Kluwer Arbitration Blog

International Law Weekend 2022: Accountability for Global Regulatory Bodies

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The 100th Annual Meeting of the American Branch of the International Law Association ("ABILA"), known as ABILA's International Law Weekend ("ILW"), took place in New York City on October 20-22, 2022 and featured more than 30 panels relevant to the theme "The Next 100 Years of International Law." One recurring theme was the role of international law in ensuring accountability, a topic which, as discussed below, often implicates international dispute resolution.

A key pair of panels addressed the accountability of two entities that might vie for the title of the most important international regulatory body that you have never heard of. The first, the Financial Action Task Force ("FATF"), is an intergovernmental body that sets global regulatory standards for combatting money laundering and financing of terrorism. Its regulatory framework has broad effects that extend from the highest levels of global finance all the way down to everyday consumer banking. The second, the Internet Corporation for Assigned Names and Numbers ("ICANN"), is a California non-profit corporation that has ultimate authority over the Internet's domain name system with significant commercial and political consequences.

Because of the unique regulatory powers of these bodies and their positions outside of ordinary State structures (including administrative law frameworks), they pose unique challenges for accountability. This post will review the accountability problems they present, and some possible solutions that intersect with various modes of dispute resolution, as suggested by the ILW panels on FATF and ICANN.

Accountability in the FATF Regulatory System

FATF describes itself as "the global money laundering and terrorist financing watchdog." The organization "sets international standards that aim to prevent these illegal activities and the harm they cause to society." These standards—most notably the FATF Recommendations—address measures to identify risks, to prevent illegal action in the financial sector, to allocate responsibilities, and to promote international cooperation. They are then implemented at the domestic level by FATF members and others, subject to a peer monitoring and evaluation process to encourage and facilitate compliance.

The ILW panel, "Controlling Misimplementation and Misuse of Global Anti-Money Laundering Standards," moderated by **David Attanasio** (Associate at Dechert LLP and Co-Chair of the ABILA Committee on International Investment Law), addressed potential negative impacts of FATF's regulatory actions and the mechanisms available to control those impacts—including possible mechanism that might draw from the repertoire of international dispute resolution. The panel included **Elisa de Anda Madrazo** (Vice President of FATF), **Lucinda Low** (Partner at Steptoe & Johnson), **Alyssa Yamamoto** (Legal Advisor to the U.N. Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism), and **David Zaring** (Professor of Legal Studies and Business Ethics at the Wharton School, University of Pennsylvania).

As **de Anda Madrazo** explained during the panel discussion, FATF has an important and valuable role in efforts to control money laundering and to counter terrorism financing, both through setting global standards and through reviewing State compliance with those standards. She also underscored that FATF is effective even though its regulations and standards take the form of soft law.

However, precisely because FATF and its Recommendations are effective even though not legally binding, they can have real impact, sometimes in undesirable ways. This practical effectiveness of the Recommendations can result in serious consequences—some of which are arguably undesirable—for participants in both domestic and international financial systems:

- Individuals or companies in those States that are non-compliant with FATF standards may find it difficult or impossible to engage with banking and other financial institutions at the international level; those institutions may refuse to do business (or be prohibited from doing so) with such individuals or companies. As **Zaring** put it, FATF review can impose serious negative consequences for the citizens of States that are found to fall short of FATF standards.
- Individuals and non-profit organizations may be targeted by States with adverse measures nominally based on the Recommendations (due to supposed money laundering or terrorism financing risk) but that are actually a form of political retaliation. In this regard, **Yamamato** observed that purported enforcement measures can be misused to target human rights defenders, journalists, civil society organizations, and vulnerable groups.
- The financial institutions that are some of the front-line subjects of the FATF Recommendations may bear onerous compliance costs. **Low** noted that the FATF Recommendations have affected financial institutions most directly and that there has been extensive enforcement in the US and other jurisdictions in recent years. Panelists observed that the result is often "overcompliance" to the disadvantage of potential customers as well as overly large compliance bureaucracies at financial institutions.
- And, as several panelists mentioned, a secondary infrastructure of reporting services has grown up that purport to identify risks for money laundering or terrorism financing, such as for politically exposed persons (individuals holding prominent political functions). These private services can have a sharp impact on an individual's ability to do business but themselves are subject to no formal oversight other than through general domestic legal mechanisms.

Nevertheless, as **de Anda Madrazo** emphasized, while the FATF Recommendations may have unintended consequences, it remains the case that global level action against money laundering and terrorism financing is needed and that FATF makes an important contribution to these efforts.

But these consequences do raise the question of how the various actors operating in the shadow the

FATF Recommendations may be held accountable for overreach, whether deliberate or inadvertent. As the panel made clear, the current system provides primarily for soft remedies, such as engagement and advocacy, including through influence of participants on FATF's decision making. In certain instances, especially regarding other actors, general purpose legal mechanisms, such as data privacy or administrative law, may provide for some accountability.

