

Work Stream 2 Topic:

Jurisdiction

Scope [Main issues that need to be investigated; Focus]

At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated:

Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.
- Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.
- Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.

Background for Discussion

Further text from the CCWG-Accountability Work Stream 1 Report, Annex 12:

Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN is incorporated under the laws of the U.S. State of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.

The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight¹ of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.

¹ 8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for

Comment [1]: I would not qualify this specific part of ws1 annex 12 as the "scope" of our work. I feel we should stick with the order and precise wording of annex 12 as a start.

Comment [2]: Jorge: I don't understand your point. All of these bullet points are taken verbatim from Annex 12, paragraph 30

Comment [3]: Dear Milton: what appears in the doc as "scope" is just a part of the ws1 text. It is a way of privileging some issues over others...

Comment [4]: Jorge, what do you think the order of the text in annex 12 indicates to us?

Comment [5]: Dear Shatan. The order is also part of the ws1 decision, where all parts of the text are at the same level.

Comment [6]: A suggestion -- these come verbatim from the paragraphs below

Comment [7]: I'm suggesting moving this language up here. Looking at Annex 12, this paragraph is the introduction to the paragraph and bullet points that follow, so it probably makes sense to keep them together. The content of this paragraph ("the main issues that need to be investigated within Work Stream 2...") suggests that these two paragraphs, taken together, could be considered the "problem statement" coming out of WS1.

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Comment [8]: This sentence taken verbatim from Annex 12.

Deleted: Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction and applicable laws issues and include:

Comment [12]: I agree that our starting point should be annex 12 pages 7 and 8 unedited as they were published. Splitting the original text into several epigraphs may yield to conceptual errors.

Comment [13]: there is reference to a "gap analysis" here and in WS1 Annex 12. Can anyone point me to this analysis and what "gaps" it is talking about?

Comment [14]: Roughly it refers to assessing the influence that ICANN's existing jurisdiction (i.e., incorporation under the laws of California) has on the existence of certain accountability mechanisms and the operation of accountability mechanisms, particularly with regard to any limits with respect to the accountability mechanisms ICANN can adopt.

Comment [15]: I think there was a general conclusion that ICANN's current jurisdiction didn't result in any significant "gaps" relating to ICANN accountability. Whether there is a formal "gap analysis" is another question, and one we need to explore.

ICANN's Bylaws (Article XVIII) also state that its principal offices shall be in California.

The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence.
- Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.
- Meeting NTIA requirements.

Staff Contribution to Staff Report on Jurisdiction

As evidenced in ICANN's strategic plans, ICANN's commitment to globalization has been a driving force behind its work. In recent years, this globalization strategy has brought about ICANN's development of three operational hubs (Los Angeles, Istanbul and Singapore) with operational ability dispersed across those hubs. ICANN has also developed a network of regional engagement centers, including most recently, Nairobi, Kenya. Engagement centers are also located in Beijing, China; Brussels, Belgium; Geneva, Switzerland; Montevideo, Uruguay; Seoul, Korea; and Washington, D.C., USA.

Along with expanding the locations where ICANN has offices and engagement centers, ICANN has also focused on how to use these expanded locations to deliver more geographically dispersed support to ICANN's stakeholders. For example, ICANN's customer service operations are now operational across the world on a 24x5 basis, with support in regional languages out of each of the operational hubs. ICANN has also demonstrated its willingness, where appropriate, to, allow for additional venues for arbitration of key contracts, such as New gTLD contracts with IGO's allowing for arbitration in Geneva, Switzerland, or for arbitration of ICANN's L-Root hosting agreements to be held in Geneva, Switzerland (for the EMEA region) or Singapore (for the APAC region). Across ICANN's contracted parties (Registries and Registrars), since 2015 those parties have been able to issue payments to ICANN in their local

profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

Deleted: At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated.

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Comment [17]: The source of the text below is unclear. Is it staff comments and opinions? If so, we should characterize it as such and include it as an annex for information.

Comment [18]: Source: ICANN strategic plans, ICANN staff. It seems fairly factual though.

Comment [19]: Jorge, Is there anything in the content of this text that troubles you?

Comment [20]: I don't agree that we should privilege staff views in this fashion. They are not the result of ccwg discussion and agreement and should not be put at the same level as our ws1 consensus

Comment [21]: I have put the the staff contribution in a separate section to distinguish it from the paragraphs above taken from Annex 12.

Comment [22]: Agree. Staff-written paragraphs about ICANN operational ability should not be the basis for discussions. They should be left as an annex, if needed at all, and we should kick off discussions on the sole basis of the text agreed in WS1.

Comment [23]: Insofar as the facts cited are relevant, why should they not be the basis for discussion?

