

Responses Adapted From: Transcript from ICANN 58 China Internet Community Readout Session (Excerpt)

[NOTE: These responses were not received in a question-and-answer format. Rather, the response was a general record of a discussion. Staff here has reorganized the content of the response to align with the questions as closely as possible. Staff did not remove any content. Where the content appeared to be directly responsive to a question, that content is in **bold**. The remaining content did not appear to be directly responsive, but has been included for purposes of transparency and completeness.]

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.

Liu Limei: As a contracting party, we noted that there was a very interesting thing as regards jurisdiction when we signed with RA. The agreement with RA states that different laws may be applicable to different contracting parties. A conventional commercial company or institution observes the laws of the Rocky Mountain County, California, in contracting with the ICANN, while some governmental organizations and organizations with special needs observe the Swiss laws. Regardless of my limited knowledge of laws, I believe it is not fair and is unreasonable. Frankly speaking, they are conditional, which is, in my opinion, the biggest problem. This is our key point of view.

Pam Little: We note ICANN has entered various 2012 round new gTLD registry agreements that are subject to different jurisdictions, such as those of Switzerland and California. While ICANN is a non-profit organization in California overseeing domain names and IP addresses, it is still a private company. As such, these registry agreements are private in nature, notwithstanding some of them are with governments and may have taken into account some special considerations, with which we are not familiar and therefore not in a position to comment. “ICANN’s jurisdiction”, as it refers to “(c) any “choice of law” or venue provisions in agreements with ICANN”, may potentially impact our registries and registrars in that if there is a dispute arising from those contracts that progresses to arbitration or court proceedings, the venue will be California, which may be a disadvantage to us. In other words, our registry and registrar business may potentially be affected by ICANN’s jurisdiction. **However, given that questions 1 and 2 in the Questionnaire are framed in the past tense, we are not able to provide any past examples.** Those questions may be viewed as leading for a pre-determined outcome.

Lang Ping: I agree with the previous speeches, especially Pam's leading question comment on the questionnaire. Internet has become an important facility or technology

for China's political and economical security. As ICANN manages resources key to our national security, our concern over its jurisdiction is mainly political. As regards to international politics, I believe the government raises the jurisdiction issue change for reasons of national security considerations. I recommend that an expert team prepare an evaluation report. Previously, we've mentioned the influence from different angles. If we can evaluate all the influences comprehensively and determine which deserves precautions and which are unlikely to happen. We should take different strategies for different threats. Thank you.

Representative from a Registry: **These are the advices given by the relevant business teams and the legal affairs team as I had not participated in the previous meeting. Their advice concerns the questionnaire only. According to them, there is no impact on our business, present and past.**

Low Jiarong: This is a leading question. I find that there are few Chinese in the working group. One is a student. The questionnaire has been released. It will be difficult for us to describe the influence exactly. If the Chinese Internet Community concerns about the issue, it is better that one or two more members from Chinese community to join the working group.

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.

Zhang Jianchuan: I think the key point here is logical deduction. Once we face a lawsuit, do we have to settle it in the United States or Singapore? I'd like to ask about your experience on the issue, especially the fourth question. You have to offer the organization evidence and evidence is hard to collect. The question is difficult to answer if similar issues did not happen before. So is logical deduction. No one wants to go to court in California on a dispute.

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.

Liu Han: I want to first talk a little bit about the controversy over the judicial jurisdiction of ICANN and its relevance to China. I think within the current legal setting, Chinese companies can have a way to cope with the problem of resolving disputes with ICANN under American law. **From a pure legal point of view, if a Chinese company has a litigation with ICANN in a California court, there is a federal court precedent. In the Vitamin C case, the Second Circuit Court ruled that it defers to the Chinese law as interpreted in the amicus brief provided by the Ministry of Commerce of the Chinese government, since it has no expertise on Chinese law. The result is that the Chinese company won the case. The implication is that if such a case related to**

ICANN arises in a California court, the Chinese company and the Chinese government can cooperate to present Chinese law to American courts.