However, in the absence of general-purpose accountability mechanisms, is there a role for international dispute resolution in relationship to the FATF ecosystem? The panel's observations suggest a range of possibilities:

- Human rights suits before regional human rights courts or UN treaty bodies may have a role where a State misuses the FATF Recommendations in a way that infringes upon human rights.
- Investor-State arbitration may similarly restrain State action that targets specific foreign investors (whether individuals or companies) or otherwise treats them unfairly.
- *Ad hoc* arbitration between FATF (or its members) and individual States—or also among others such as affected individuals or entities—could be used to resolve legal and factual disputes related to compliance with FATF standards

And, perhaps, FATF itself could facilitate the creation of neutral dispute resolution mechanisms, including for the decisions that the body itself takes. The ICANN system discussed below, for example, may provide a possible model—employing tools from international arbitration—that could be adapted (with improvements that address ICANN's shortcomings) to the FATF ecosystem.

Accountability in the ICANN Regulatory System

While ICANN is organized as a California non-profit corporation, it has ultimate regulatory authority over key aspects of the global Internet. Its most important function from the perspective of non-technical Internet users is its authority over the Internet's domain name system, which allows users to identify computers connected to the Internet based on ordinary names (as opposed to strings of numbers). This naming system is quite familiar—arbitrationblog.kluwerarbitration.com is an example of such a domain name and it references the server on which you are currently reading this post.

The panel "Accountability in Internet Governance," moderated by **Rose Marie Wong** (Associate at Dechert LLP), focused on ICANN's oversight and accountability mechanisms. The panel included **Christopher Gibson** (Professor of Law and Director of the Business Law and Financial Services Concentration at Suffolk University), **Mike Rodenbaugh** (Owner of Rodenbaugh Law), **Kenneth B. Reisenfeld** (Partner at BakerHostetler), and **Aníbal Sabater** (Partner at Chaffetz Lindsey LLP).

At a technical level, ICANN determines who may register domain names under each top-level domain—for example .COM, .NET, or .EDU—and indeed what top-level domain names exist. These registries charge fees for each domain name, which can be a lucrative business. During the course of the last decade, ICANN expanded the set of top level domains through an application process open to private entities (the New generic Top Level Domain Program), resulting in the addition of numerous new top level domains—including .ATTORNEY, .ENERGY, and .GOOGLE—to the Internet name space. In short, ICANN has final authority over what names are

available on the Internet and who is able to register them in return for a fee paid for each domain name.

Although ICANN also has more technical functions, its authority over the domain name system has significant impact on commercial, political, and individual interests. This function has led to significant disputes of broad importance in two major categories:

- Disputes have frequently arisen regarding the registration of domain names that allegedly overlap or infringe upon trademarks. Developing effective means to resolve such disputes was one of the major tasks confronting ICANN at its inception in the late 1990s, during a period in which the Internet was quickly becoming a technology of major global importance.
- Disputes have also arisen regarding ICANN's efforts to expand the number of top-level domain names, particularly when ICANN has made decisions among multiple applicants for the same top-level domain name. These disputes often concern ICANN's fairness, neutrality, and diligence when making such decisions with significant commercial and public policy implications.

As with FATF, ICANN is subject to various forms of soft remedies, political and otherwise. ICANN, however, has also established external accountability mechanisms—employing tools from international arbitration—that permit a nominally neutral decision on such disputes.

First, the ICANN Uniform Domain Name Dispute Resolution Policy ("UDRP")—which allows for a form of arbitration in many cases—applies to all registered domain names. As **Gibson** (who has decided more than 200 cases under the UDRP) observed, through the UDRP process, trademark owners may challenge the registration of a domain name registered anywhere in the world on the grounds that (i) the domain name is identical, or confusingly similar to, their trademark; (ii) the domain name registrant lacks rights or a legitimate interest in the domain name; and (iii) the domain name was registered and used in bad faith.

In the view of **Gibson**, the UDRP has been generally successful and may provide a model for international online dispute resolution systems more generally. Since 1999, when the UDRP was created, more than 370 million domain names have been registered around the world, and more than 60,000 cases have been decided. In May 2022, ICANN issued a status report on the UDRP that positively evaluated the effectiveness of the mechanism in terms of efficiency, fairness, and reducing the abusive registration of domain names.

Second, ICANN's Independent Review Process mechanism, which applies more broadly than the UDRP, allows for challenges to ICANN's actions and inactions—including by its Board, Directors, Officers, and Staff—such as decisions regarding new top level domain names. The IRP provides for dispute resolution through international arbitration based on the ICDR International Arbitration Rules, supplemented by Interim Supplementary Procedures. **Sabater**, who has acted as a panelist in an IRP, noted that, through this mechanism, ICANN has given its consent to be sued by any party who claims to be materially prejudiced by an act or omission adopted by ICANN—and that this is a very broad scope of consent.

