Jurisdiction on the Internet and the Future of Digital Trade: How to Prevent a Legal Arms Race

World Trade Organization
20.09.2018 - Geneva
Paul Fehlinger, Deputy Director
JURISDICTION ON THE INTERNET AND THE FUTURE OF DIGITAL TRADE

1. The cross-border Internet: addressing legal uncertainty
2. The Risk of a legal arms race
3. Creating the enabling environment for a global digital economy
4. The Internet & Jurisdiction Policy Network
5. The Ottawa Roadmap
"Managing the way that a large number of separate legal frameworks apply to the internet is one of the big policy challenges of our time — more complex even than building the internet itself”

Vint Cerf, co-founder of the Internet, Financial Times
Transnational is the New Normal
The Cross Border Internet: Data Flows and Digital Services
Westphalian Sovereignty: A System Based on Territoriality
More Interconnected Users and Services Than Ever

Source: World Bank World Data Indicators
As Cross Border Data Flows and Services increase, so do Legal Conflicts

Most online interactions involve multiple jurisdictions at once

- Location(s) of servers
- Location(s) of country of incorporation
- Location(s) of users
- Location(s) of effects
Existing International Cooperation Frameworks Struggle

- Harmonization of national laws at global level unlikely soon (crime, speech, privacy etc.)
- Absence of an international internet court
- Absence of an all-encompassing global treaty
- Massive online micro justice
- Current frameworks for legal cooperation designed for exceptions, not new transnational digital realities (Speed, scale, coverage)
A Common Concern for all Actors

Governments

Businesses

Users/Customers
A Concern for Governments

- Enforcement of the rule of law online.
- Protecting citizens’ and businesses’ rights.
- Addressing abuses.
- Adapting regulatory frameworks to fast-paced innovation.
- Dealing with the number of transnational micro-conflicts.
A Concern for Businesses

- Potential compliance with 190+ jurisdictions.
- Increasing public role for private actors (decision making).
- MNCs struggle despite great resources.
- Challenge for MSMEs.
A Concern for Users/Customers

• Uncertainty about what laws apply to their online interactions.
• Lack of cross-border redress mechanisms.
• Unclear privacy and consumer protection standards for cross-border digital services.
THE RISK OF A LEGAL ARMS RACE

“[T]he open internet could be a thing of the past within a decade or two. What is needed, [the participants in the Global Conference of the Internet & Jurisdiction Policy Network] said, is more international co-operation—but not of the old kind.”

- The Economist
A Brief Historical Overview

Phase 1: Philosophical Debate (1995 - 2005)


Phase 3: Proliferation of Uncoordinated Action (since 2015)
Enforcing National Laws on the Cross-border Internet

Great sense of urgency (short-term results vs. long term cumulative effects)

Two dynamics -

• Extraterritorial extension of sovereignty
• Limits of enforcability

Unintended Consequences of Uncoordinated Action

• Kantian imperative in cyberspace
• Risk of unscalable solutions
• Risk of unwanted fragmentation
Scalable Solutions Require Bridging Silos

**Geographic Silos**
- National
- Regional

**Policy Silos**
- Digital Economy
- Human Rights and Rule of Law
- Cybersecurity
Concrete Governance Challenges: 4 Examples

1. Data flows and privacy frameworks
2. Cross-border access to user data
3. Intermediaries and user/automatically generated content
4. Intermediaries and micro trade disputes
A global digital economy demands frameworks that are as transnational as the Internet itself.

Cross-border jurisdictional conflicts will grow in the absence of operational solutions and standards.

How to continue to have a cross-border Internet while respecting national laws?

Need for
- Legal certainty
- Trust
- Predictability
- Due process across borders
In managing, promoting, and protecting [the Internet’s] presence in our lives, we need to be no less creative than those who invented it. Clearly, there is a need for governance, but that does not necessarily mean that it has to be done in the traditional way for something that is so very different.

- Kofi Annan, former UN Secretary General
More Transnational Cooperation, or less global digital trade and services

• A pragmatic way forward
  • Legal interoperability
  • Policy Coherence
• Developing standards and solutions for how to apply national laws on the cross-border Internet without nationalizing data flows and services.
• Agile governance to produce scalable and operational solutions that are adapted to the fast changing ecology of the Internet.
• Reconciling competing objectives: Enable the global digital economy, fight abuses, protect human rights, ensure security.
Governance OF and ON the Internet

- Governance OF the Internet (technical governance)
  - Exiting ecosystem (IETF, W3C, ICANN).
  - Multi-stakeholder approach.
  - Ensures technical interoperability of the Internet though standards.

