



Comment on Work Stream 2 Recommendations on ICANN Jurisdiction

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Business Constituency Submission

GNSO//CSG//BC

Background

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

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

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

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

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

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

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

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

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

BC General Comment

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

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

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

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

We therefore do not agree with the noted minority view that the “draft report falls short of the objectives envisaged for Work Stream 2 – in particular the need to ensure that ICANN is accountable towards all stakeholders –, by not tackling the issue of ICANN's subjection to US jurisdiction.”³

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

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

BC Comment on Recommendations Relating to OFAC Sanctions

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

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

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

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

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

BC Comment on addressing non-OFAC sanctions

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

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

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

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

BC suggests Stress Testing for Recommendations Relating to Sanctions

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

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

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

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

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

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

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

1. **Menu Approach.** The Sub-group supports a "Menu" approach, where the governing law would be chosen before the contract is executed from a "menu" of possible governing laws. The menu needs to be defined; this could best left to ICANN and the registries. The Sub-group discussed a number of possible menus, which could include one country, or a small number of countries, from each ICANN Geographic Region, plus the status quo (no choice of law) and/or the registry's jurisdiction of incorporation and/or the countries in which ICANN has physical locations.

The Sub-group has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The Sub-group has also not determined how options will be chosen from the menu, e.g., the registry could simply choose from the menu, or it could be negotiated with ICANN?

2. **"California" (or "fixed law") Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.
3. **Carve-out Approach.** A third possible option would be a "Carve-Out" approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., New York) and other parts are governed by the law of the registry's jurisdiction by law chosen using the "Menu" approach.

4. **Bespoke Approach.** In the “Bespoke” approach, the governing law of the entire agreement is the governing law of the Registry Operator.
5. **Status Quo Approach.** A fifth possible approach is to retain the status quo, i.e., have no “governing law” clause in the RAA.

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

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

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

Conclusion

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

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

It was approved in accord with the BC charter.

Annex

Stress Tests for Recommendations of Work Stream 2 Jurisdiction

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

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

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

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

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

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

EXISTING ACCOUNTABILITY MEASURES

PROPOSED ACCOUNTABILITY MEASURES

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

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

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

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

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

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

CONCLUSIONS:

Existing measures may not be adequate.

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

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

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

EXISTING ACCOUNTABILITY MEASURES

PROPOSED ACCOUNTABILITY MEASURES

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

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

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

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

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

CONCLUSIONS:

Existing measures may not be adequate.

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