

Proposed Issues Submitted by Subgroup Participants: Draft for Review in Meeting of September 13 2017

Proposed Issues: Major Topics	Individual Proposed Issues	Submitted by	Notes
OFAC	<ul style="list-style-type: none"> ● ICANN contractual language in RAA relating to OFAC licenses ● Applicability of OFAC to Non-US Registrars ● Application of OFAC restrictions by Non-US Registrars ● Approval of gTLD registries ● Cancellation by some registrars of domain name registrations owned by registrants in countries subject to OFAC 	Farzaneh Badii, Kavouss Arasteh	Context: Study of general licenses, ICANN’s response to need for specific licenses with registries and registrars will be discussed as potential solutions
Provisions relating to choice of law in certain ICANN Agreements	<ul style="list-style-type: none"> ● Registry Agreements do not have a provision stating the governing law of the agreement ● Registrar Agreements do not have a provision stating the governing law of the agreement ● Arbitration of Registry Agreement: Lack of choice in arbitral body and jurisdiction of arbitration ● Lack of governing law provisions could lead to courts more likely choosing their own law as governing law ● provisions regarding the venue for hearing disputes in registry agreements are limited to one specific venue, with flexibility allowed only in contracts with Governments and other special cases 	Raphael Beauregard-Lacroix, Jorge Cancio	[Jorge Cancio]: see: - flexibility for IGO/public authorities/other special circumstances in allowing to choose between Geneva and L.A. (section 5.2. ALT registry agreement) and Judge/judicial disputes: registries: <ul style="list-style-type: none"> • court in L.A. • flexibility for IGO/govt entities: court with jurisdiction in Geneva, unless agreement (ALT 5.2. registry agreement)
U.S. court jurisdiction over ICANN activities	<ul style="list-style-type: none"> ● Jurisdiction over ICANN's activities that (1) comply with GAC advice or (2) are otherwise based on powers recognised onto Governmental authorities according to 	Thiago Jardim	ICANN activities “based on powers recognised onto Governmental authorities according to ICANN Bylaws” may relate mostly to ccTLDs

	<p>ICANN Bylaws</p> <ul style="list-style-type: none"> ● ICANN policy development and policy implementation activities which ICANN performs in the global public interest are subject to litigation in US courts 		and if so it should be considered as part of those potential issues.
Non-interference of international actors in ICANN's core activities	<ul style="list-style-type: none"> ● States (and International Organizations) should refrain from exercising concurrent jurisdiction respecting ICANN's special role and governance model. 	Erich Schweighofer	Raised in the context of "the issue on partial immunity"
US's executive, regulatory, legislative and judicial jurisdiction over things ICANN and the unique solution of general immunity under the US International Organizations Immunities Act	<ul style="list-style-type: none"> ● US executive and regulatory powers over ICANN ● Domain seizures by US executive agencies like US customs: Could these potentially be applied to gTLDs? ● US legislature's unlimited power over ICANN ● US's courts' judicial writ over all aspects of ICANN: Almost any US court can take up for its judicial consideration whether ICANN works within each of such applicable law or not. 	Parminder	Discussed in the context of general immunity, as follows: "The only solution there is a general immunity under the US International Organizations Immunities Act, with proper customization and exceptions for ICANN to enable to be able to perform its organizational activities from within the US. The chief exception I understand would be the application of California non-profit law."
US Courts may hear disputes regarding Community TLDs	<ul style="list-style-type: none"> ● US Courts may hear disputes regarding the management of a community TLD (not only Community-based applications (e.g., .swiss, .music., .gay) but all TLDs that "serve a community") which should be dealt mainly under the relevant local laws and by the relevant local authorities ● US Courts may hear disputes relating to community TLDs (as defined above) ● Decisions affecting fundamentally the global community as a whole, or specific local 	Jorge Cancio, Thiago Jardim	At least partially related to choice of law issue. Subset of potential issue of US Courts jurisdiction generally

	communities, should be protected against undue interference by the authorities of one specific country		
Making sure that the hearings of the IRP are location-neutral		Jorge Cancio	Majority of "meetings" of the IRP are virtual. In person meetings would be rare and at the discretion of the panel - No explicit solution proposed
Non-interference of States in ccTLDs of other States	<ul style="list-style-type: none"> • Courts overriding ccTLD delegations • "In Rem" jurisdiction of US courts over ccTLDs • Jurisdiction of US courts and enforcement measures by domestic agencies in respect of activities relating to the management of ccTLDs of other countries. 	Kavouss Arasteh, Farzaneh Badii, Thiago Jardim	First bullet point is subset of potential issue of US Courts generally. The overall proposed issue has also been stated as: "US organs can possibly interfere with ICANN's ccTLD management, regardless of whether that has already happened." There appear to be no examples of this. The ccNSO will have a PDP on developing a dispute resolution system, which could address this as these are excluded from IRP as requested by the ccNSO (similar to ASO). However, it has been asserted that the proposed issue would not be resolved by such a dispute resolution system and that immunity from US jurisdiction should still be recommended.
California not-for-profit incorporation and headquarters location have a positive effect on ICANN accountability mechanisms and operations.	<ul style="list-style-type: none"> • Questioning and attempting to limit ability of third parties to litigate against ICANN in US courts undermines Work Stream 1 accountability mechanisms • Work Stream 1 mechanisms take advantage of specific aspects of California law • Questioning and attempting to limit ability 	Brian Scarpelli	Related to US court issues, also legislative and regulatory issues.

	<p>of third parties to litigate against ICANN in US courts and use previously existing ICANN mechanisms has a negative effect on the perception of these accountability mechanisms.</p> <ul style="list-style-type: none">• Application of US law to ICANN's actions controls ICANN and subjects it to the rule of law: limiting this makes ICANN less accountable		
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