However, the panelists noted that the Independent Review Process as it stands is far from ideal. For example, **Reisenfeld** (who has acted as an Emergency Panelist in an IRP) observed that, while the Emergency Panelist procedure envisioned in ICDR Rules is designed to be efficient and expeditious, it has proven to be cumbersome and time consuming. This is problematic, especially since, as **Reisenfeld** explained, Emergency Panelists are appointed to address requests for interim

relief, such as stay requests to preserve the status quo and prevent ICANN from completing an auction or from registering a contested top-level domain name.

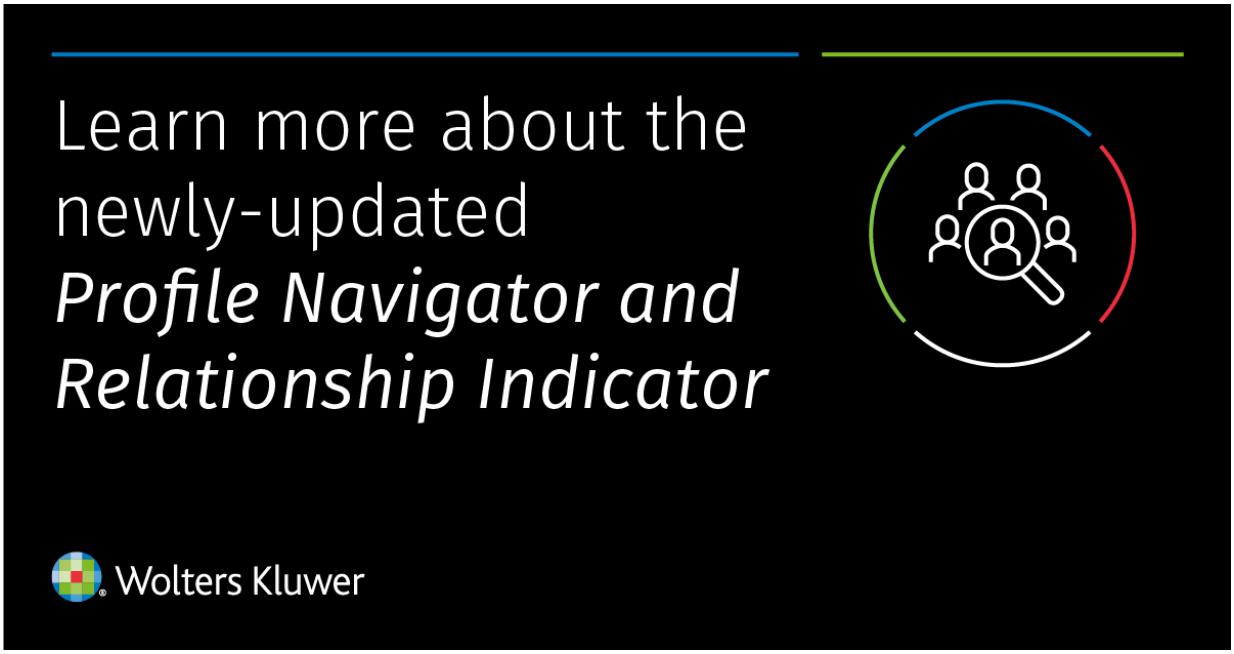
Sabater also noted that, on the merits, IRP panels have had limited authority and could not "step into the shoes" of ICANN—at least under the prior IRP framework pursuant to which Sabater sat as an IRP panelist for the .PERSIANGULF dispute. He observed that his panel simply assessed whether ICANN, in making its decision on that top-level domain name, was subject to a conflict of interest or failed to exercise due diligence but that it did not review the merits of ICANN's decision. That said, despite the limitations Sabater's panel found in its mandate, the panel nevertheless concluded that ICANN had failed to perform adequate due diligence and should have more fully engaged with participants.

Even if the IRP as it then stood or even as it currently stands may not be fully adequate, as **Sabater** noted, it is a remarkable experiment in accountability for an organization that wields significant regulatory power outside of a State framework. If its challenges were addressed, it might provide guidance to other organizations—such as FATF—that share certain structural similarities with ICANN.

Conclusion

ICANN and FATF provide an interesting contrast as to how accountability may be brought to global regulatory bodies. While FATF has not yet provided for formal accountability procedures, ICANN has taken initial steps toward subjecting itself to external accountability. Its example suggests that the tools of international arbitration may have a valuable role to play in these efforts, both for ICANN itself and for other regulatory bodies like FATF.

See prior International Law Weekend coverage here.



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