Comment [24]: Rafael, Is there anything in the content of this text that troubles you?

Comment [25]: Thanks Greg. First, I have a question, has it been written by the staff supporting the CCWG or by the ICANN legal staff? Second, this so-called "background paper" includes legal affirmations and warnings ("would not..." "would continue...") that could preempt discussions, that have not been agreed upon, and that do not belong in a background text that should only include facts and history. Third, the part related to operational ability and strategic engagement and commitment to globalization is great but I think we should only retain the part affecting legal ability.

Comment [26]: My understanding is that the staff papers were all prepared by staff supporting the CCWG. The papers were then reviewed before being released, but I'm not sure who those reviewers were.

Comment [27]: We will not preempt discussion or critical review of any part of the staff contribution.

Draft for COMMENTS by WS2 Jurisdiction Subgroup MEMBERS

currency equivalent, thereby reducing the barriers for doing business. ICANN has already started considering contracting and other operational issues that can help bring better service to ICANN's stakeholders. If future modifications are developed, it will be important for ICANN's contracted parties (those that will be most directly impacted) to be provided with opportunities to participate in the discussion and design solutions.

For its contracted parties, ICANN has made available a waiver program through which contracted parties can seek waiver from obligations that would conflict, for example with privacy laws in their home countries. Information on ICANN's data retention waiver process is available at <https://www.icann.org/resources/pages/retention-2013-09-13-en>.

The CCWG-Accountability's WS1 effort involved the retention of two external firms, including one specifically versed in California not-for-profit organization law, to help advise the community on the design of accountability mechanisms that are acceptable and enforceable under California law. Collectively, close to US\$5 million dollars was spent across these two firms to design and implement the Empowered Community structure based on the California legal concept of a "designator". These modifications are now in place for an anticipated transition of the NTIA's stewardship role over the management of the DNS. NTIA's assessment of the CCWG-Accountability's proposal included reference to the Sole Designator concept that is specifically tied to California corporations law. The high amounts of community funds that were invested in the proposal development, and remaining accountable to the community that provided ICANN with these funds, should be kept in mind in the event that the WS2 effort is looking to modify core jurisdictional concepts.

In the event that some of the concerns raised about ICANN's jurisdiction are tied to concerns that flow from ICANN's presence in the United States, it is important to note that moving ICANN to another jurisdiction (however likely or unlikely that outcome might be) would not remove the impacts of ICANN doing business in the United States. ICANN's long history of being located in the United States, and long history of contracting here, would continue to make ICANN subject to jurisdiction (where appropriate) in the United States. Any ongoing operations within the U.S. would continue the requirements for ICANN to comply with all appropriate U.S. legal requirements and regulations.

Summary of Helsinki F2F Lightning Talks and Related Discussion²

Jordan Carter - Lightning talk on jurisdiction

- Need to be upfront about interests
- Need not stray beyond mandate.
- Need to define requirements/scope before we start.
- Make recommendations.
- Questions?

² From F2F Meeting Notes, https://docs.google.com/document/d/1knnd9yN9M4ZIE0jgO_kCuurHGo81ZdjEDjbVGP4zDtU/edit#

Draft for COMMENTS by WS2 Jurisdiction Subgroup MEMBERS

- Greg Shatan - Agree with Jordan Carter on interests being open to make the conversation candid.
 - Jordan Carter - reason I did this is to ensure that the interests are legitimate and would be beneficial for the work.
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Pedro Ivo da Silva - Lightning talk on jurisdiction

- Mostly about process we should adopt to tackle the subject.
- Discussions must be fact based.
- Expert input will be key.
- Recap of WS1 report.
- Proposed Way forward (scenario based approach (stress tests?)).
- Example 1 - Govt Sanctions (includes new laws and regulations).
- Example 2 - governing law for contracts between a gTLD registry and ICANN.
- Tools (diversity, expert legal advice, previous studies on Jurisdiction issues (internationalization of ICANN - Meeting the needs of the global Internet community of the future (2009))).
- Questions:
 - Paul McGrady - tail wagging the dog - This seems to put back in question the single designator decision which would reopen all the results of WS1. Also let's not dance around the issue - is there a possibility of moving ICANN? PIvoSilva - this is just a suggestion of a process and not suggesting a result - need to look at all the concerns of the community. Feasibility is a key requirement but the sub-group needs to reach its own conclusions.
 - Thomas Rickert - Jordan Carter is recommending that the starting point is the WS1 recommendations.
 - Elliot Noss - Most important principle is multi-stakeholderism - any discussion on jurisdiction must ensure respect for this. No nation state has demonstrated the multi-stakeholderism is above their interest. As such we are shopping for such a jurisdiction and if we present this as a requirement some may put up their hands - even if it does not exist today.
 - Thomas Rickert - sounded like a lightning talk.
 - Greg Shattan - we seem to have a variety of definitions of Jurisdiction which is not helpful. I have identified a number of these. On govt sanctions - I do not see how this fits or is it referring to interference from govts?
 - Mathieu Weill - My understanding of the scenario approach is very similar to the stress test approach - could we use the same framework as we did for the ST in WS1. On experts were you thinking of public interest experts?
 - Pedro Ivo da Silva - yes but do not call it stress test. Need private law expert.
 - David McAuley - Agree with Mathieu Weill - All scenarios have to comply with the WS1 recommendations (subject to).

