policies (e.g., delegation of a gTLD; acceptance of certain terms of registry operation) as violations of law.

The sub-group did not reach consensus on these documents, which may be found along with other working documents of the sub-group in the “Supplement of Working Documents.”[6]

[6] This will be a compendium of documents worked on by the group but not finished. It will be clearly noted that these documents are not consensus documents and do not represent findings by the sub-group.

The sub-group then agreed it would be worthwhile to develop and publish a questionnaire to give the broader Community an opportunity to provide factual information that could help inform the sub-group. The Questionnaire[7] is set forth below:

QUESTIONNAIRE *Responses must be transmitted via email to: ccwg-acctws2.jurisdiction.questionnaire@icann.org*
1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction* in any way? *If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*
2. Has ICANN's jurisdiction* affected any dispute resolution process or litigation related to domain names you have been involved in? *If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.*
3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above? *If the answer is yes, please provide these copies and/or links.*
4a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?* *If so, please provide documentation.* 4b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.*

The questionnaire was published on 9 February 2017 and the response period closed on 17 April 2017. The sub-group received 21 responses to the questionnaire, which are in **Annex A** and also may also be found at https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire. Members of the sub-group reviewed and evaluated questionnaire responses and presented them to the sub-group.

The sub-group also developed a series of Questions for ICANN Legal, which may be found at https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/84222028/JurisdictionQuestiontoICANNLegalv2-0001. The Questions were sent to ICANN Legal on 2 March 2017 and

[7] The questionnaire and links to responses may be found at https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire.

responses were received on 10 April 2017. The questions and ICANN Legal's responses are attached as **Annex B**. These responses were discussed in the sub-group and with ICANN Legal.

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

Based on this work, the sub-group developed a master list of "proposed issues" (**Annex D**). From this list, the sub-group prioritized, in the time remaining, the issues relating to OFAC sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contracts. After careful consideration of these issues, the sub-group reached consensus on recommendations for each of these.

The sub-group proposed recommendations were submitted to the CCWG-Accountability Plenary. The CCWG-Accountability WS2 plenary meeting on 27 October 2017 included a discussion focused on jurisdiction issues.

The draft report was approved by consensus as defined in the CCWG-Accountability charter, and not by full consensus.[8] The government of Brazil, which did not support approving the report, prepared a dissenting opinion, which is supported by several other participants and can be found in **Annex E** of the report.

A transcript of the plenary discussions is included as **Annex F** to this report. As a result of these discussions, the section "Further Discussions of Jurisdiction-Related Concerns" was added to the draft report, suggesting a path forward for these concerns beyond the CCWG-Accountability through a further other multistakeholder process.

The draft report was published for Public Comment on 14 November 2017. The Public Comment period closed on 14 January 2018. Fifteen comments were received. These comments may be found at https://mm.icann.org/pipermail/comments-jurisdiction-recs-14nov17. These comments were summarized by ICANN staff in a "comment tool" spreadsheet, which may be found at https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/79436152/Jurisdiction-PublicComments-jan2018-Summary-post.pdf. These comments were each duly considered and discussed by the sub-group. Where this led to a change to the sub-group consensus, the draft report was then changed to reflect the new consensus. The suggestion added to the report that "Further Discussions of Jurisdiction-Related Concerns" are needed was echoed in several comments subsequently received. These comments did not bring any changes to the report, recognizing that the need for "further discussions" to address unresolved concerns, including in other fora, had already been acknowledged.

[8] CCWG-Accountability Charter, Section V:

(a) Full Consensus – A position where no minority disagrees; identified by an absence of objection.

(b) Consensus – A position where a small minority disagrees, but most agree

In the absence of Full Consensus, the Chair(s) should allow for the submission of minority viewpoint(s) and these, along with the consensus view, shall be included in the report.

RECOMMENDATIONS REGARDING OFAC AND RELATED SANCTIONS ISSUES

Background

The sub-group has considered several related issues under the common topic of the effect of government sanctions on ICANN's operations and accountability. In particular,[9] these issues have been raised in relation to U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC).

OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted individuals and entities.[10] Where a nation is subject to sanctions, the sanctions may extend to its citizens, regardless of their personal character or activities. OFAC has been delegated responsibility by the Secretary of the Treasury for developing, promulgating, and administering U.S. sanctions programs. Many of these sanctions are based on United Nations and other international mandates; therefore, they are multilateral in scope, and involve close cooperation with allied governments. Other sanctions are specific to the national security interests of the United States.

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

OFAC also enforces apparent violations of its regulations, based on its Economic Sanctions Enforcement Guidelines.[11] Enforcement may result in civil penalties up to $250,000 per violation or twice the amount of a transaction, whichever is greater.

Persons Subject to Compliance Obligations

According to the OFAC website, "U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply."[12]

[9] In the future, if ICANN is subject to other similar sanctions (e.g., similar in scope, type, and effect, and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.

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

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

[12] https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic.

Covered Persons

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

Prohibited Transactions

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

OFAC Licenses

OFAC has the authority, through a licensing process, to permit certain transactions that would otherwise be prohibited under its regulations. OFAC can issue a license to engage in an otherwise prohibited transaction when it determines that the transaction does not undermine the U.S. policy objectives of the particular sanctions program, or is otherwise justified by U.S. national security or foreign policy objectives. OFAC can also promulgate general licenses, which authorize categories of transactions, without the need for case-by-case authorization from OFAC. General licenses are actually regulations, which must be adopted and then can be found in the regulations for each sanctions program[13] and may be accessed from OFAC's website.

The regulation covering a general license will set forth the relevant criteria of the general license, including the classes of person and category or categories of transactions covered by the general license.

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

ISSUES AND RECOMMENDATIONS

- ICANN and U.S. Sanctions
- ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses
- Applicability of OFAC to Non-US Registrars
- Approval of gTLD Registries

[13] 31 CFR, Chapter V (Regulations). https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title31/31cfrv3_02.tpl

- Application of OFAC Restrictions by Non-US Registrars
- General Licenses

ICANN and U.S. Sanctions

There is a tension between ICANN'S goal of administering the Internet as a neutral global resource and the imposition of sanctions by the U.S. on other countries.[14] Sanctions, laws, and policies, when applied to domain name registrars and registries, can hamper access to the domain name system by innocent users and businesses, simply based on their nationality. For these persons to transact with ICANN, they or ICANN will need to apply for an OFAC license.

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

Currently, the Terms and Conditions for the Registrar Accreditation Application state that "ICANN is under no obligation to seek [a license for a transaction with a non-SDN resident of a sanctioned country] and, in any given case, OFAC could decide not to issue a requested license."[15]

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

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

[14] 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. In the future, if ICANN is subject to other similar sanctions (e.g., similar in scope, type and effect and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.

[15] https://www.icann.org/resources/pages/application-2012-02-25-en.

Recommendation

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

> **"4. Application Process.**
>
> Applicant acknowledges that ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the "SDN List"). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. **However, Applicant acknowledges that ICANN is under no obligations to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.**" (emphasis added)

The last sentence should be amended to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not on the SDN List). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

Approval of gTLD Registries

In the 2012 round of the New gTLD Program, it proved to be difficult for residents from countries subject to U.S. sanctions to file and make their way through the application process. The AGB (Applicant Guidebook) states, in language highly reminiscent of the RAA: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license."[16]

It is the sub-group's understanding that new gTLD applicants from sanctioned countries who are not on the SDN List found that the process for requesting that ICANN apply for an OFAC license is not transparent, and that response times for ICANN replies felt quite lengthy. In particular, ICANN apparently did not provide any indication that it had applied for an OFAC license.

Furthermore, the process is quite lengthy, even if ICANN is proceeding with speed. As a result, applicants may have felt they were in limbo.

[16] New gTLD Applicant Guidebook, 1-25.