Jiang Yayun: From our perspective, the questions in the Questionnaire seem fairly tricky. While ICANN's jurisdiction may not have resulted in adverse outcome, its impact is real and material. We believe ICANN's jurisdiction choice is neither scientific nor logical. For example, all registrars operating in China must comply with Chinese laws when they perform their obligations under their agreements (RAA) with ICANN. However, ICANN staff may not have the necessary knowledge or expertise of Chinese laws. Therefore, when a dispute arises under the RAA, ICANN's determination may be inconsistent with the requirements under Chinese laws. Further, all legal proceedings are subject to the jurisdiction of California, USA. Those courts may lack expertise of Chinese laws, the laws that are applicable to the registrar's performance if its RAA obligations. Similarly, those courts may make decisions that are inconsistent with registrars' obligations under Chinese laws. This poses an unfair disadvantage to non US-based registrars. Under these circumstances, most registrars may rather "comply" with ICANN's determination when they have a dispute or disagreement with ICANN. This may create an appearance that registrars are able to resolve their disagreements amicably with ICANN. But the fact may be that, due to their concerns over ICANN's jurisdiction, registrars are being pragmatic in making concession instead of pursue legal options. In our view, the issue of ICANN's jurisdiction may hinder the development of an appropriate legal regime for legitimate domain businesses, which in turn is detrimental to the domain industry in the long run.

4 a. 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.

Cai Xiongshan: Contracts between ICANN and registries or registrars are civil ones. And for civil contracts, you can choose the applicable laws. In fact, many Internet contracts use California laws as their applicable laws. The core of the ICANN jurisdiction issue in the international society is that, it is not only civil, but also administrative and criminal. ICANN is an organization registered in the United States. Is it possible that ICANN is requisitioned by the US government? The global Internet stability would be affected once it happens. Embassies and diplomats are exempt. However, ICANN is an entity registered in the U.S. and is under US jurisdiction. The question is unanswerable. The question is whether the US government can shut down ICANN, or control the ICANN through legal measures so that ICANN fails to function properly and the global Internet security and stability are seriously undermined, rather than whether the contracts are subject to California laws or not. This is my personal opinion.

Liu Han: Second, regarding global Internet governance, I argue that state sovereignty has been never absent in cyberspace, despite numerous claims that cyberspace is independent from governments of physical world. **The creation of ICANN, for example, happened against the backdrop of a soul-stirring event in which the American government tried to put the root of DNS in their control. I mean the Clinton administration's 1998 move against Jon Postel's attempt to removed four root DNS servers from the supervision of the federal government.** That shows the historical origins of the

controversy over global Internet governance: the sovereign nation-state has never relinquished its fundamental control over the root of the Internet.

b. 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.

Kan Kaili: there are two layers for this debate. One is the contracting party, another is the government level. From the contracting party side, a contracting party is signing agreement with ICANN through negotiation. The contracting party can choose the applicable law which it thinks beneficial. From the government side, it is somewhat inappropriate that ICANN as a global administrator of the Internet has its jurisdiction in California. But how to solve this issue? I cannot see any solution. There is no mutually acceptable solution. With this I would suggest the government follow the discussion thread calmly rather than raising the issue.

Hao Fangbei: In my personal view, ICANN is a company fulfilling functions of an international organization. It is inappropriate for such a company to distribute key Internet IT resources and is not beneficial for the development of the Internet. Our government, community, and industry shall all play a strong role in ICANN. We must be familiar with the international rules, use the rules, and turn ourselves from a rule observer to a rule maker. The government is enhancing its role in GAC. The government, community, and industry shall contribute Chinese wisdom and solutions in ICANN.

Chen Rong: GAC's concern on the jurisdiction issue is in view of national security. Personally, I think the issue can be considered in two aspects. In view of GAC, the government, and national security, the issue concerns national interests, not just in words. But in addition to official statements and governmental statements, enterprises have also a lot of things to do. For example, different companies have different concerns. I think it is a good thing for ICANN to send questionnaires. It offers you an opportunity to make your voice heard. We do not have to give exact answers to these questions. We can write down all our concerns on it.

Wang Wei: The question can be left to the next generation, as it could not be solved in one or two years. Instead, it can be made a long-term issue.

Song Zheng: In my opinion, ICANN has two features. One is that it serves only public welfare and engages the security and stability of root server systems. These tasks, including the distribution of top-level domain names in countries and regions, are absolutely the scope of the sovereignty within countries and purely of public welfare, and should not be controlled by a single government or jurisdiction. **From this point of view, we may doubt why such affairs are subject to the jurisdiction of a country and believe that they should be given judicial exemption. It is similar to the United Nations in New York. The US police cannot just lock away the UN Secretary-General. This is unactionable. Commercially, it may be actionable. However, even if it is possible to make such legal arrangements, it would be truly difficult to achieve such effects.**