- Governance ON the Internet (governance its uses)
  - Early stage, emerging ecosystem.
  - WSIS, IGF, NETmundial, Internet & Jurisdiction Policy Network.
  - Connecting actors, bridging silos.
  - Voluntary standards that can be later implemented by existing processes/institutions, or more innovative regulatory instruments.
Multistakeholderism and Existing International Processes

Agenda Setting → Policy Formulation → Policy Adoption → Policy Implementation → Evaluation
THE INTERNET & JURISDICTION POLICY NETWORK

- Organization founded in 2012
- Ongoing multi-stakeholder policy process
- Solutions-oriented
- Over 200 key entities from 40+ countries
Secretariat’s Mission

**CONNECT**

stakeholders across policy silos to generate common understanding and policy coherence.

Events since 2012:

- **CONVENED:** 13
- **ORGANIZED:** 26
- **CONTRIBUTED:** 101

in **36 countries**

**INFORM**

decision-making and policy innovation through evidence-based research.

**OBSERVATORY**

31 top experts from 28 leading universities

**RETROSPECT DATABASE**

More than 1.500 searchable cases from 120 countries

**ADVANCE**

the global debate to catalyze the development of shared frameworks and operational solutions.
Focus For Joint Action

How can transnational data flows and the protection of privacy be reconciled with lawful access requirements to address crime?  
**Focus: Cross-border access to user data**

How can we manage globally-available content in light of the diversity of local laws and norms applicable on the internet?  
**Focus: Cross-border content restrictions**

How can the neutrality of the internet’s technical layer be preserved when national laws are applied to the Domain Name System?  
**Focus: Cross-border domain suspensions**
Enabling Multistakeholder Cooperation

2nd Global Conference of the Internet & Jurisdiction Policy Network

February 26 - 28
Ottawa, Canada
Institutional Supporters

Conference Partners
Methodology

- Common Understanding
- Areas for Cooperation
- Policy Options
- Operational Solutions
OTTAWA ROADMAP

Three Work Plans with Common Objectives and Structuring Questions to develop policy standards and frameworks for:

- Cross-border access to user data
- Cross-border content restrictions
- Cross-border domain suspensions

https://www.internetjurisdiction.net/OttawaRoadmap
Key Outcomes

• Call for more legal certainty in cyberspace
• The need for policy standards and frameworks
• Ensuring policy coherence and legal interoperability
• Commitment to collaboration and joint action
• Adoption of Common Objectives and Work Plans
• Creation of multistakeholder Contact Groups
Data & Jurisdiction Work Plan: Objective

In this perspective, participants in the Data & Jurisdiction Workstream at the second Global Conference of the Internet & Jurisdiction Policy Network in Ottawa, Canada, on February 26-28, 2018, identified as a common objective:

- The definition of high substantive and procedural standards
- Allowing relevant authorities from specific countries,
- In investigations regarding certain types of crimes with clear nexus with the requesting country,
- To directly submit structured and due process-respecting requests
- To private companies in another country to obtain the voluntary disclosure
- Of user data, irrespective of where such data is stored.
## Data & Jurisdiction Work Plan: Structuring Questions