Recommendation

ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN List). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

Application of OFAC Limitations by Non-US Registrars

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

There may be other ways that non-U.S. registrars give the impression that these registrars are following OFAC sanctions. For example, the sub-group was provided examples of two non-U.S. registrars with registrant agreements that stated that persons located in sanctioned countries could not use their services due to OFAC sanctions.[17] Both registrars apparently used a registrant agreement "cut and pasted" from other sources.[18] One of the two registrars (Gesloten) has since revised its registrant agreement significantly, and removed any mention of OFAC restrictions. OFAC restrictions could have been included in these registrant agreements as a "cut and paste" error or because the registrar believed (rightly or wrongly) that OFAC sanctions applied to it. In either case, the conclusion is the same: registrars should understand which laws apply to their businesses, and they should make sure that their registrant agreements accurately reflect those laws.

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

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

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

[18] For example, both agreements used "Mumbai time" as a standard even though neither is in India, located in that time zone, or has any particular contacts with India.

Recommendation

ICANN needs to bring awareness of these issues to registrars. ICANN should clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

General Licenses

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

An OFAC "general license" is actually a regulation. Creation of a general license involves a regulatory process, which is in the purview of the Executive Branch (more specifically, the U.S. Treasury, of which OFAC is a part). Indeed, 31 CFR § 595.305 defines a general license as "any license or authorization the terms of which are set forth in this part." In other words, the general license is a part of the OFAC regulations. As such, one does not merely "apply" for a general license. One must determine the desired parameters of the general license(s) and work with the U.S. Department of the Treasury and provide appropriate reasoning, support, etc. so that the Treasury undertakes the regulatory effort to bring the general license into being.

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

Recommendation

ICANN should take steps to pursue one or more OFAC "general licenses" with the U.S. Department of Treasury in connection with DNS-related transactions. Initially, ICANN should make it a priority to study the costs, benefits, timeline, and details of seeking and securing one or more general licenses for DNS-related transactions. ICANN should then pursue one or more OFAC

general licenses, unless significant obstacles were discovered in the “study” process. If there are significant obstacles, ICANN should report them to the community and seek its advice on how to proceed. If unsuccessful, ICANN would need to find other ways to accomplish the ultimate goal – enabling transactions between ICANN and residents of sanctioned countries to be consummated with a minimum of “friction.”

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When implementing each of the recommendations in this section, their utmost importance to ICANN in carrying out its mission and facilitating global access to DNS should be considered. Taking into account this importance, the implementation phase should start as soon as possible, but in no event later than six months after approval by the ICANN Board.

RECOMMENDATIONS REGARDING CHOICE OF LAW AND CHOICE OF VENUE PROVISIONS IN ICANN AGREEMENTS

Background

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

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

Both the RA and the RAA are standard-form contracts that do not typically give rise to negotiation between ICANN and the potentially contracted party, with some minor exceptions when the contracted party is an intergovernmental organization or a governmental entity. Any changes to the base agreements are now determined through an amendment procedure, detailed in each agreement (see, e.g., Art. 7.6 of the RA).

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

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

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

Issues

- **Choice of law provision in registry agreements.**

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

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

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

- **Choice of venue provision in registry agreements.**

  Disputes arising in the context of ICANN's RA are to be resolved under "binding arbitration" pursuant to ICC rules. Moreover, the RA contains a choice of venue provision. This provision states that the venue is Los Angeles, California as both the physical place and the seat[19] of the arbitration (to be held under ICC rules).

Possible Solutions

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

   A. Menu Approach

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

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

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

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

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

[19] The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

The method of "choosing" from the menu also needs to be considered. The sub-group recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

The Menu approach has the following advantages:

1. It provides the parties, especially the registries, with effective freedom to define the law(s) governing their contracts. This may contribute to avoiding conflicts between provisions established in the contract and the provisions of national or supranational law, since the RA would be interpreted under the same national law that governs the registry (this assumes that the registry operator's national law is "on the menu").

