

**UNITED NATIONS COMMISSION ON SCIENCE AND TECHNOLOGY  
FOR DEVELOPMENT**

**Working Group on Enhanced Cooperation**

**Contribution to the guiding questions agreed during first meeting of the  
WGEC**

**Submitted by**

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**Jurisdiction and equal footing with respect to Internet domain names and addresses**

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1. This submission addresses the question: “2. Taking into consideration the work of the previous WGEC and the Tunis Agenda, particularly paragraphs 69-71, what kind of recommendations should we consider?”

2. The specific proposed recommendations are shown as underlined text in paragraphs 11, 12, 15, and 17 below.

3. The Tunis Agenda states:

**68.** We recognize that all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet. **We also recognize** the need for development of public policy by governments in consultation with all stakeholders.

**69.** We further recognize the need for enhanced cooperation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues.

4. In the process of revising its bylaws as part of the IANA transition process, the Internet Corporation for Assigned Names and Numbers (ICANN) has explicitly chosen to subject itself to the laws of California, see for example articles 6.1(a) and 24.1 of the new bylaws<sup>2</sup>. Further, ICANN’s articles of incorporation<sup>3</sup> specify that it is a California corporation. Article 6 of the bylaws and the articles of incorporation can only be changed upon approval by a three-fourths vote of all the Directors and the approval of the Empowered Community<sup>4</sup>. A change to a fundamental bylaw is approved by the Empowered Community only if it is not objected to by more than one member of that body<sup>5</sup>.

5. Since ICANN is legally a US entity, it is subject to the jurisdiction of US courts<sup>6</sup>. US courts have exercised that jurisdiction in the past<sup>7</sup>.

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<sup>1</sup> <http://www.apig.ch>

<sup>2</sup> <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

<sup>3</sup> <https://www.icann.org/resources/pages/governance/articles-en>

<sup>4</sup> See article 25 and 25.2(b).

<sup>5</sup> See 1.4(b)(ii) of the Annex D of the bylaws.

<sup>6</sup> A detailed explanation of why this is significant, including the historical background of the issue, is provided at: <http://cis-india.org/internet-governance/blog/jurisdiction-the-taboo-topic-at-icann> ; a shorter account is provided at:

<http://www.epw.in/journal/2016/42/web-exclusives/internet-governance.html>

8. In line with the principles of equal footing and equal roles and responsibilities of all governments enunciated in the Tunis Agenda, ICANN should not be subject to the jurisdiction of a particular country.

9. One solution would be for the USA (or some other country) to grant some form of immunity to ICANN.

10. But, since ICANN has chosen to subject itself to the jurisdiction of the USA, it does not appear that ICANN would accept some form of immunity.

11. Therefore it seems more appropriate to propose to recommend that the USA make a binding agreement with other states to the effect that it would not exercise its jurisdiction over ICANN in ways that would violate the principles of equal footing and equal roles and responsibilities of all governments. For example, the USA could agree that it would not exercise its jurisdiction in order to force ICANN to re-delegate a ccTLD or to reassign IP addresses<sup>8</sup>.

12. Such a binding agreement would have to take the form of a treaty. The exact language of the treaty would have to be carefully negotiated. Therefore, it is proposed to recommend that concerned states consider the matter and consider inviting the USA to convene a treaty negotiation on this matter.

13. Further, the IANA transition process provides that the management and operation of the authoritative root zone server will continue to be provided by Verisign, but under a contract with ICANN, and not under a contract with the US government as was the case in the past.<sup>9</sup>

14. This decision was not the result of a public consultation. Verisign is a US company, subject to US jurisdiction, so US courts could order Verisign directly to change the root, they don't necessarily need to order ICANN to do so. So long as Verisign had a contract with the US government, it was unlikely that Verisign could be sued directly, because it was just implementing whatever NTIA told it do. But now the US government is no longer in the loop, so Verisign can be sued directly.

15. Therefore, it is proposed to recommend that the USA make a binding agreement with other states to the effect that it would not exercise its jurisdiction over Verisign (or any future operator of the authoritative root zone file) in ways that would violate the principles of equal footing and equal roles

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<sup>7</sup> See for example <https://www.icann.org/news/announcement-2-2016-03-05-en> and <https://www.prlog.org/12539064-united-states-court-has-granted-an-interim-relief-for-dca-trust-on-africa.html> and the court case filed just prior to the IANA transition: [https://www.texasattorneygeneral.gov/files/epress/Net\\_Complaint\\_-\\_FILED.pdf](https://www.texasattorneygeneral.gov/files/epress/Net_Complaint_-_FILED.pdf) <http://ia601506.us.archive.org/17/items/gov.uscourts.txsd.1386946/gov.uscourts.txsd.1386946.7.0.pdf> <http://ia601506.us.archive.org/17/items/gov.uscourts.txsd.1386946/gov.uscourts.txsd.1386946.10.1.pdf>

A full compendium of litigation concerning ICANN is found at:

<https://www.icann.org/resources/pages/governance/litigation-en>

<sup>8</sup> This example is not theoretical. The equivalent of such remedies, namely “attachment” has been requested in a lawsuit involving Iran, see: <https://www.icann.org/resources/pages/icann-various-2014-07-30-en> and in particular page 1 of <https://www.icann.org/en/system/files/files/appellants-brief-26aug15-en.pdf>.

<sup>9</sup> <https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency>

and responsibilities of all governments. Such a binding agreement could be part of the treaty referred to above.

16. Further, ten of the thirteen root servers which provide the data used by all other instances of root servers are managed by US entities (three of which are US government agencies: NASA, Defense Systems Information Agency, and US Army); the other three servers are managed by entities in Japan, the Netherlands, and Sweden.<sup>10</sup> An operator of a root server could misuse it in various ways, in particular to collect certain types of data or to degrade certain services.<sup>11</sup>

17. Therefore, it is proposed to recommend that the USA, Japan, the Netherlands, and Sweden make a binding agreement with other states to the effect that they would not exercise their jurisdiction or operational control over any root server in ways that would violate the principles of equal footing and equal roles and responsibilities of all governments. In the case of the USA, such a binding agreement could be part of the treaty referred to above.

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<sup>10</sup> See [https://en.wikipedia.org/wiki/Root\\_name\\_server](https://en.wikipedia.org/wiki/Root_name_server)

<sup>11</sup> See [http://www.cavebear.com/old\\_cbblog/000232.html](http://www.cavebear.com/old_cbblog/000232.html)