<table>
<thead>
<tr>
<th>Standards</th>
<th>Scope</th>
<th>Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualifying Regimes and Requests</td>
<td>Nexus</td>
<td>Data Localization</td>
</tr>
<tr>
<td>Countries</td>
<td>Users</td>
<td>Scalability</td>
</tr>
<tr>
<td>Authorities</td>
<td>Requests</td>
<td>Data Preservation</td>
</tr>
<tr>
<td>Companies</td>
<td>Capacity</td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>Position and Organization</td>
<td></td>
</tr>
<tr>
<td>-------------------------------</td>
<td>-----------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Robert Young</td>
<td>Legal Counsel, Canada, Department of Global Affairs</td>
<td></td>
</tr>
<tr>
<td>Sunil Abraham</td>
<td>Vice President, Leadership Programs, Mozilla Foundation</td>
<td></td>
</tr>
<tr>
<td>Waiswa Abudu Sallam</td>
<td>Head Legal Affairs, Uganda, Communications Commission</td>
<td></td>
</tr>
<tr>
<td>Karen Audcent</td>
<td>Senior Counsel and Team Leader, Canada, Ministry of Justice</td>
<td></td>
</tr>
<tr>
<td>Kerry-Ann Barrett</td>
<td>Cyber Security Policy Specialist, Organization of American States (OAS)</td>
<td></td>
</tr>
<tr>
<td>Cathrin Bauer-Bulst</td>
<td>Deputy Head of Unit, Fight Against Cybercrime, European Commission, DG HOME</td>
<td></td>
</tr>
<tr>
<td>Eduardo Bertoni</td>
<td>Director, Argentina, National Access to Public Information Agency</td>
<td></td>
</tr>
<tr>
<td>Joseph Cannataci</td>
<td>Special Rapporteur on the Right to Privacy, United Nations</td>
<td></td>
</tr>
<tr>
<td>Jennifer Daskal</td>
<td>Associate Professor, American University Washington College of Law</td>
<td></td>
</tr>
<tr>
<td>Fernanda Domingos</td>
<td>Federal Prosecutor, Brazil, Federal Prosecutor’s Office of the State of Sao Paulo</td>
<td></td>
</tr>
<tr>
<td>Brendan Eiffe</td>
<td>Head, Irish Central Authority for Mutual Legal Assistance Ireland, Department of Justice and Equality</td>
<td></td>
</tr>
<tr>
<td>Thomas Fitschen</td>
<td>Director, Cyber Foreign Policy and Cyber Security, Germany, Federal Foreign Office</td>
<td></td>
</tr>
<tr>
<td>Sharon Bradford Franklin</td>
<td>Director, Surveillance and Cybersecurity Policy, New America Foundation</td>
<td></td>
</tr>
<tr>
<td>Eric Freyssinet</td>
<td>Chief Digital Strategy Officer, France, Ministry of Interior</td>
<td></td>
</tr>
<tr>
<td>Tonia Gillet</td>
<td>Counsel, Office of Legal Affairs, Interpol</td>
<td></td>
</tr>
<tr>
<td>Hartmut Glaser</td>
<td>Executive Secretary, Brazilian Internet Steering Committee (CGI.br)</td>
<td></td>
</tr>
<tr>
<td>Nicole Gregory</td>
<td>Head, Data and Online Harms Policy, United Kingdom, Foreign and Commonwealth Office</td>
<td></td>
</tr>
<tr>
<td>Jane Horvath</td>
<td>Senior Director, Global Privacy, Apple</td>
<td></td>
</tr>
<tr>
<td>Gail Kent</td>
<td>Global Public Policy Manager, Facebook</td>
<td></td>
</tr>
<tr>
<td>May-Ann Lim</td>
<td>Executive Director, Asia Cloud Computing Organization</td>
<td></td>
</tr>
<tr>
<td>Sara Marcolla</td>
<td>Specialist, EC3 Internet Governance, Europol</td>
<td></td>
</tr>
</tbody>
</table>
Data & Jurisdiction Contact Group: Members

Drew Mitnick  
Policy Counsel  
Access Now

Greg Nojeim  
Senior Counsel and Director, Freedom, Security and Technology Project, Center for Democracy & Technology (CDT)

Barrack Otieno  
Associate  
Kenya ICT Action Network (KICTANET)

Marc Porret  
Senior Legal Office  
United Nations Counter-Terrorism Committee Executive Directorate (UNCTED)

Katitza Rodriguez  
International Rights Director  
Electronic Frontier Foundation (EFF)

Alberto Rodriguez Alvarez  
Advisor to the National Digital Strategy, Mexico, Office of the President

Alexander Seger  
Executive Secretary, Cybercrime and Convention Committee and head of Cybercrime Division, Council of Europe

Acadia Senese  
Law Enforcement and Information Security Counsel  
Google

Bernard Shen  
Assistant General Council  
Microsoft

Christoph Steck  
Director, Public Policy and Internet  
Telefonica

Dan Suter  
Director  
iJust

Dan Svantesson  
Professor  
Bond University

Peter Swire  
Professor  
Georgia Institute of Technology, Scheller College of Business

Chris Willson  
Senior Manager, Public Policy (Internet Governance)  
Amazon Web Services

Herbert Gustav Yankson  
Chief Superintendent of Police  
Ghana, Police Service

Moctar Yedaly  
Head, Information Society Division, African Union Commission
Content & Jurisdiction Program: Objective

The fundamental aim is to define workable jurisdictional interfaces between disparate national legal rules. Participants in the Content & Jurisdiction Workstream at the second Global Conference of the Internet & Jurisdiction Policy Network in Ottawa, Canada, on February 26-28, 2018, have agreed upon the identification of the current status as well as achieving clarification and coherence with respect to the following points as a common objective:

• Applicable substantive norms, including the interplay between agreed international and regional human rights, national laws, and companies’ community guidelines,
• The respective obligations of states and the respective responsibilities and protections of other actors, including the identification of allegedly illegal content,
• Decision-making, standards and procedures, including the escalation path for individual decisions and appeal mechanisms,
• Legitimate purposes, necessity and proportionality regarding the geographic scope of restrictions,
• The necessary due process and transparency standards that should be applied across borders.
### Content & Jurisdiction Program: Structuring Questions

<table>
<thead>
<tr>
<th>Standards</th>
<th>Algorithms</th>
<th>Request Formats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convergence</td>
<td>Procedural Standards</td>
<td>Notification</td>
</tr>
<tr>
<td>Response Time</td>
<td>Geographic Scope</td>
<td>Remediation</td>
</tr>
<tr>
<td>Decision Making</td>
<td>Transparency</td>
<td>Types of Content</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Types of Actors</td>
</tr>
</tbody>
</table>
### Content & Jurisdiction Contact Group: Members

<table>
<thead>
<tr>
<th>Wolfgang Schulz</th>
<th>Agnes Callamard</th>
<th>Elena Dodonova</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director</td>
<td>Director, Columbia University, Global Freedom of Expression Project</td>
<td>Administration, Media and Internet Division, Council of Europe</td>
</tr>
<tr>
<td>Hans Bredow Institute</td>
<td></td>
<td>Anriette Esterhuysen</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Senior Advisor Internet Governance, Policy and Strategic Planning, Association for Progressive Communications</td>
</tr>
<tr>
<td>Carlos Affonso Souza</td>
<td>Maria Paz Canales</td>
<td>Miriam Estrin</td>
</tr>
<tr>
<td>Director, Institute for Technology and Society (ITS RIOS)</td>
<td>Executive Director, Derechos Digitales</td>
<td>Public Policy Manager Google</td>
</tr>
<tr>
<td></td>
<td>Mark Carvell</td>
<td>Raquel Gatto</td>
</tr>
<tr>
<td></td>
<td>Head of International Online Policy, United Kingdom, Department for Culture Media and Sport</td>
<td>Regional Policy Advisor Internet Society (ISOC)</td>
</tr>
<tr>
<td></td>
<td>Jacques de Werra</td>
<td>Daniel Holznagel</td>
</tr>
<tr>
<td></td>
<td>Professor and Vice Rector, University of Geneva</td>
<td>Legal Officer, Germany, Federal Ministry of Justice and Consumer Protection</td>
</tr>
<tr>
<td></td>
<td>Agustina Del Campo</td>
<td>Raman Jit Singh Chima</td>
</tr>
<tr>
<td></td>
<td>Director, University of Palermo, CELE</td>
<td>Policy Director Access Now</td>
</tr>
<tr>
<td></td>
<td>Harlem Desir</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Representative on Freedom of the Media OSCE</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Azmina Dhrodia</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Researcher, Technology and Human Rights Amnesty International</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ellen Blackler</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vice President, Global Public Policy, The Walt Disney Company</td>
<td></td>
</tr>
</tbody>
</table>
Content & Jurisdiction Contact Group: Members

David Kaye  
Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations

Edinson Lanza  
Special Rapporteur for Freedom of Expressions, Organization of American States (OAS)

Emma Llanso  
Director, Free Expression Project, Center for Democracy and Technology (CDT)

Rebecca MacKinnon  
Director, Ranking Digital Rights  
New America Foundation

Katherine Maher  
Executive Director,  
Wikimedia Foundation

Giacomo Mazzone  
Head of Institutional Relations and Members Relations, European Broadcasting Union (EBU)

Carly McDaniel  
Senior Policy Analyst,  
Canada, Department of Public Safety

Corynne McSherry  
Legal Director,  
Electronic Frontier Foundation (EFF)

Paul Nemitz  
Principal Advisor,  
European Commission, DG JUST

Juan Ortiz-Freuler  
Policy Fellow,  
World Wide Web Foundation

Elena Perotti  
Executive Director, Public Affairs and Media Policy,  
WAN-IFRA

Nick Pickles  
Senior Strategist, Public Policy,  
Twitter

Jason Pielemeier  
Policy Director,  
Global Network Initiative (GNI)

Frederic Potier  
National Delegate  
France, Inter-ministerial Delegation for the Fight against Racism, Antisemitism and anti-LGBT hatred