Draft for COMMENTS by WS2 Jurisdiction Subgroup MEMBERS

- Pedro Ivo da Silva - yes.
 - Alan Greenberg - Implication of a change of jurisdiction vs empowered community would imply we would need a comparable construct or we have to redo all that work.
 - Vidushi Marda - How to address everything is based on California law.
 - Pedro Ivo da Silva - must remember we are building on all the work that has been done. Jurisdiction is a multi-faceted issue and not only on jurisdiction of incorporation. We need to filter the real topics.
 - Sebastien Bachollet - thanks Elliot Noss for his talk. I have written to the French govt asking if the French govt. Is willing to offer special considerations for hosting ICANN.
 - Jorge Cancio - Back to a procedural level - many common elements between the two talks - need to avoid talking about jurisdiction as a theoretical issue. Need to address specific scenarios with a fact based approach with expert support. Support the need for diversity.
 - Lyman Chapin SSAC - I spend a lot of time explaining to other people what the CCWG is about - Jurisdiction issues are of two types - where it is incorporated - this has many aspects which are very technical from a legal POV for which many of us are not equipped to discuss properly and therefore we end up in many rat holes which we eventually crawl out of. The second is about how ICANN creates its own jurisdiction or regulation. So my interest is how we are planning to deal with both those.
 - Thomas Rickert - not only about the incorporation.
 - Farzaneh Badii - Govt sanctions are a matter of jurisdiction? In the case of the .IR there are no mechanisms to avoid this. There are also sanctions in place which prevent Iranians from applying for new gTLDs.
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Phil Corwin - Lightning talk on jurisdiction

- Address the point of ICANN's corporate jurisdiction: enshrine that status (US) into the fundamental Bylaws.
 - ICANN has been a California not-for-profit since its founding in 1998. The WS1 plan was designed to be maximum effective in California jurisdiction.
 - Enshrining ICANN's US status in the Bylaws would save us from reopening the question in the future, and save us from legal costs.
 - Paul McGrady -- what's the purpose of this conversation?
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Thomas Rickert - Recap on jurisdiction lightning talks

- Scoping is not limited to the jurisdiction of incorporation and the incorporation requirement is in the articles of incorporation and as such is equivalent to a fundamental Bylaw.
- Rethink the language we are using given the confusion about the various uses of Jurisdiction.

Methodology to use the Stress Test framework even if we do not call it this.

Resources

On 26 June at ICANN56 in Helsinki, Pedro Ivo da Silva, Jordan Carter and Phil Corwin presented lightning talks to the CCWG-Accountability on this topic. To view the first twopresentations, please see: <https://community.icann.org/x/rBWOAw>. To view the article that Phil Corwin’s talk was based on, please see: http://www.circleid.com/posts/20160523_the_irritating_irresolution_of_icann_jurisdiction/

The transcript of the Helsinki F2F may be found at https://community.icann.org/download/attachments/59648283/ICANN56-HEL_Sun26Jun2016_CCWG%20Accountability%20WS2%20Session-en.pdf?version=1&modificationDate=1468449992000&api=v2

A Google Doc containing live notes of that meeting may be found at: https://docs.google.com/document/d/1knnd9yN9M4ZIE0jgO_kCuurHGo81ZdjEDjbVGP4zDtU/e/dit?usp=sharing

The “home page” for the Helsinki F2F may be found at: <https://community.icann.org/pages/viewpage.action?pagelD=59648283> .

Blog: Building Confidence in ICANN’s Operations: <https://www.icann.org/news/blog/building-confidence-in-icann-s-operations>

Comment [28]: A summary of the lightning talks in Helsinki and the discussion we had there, based on the transcript (which should be linked to, would be relevant and should, in my view, come before any staff opinions

Comment [29]: I've provided that link. If others think summaries of the lightning talks would be helpful, I suggest it would be best to have those summaries prepared by the speakers, if at all possible. We'll need to consider whether and how to deal with the possibility of summarizing the relevant portions of the transcript. It will be important to share the workload among all the members of this subgroup.

Comment [30]: Jorge, I've now put the summaries from the Meeting Notes taken at the F2F into this document.