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## **AT-LARGE ADVISORY COMMITTEE**

### **ALAC Statement on Recommendations on ICANN Jurisdiction**

#### **Introduction**

Bastiaan Goslings, ALAC Vice Chair and ALAC Member of the European Regional At-Large Organization (EURALO), Hadia Elminiawi, ALAC Member of the African Regional At-Large Organization (AFRALO), Erich Schweighofer and Tatiana Tropina, members of EURALO, Stanley Osao, member of the Asian, Australasian, and Pacific Islands Regional At-Large Organization (APRALO) and Vanda Scartezini, member of the Latin American and the Caribbean Islands Regional At-Large Organization (LACRALO), developed an initial draft of the Statement on behalf of the ALAC.

On 11 January 2018, the first draft of the Statement was posted on its [At-Large Workspace](#).

On that same date, ICANN Policy Staff in support of the At-Large Community sent a Call for Comments on the Statement to the At-Large Community via the [ALAC Work mailing list](#).

On 13 January 2018, a version incorporating the comments received was posted on the aforementioned workspace and the ALAC Chair requested that Staff open an ALAC ratification vote.

In the interest of time, the ALAC Chair requested that the Statement be transmitted to the ICANN public comment process, copying the ICANN Staff member responsible for this topic, with a note that the Statement is pending ALAC ratification.

## **ALAC Statement on Recommendations on ICANN Jurisdiction**

ICANN is responsible for globally coordinating the hierarchical distribution of a set of critical Internet resources. In its daily operations, local applicable law within a certain jurisdiction will preside over ICANN policies for end-users and business within that jurisdiction. But insofar as ICANN (i.e. the outcome of its multistakeholder policy making processes) determines the impact of decisions made within its remit, it is imperative that global interests are kept in mind and that no particular jurisdiction benefits over others because of what ICANN does.

The IANA transition ended the special role of the United States government vis-a-vis ICANN's role, which essentially provided a right of veto for the U.S. when it came to changes in the DNS root zone file and formalized ICANN's future accountability to the global multistakeholder Community. However, being a cooperation and inevitably based and headquartered in a particular jurisdiction left remaining challenges in terms of this accountability; as clearly stated in Annex 12 of the CCWG-Accountability's final report for Work Stream 1 (WS1), ICANN will stay incorporated under the laws of the U.S. State of California. Because of this, some feared the risk of U.S. federal government regulating ICANN activities to the detriment of the interests of other nation states and/or stakeholder groups. Which would mean the United States, because of "jurisdiction", would still have more power over ICANN than other nation states.

The ALAC very much appreciates the work done by CCWG-Accountability WS2 Jurisdiction Subgroup, and the recommendations it has published for public comment in November 2017 to tackle ICANN's jurisdictional challenges. And the ALAC agrees with all consensus recommendations as put forward by the Subgroup. The ALAC especially wants to highlight the following recommendations:

- ICANN should apply for and use best efforts to secure an Office of Foreign Asset Control (OFAC) license if the party from a sanctioned country 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;
- ICANN should commit to applying for and using best efforts to secure an OFAC license for all new gTLD applicants from sanctioned countries if the applicant is otherwise qualified (and is not on the specially designated nationals (SDN) list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant;
- ICANN should clarify to registrars that the mere existence of their Registrar Accreditation Agreement (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;
- ICANN should take steps to pursue one or more OFAC "general licenses", initially by prioritizing a study of the costs, benefits, timeline and details of the process: these licenses would have to be developed in conjunction with the U.S. Department of the Treasury. They would cover transactions integral to ICANN's role in managing the DNS and contracts for Internet resources, such as registries and registrars entering into 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.

The ALAC trusts that these recommendations will help ICANN in taking further steps to reduce and hopefully eliminate the effect U.S. sanctions against foreign governments can inadvertently have on Internet users and businesses in those sanctioned countries.

As reflected by the size of the draft report, the Jurisdiction Subgroup's work is impressive: identifying the different "layers of jurisdiction", attempting to determine the influence of ICANN's existing jurisdiction(s) relating to the resolution of disputes (i.e. governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms, involving the community with a Questionnaire to provide factual information, comprehensively reviewing the litigations in which ICANN has been a party, and much more.

The ALAC is convinced the comprehensive findings of the Subgroup will assist further work that needs to be done, especially when it comes to 'discussions of limited, partial, relative or tailored immunity for ICANN that did not come to conclusion'.

As proposed by the Subgroup and which the ALAC fully supports:

"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 Subgroup suggests that a further other multistakeholder process of some kind should be considered to allow for further consideration, and potentially resolution, of these concerns."