Thomas Schneider  
Vice-Director,  
Switzerland, Federal Office of Communications (OFCOM)

Bernard Shen  
Assistant General Counsel  
Association for Progressive Communications

Christoph Steck  
Director, Public Policy and Internet,  
Telefonica

Peter Stern  
Policy Manager, Stakeholder Engagement,  
Facebook
Domain & Jurisdiction Program: Objectives

In this perspective, participants in the Domains & Jurisdiction Workstream at the second Global Conference of the Internet & Jurisdiction Policy Network in Ottawa, Canada, on February 26-28, 2018, identified as a common objective to define, on a topic-by-topic basis:

• Under what strict conditions might interruption of a domain name without consent of the registrant be envisaged/acceptable;
• What actions should/would domain name operators be willing and able to exercise;
• What rules and procedures could help establish or enhance the credibility of notifiers’ notifications (for information or action); and
• What possible mechanisms can help improve transparency in such processes.
## Domains & Jurisdiction Program: Structuring Questions

<table>
<thead>
<tr>
<th>Standards</th>
<th>Procedural Guarantees</th>
<th>Transparency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court Orders</td>
<td>Remediation</td>
<td>Education</td>
</tr>
<tr>
<td>Notifications</td>
<td>Request Validation</td>
<td>Tools</td>
</tr>
<tr>
<td>Due Diligence</td>
<td>Liability</td>
<td></td>
</tr>
</tbody>
</table>
Domains & Jurisdiction Contact Group: Members

Maarten Botterman  
GNKS Consult Director and Board Director,  
ICANN

Benedict Addis  
Chair,  
Registrar of Last Resort (RoLR)

Fiona Alexander  
Associate Administrator, NTIA,  
USA, Department of Commerce

Elizabeth Behsudi  
Vice President and General Counsel,  
Public Interest Registry

Tijani Ben Jemaa  
Executive Director,  
Mediterranean Federation of Internet Associations (MFIA)

James Blader  
Vice President of Policy,  
GoDaddy

Jordan Carter  
Chief Executive,  
InternetNZ

Keith Drazek  
Vice President, Public Policy and Global Relations,  
VeriSign

Heather Dryden,  
Senior Advisor,  
Canada, Department of Innovation, Science and Economic Development

Rita Forsi  
Director General, Superior Institute for Communications and Information Technology,  
Italy, Ministry of Economic Development

Jothan Frakes  
Executive Director,  
Domain Name Association (DNA)

Grace Githaiga  
Associate,  
Kenya ICT Action Network (KICTANET)

Hartmut Glaser  
Executive Secretary,  
Brazilian Internet Steering Committee (CGI.br)

Rahul Gosain  
Director, IRSME  
India, Ministry of Electronics and Information Technology

Rudolf Gridl  
Head of Division, Internet Governance  
Germany, Federal Ministry for Economic Affairs and Energy

Rob Hall  
CEO  
Momentous

Byron Holland  
President and CEO  
Canadian Internet Registry Authority (CIRA)

Will Hudson  
Senior Advisory for International Policy  
Google

Manal Ismail  
Executive Director, International Technical Coordination, Egypt National Telecommunications Regulatory Authority

Konstantinos Komaitis  
Director, Policy Development  
Internet Society (ISOC)
Domains & Jurisdiction Contact Group: Members

Mailia Maciel
Digital Policy Senior Researcher,
Diplo Foundation

Desiree Miloshevic
Senior Advisor, International Affairs and Public Policy
Afilias

Paul Mitchell
Senior Director, Technology Policy,
Microsoft

Cristina Monti
Head of Sector, Internet Governance and Stakeholders Engagement
European Commission, DG CONNECT

Michele Neylon
CEO
Blacknight Internet Solutions

Seun O jedeji
Chief Network Engineer
Federal University of Oye-Ekiti

Rod Rasmussen
Principal
R2 Cyber

Bryan Schilling
Consumer Safeguards Director,
ICANN

Jorg Schweiger
CEO,
DENIC

Geo Van Langenhove
Legal Manager and Data Protection Officer,
European Registry of Internet Domain Names (EURid)

Petet Van Roste
General Manager,
Council of European National Top-Level Domain Registries (CENTR)

Chris Wilson
Senior Manager, Public Policy,
Amazon Web Services
3rd Global Conference of the Internet & Jurisdiction Policy Network

Berlin, Germany
June 3-5, 2019

IN PARTNERSHIP WITH

INSTITUTIONAL SUPPORTERS