2. It may also help registries that are more comfortable with subjecting their agreement in whole or in part to law(s) with which they are more familiar. This could lower the hurdles for those considering applying to operate a registry who are not familiar with U.S. law and thereby make ICANN's global outreach efforts more efficient.

3. Another possible advantage of the menu option is that parties may then choose a governing law which allows them to be compliant with mandatory extra-contractual legal obligations while not violating the provisions of the contract.

However, there are some disadvantages of the Menu approach.

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

A second disadvantage, which is related to the first, is that some registries could ultimately find themselves with a significantly different RA governing their relation with ICANN by virtue of mandatory modifications brought about by a different governing law.[20] These differences could turn out to be either an advantage or a disadvantage to these registries but could well be perceived as unfair. Over time, this could, and in all likelihood would, lead to some form of jurisdiction shopping by registries.

A third disadvantage is the fact that a choice must be made on the contents of the "Menu"

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

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

B. "California" (or "fixed law") Approach

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

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

The main disadvantage of this option is that it forces all registries worldwide to look to California law when interpreting their contract with ICANN. While US-based registries might not see that as a problem, several members of the sub-group outlined the inconsistency between the global mandate of ICANN and the imposition of California law in its contracts with registries. Moreover, this might place some non-U.S. registries at a disadvantage in interpreting and potentially litigating the RA, since their knowledge of California and U.S. law might be limited.

Finally, California law might act as a chilling effect on potential litigation, discouraging litigants from litigating simply based on their lack of knowledge of California law.

C. Carve-out Approach

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

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

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

Another disadvantage of this option is the fact that the applicable law within each RA is not uniform. This option assumes that all the obligations contained in the RA can be

neatly separated in categories, which are then "labeled" with a given applicable law. In practice, it may well turn out that many obligations are interdependent and as such, this choice may make the RA difficult for interpret for the parties and eventually for arbitrators, and as such make dispute outcomes more difficult to predict, which in turn could diminish accountability.

D. Bespoke Approach

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

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

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

E. Status Quo Approach

A fifth possible approach is to retain the status quo (i.e., have no "governing law" clause in the RA). The advantages of this approach have been explained by ICANN Legal in a document sent to the sub-group in response to questions asked by the sub-group [21]:

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

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

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

2. Choice of law provision in registrar accreditation agreements

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

3. Choice of venue provisions in registry agreements

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

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

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

From the perspective of the contract issuer (which, in our case, would be ICANN), one risk associated with such a change is having to deal with a different *lex arbitri* than that of California. ICANN would also have to hire local counsel and travel to various arbitration proceedings. Furthermore, the *courts* of the seat of the arbitration may be competent to order interim relief and hear challenges to the award, among other things.[22]

Finally, the options given in the "venue menu" could correspond to ICANN's own regions as defined in ICANN's Bylaws; that is, ICANN could offer at least one venue per region.[23]

RECOMMENDATIONS

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

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

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

Choice of Law in Registry Agreements

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

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

The sub-group recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

Choice of Law in Registrar Accreditation Agreements

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

Choice of Venue in Registry Agreements

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

Further Discussions of Jurisdiction-Related Concerns

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

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

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

STRESS TESTS

"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.

Stress tests are used 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.

The following Stress Tests assess the recommendations to address government 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**
ICANN management is able to explain the extent to which sanctions affecting ICANN would also affect contract parties. The community has the ability to challenge not 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 to have ICANN clarify to registrars that the mere existence of their Registration Accreditation Agreement (RAA) with ICANN does require the registrar to comply with sanctions that apply to the ICANN corporation. This clarification, if credible and legally substantiated, should allow registrars to accept domain registration requests from citizens of any country, subject to limitations and obligations due to applicable law.
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 an OFAC license. Currently, "ICANN 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 need licenses" to cover transactions such as is 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.

<u>Stress Test #3</u>: 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 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 need applicants otherwise qualified. ICANN should also be helpful and such 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