

I have a fundamental problem with how this is described. If there are laws that are applicable to ICANN (assuming appropriate jurisdictional reach, etc), acting in accordance with law is not fairly described as acquiescing. It is following the law. There are important baselines here – depending on the law, violations of law could result not just in fines, but in individual criminal liability for officers and directors. Having on record an intention to act in contravention of law or in disregard to appropriate court orders could impact the organization’s ability to maintain insurance, including director’s and officer’s insurance which could serve as a vital part of someone’s decision to serve on the ICANN Board. There is clearly a tension here, but I think that getting more precise about the intended consequence that we are trying to avoid will get us further in describing the accountability mechanisms that may allow recourse.

I heard the concern on the call that ICANN may receive legal advice that places it in too risk adverse of a situation – that there may be advice that ICANN should do x or y to avoid fines or legal action, and that action would result in ICANN failing to abide by an established policy or impede on existing policy development work. When seen like this, why is this risk any different than any other situation where ICANN may act contrary to policy?

I also heard on the call that ICANN could choose to challenge legislation or a court order. But we have to be very clear that challenging is not the same as ignoring or acting contrary to. Also, at least in US jurisdictions, there is a requirement for good faith in asserting legal arguments, so ICANN shouldn’t be forced into a position where it faces sanctions for maintaining an untenable legal position.

These are all things that need to be considered, but I think that getting crisper on the consequence we are trying to avoid will help navigate through these issues.

This sounds as if the community should have the opportunity to insert itself into a contractual dispute? It’s not clear to me what the IRP here would be doing, and in some cases (though not all) the injunction may not be based on ICANN process or decision. What if the entity seeking the injunction is acting outside of ICANN-developed process or policy? Here again may be a place where there needs to be a clearer statement in the stress test itself - shouldn't this be tied to an ICANN failure in process or policy in order to be related to accountability?