

## Multiple Layers of Jurisdiction

### 1. Jurisdiction of incorporation.

a. This refers to the jurisdiction in which an entity is legally incorporated.

Jurisdiction of incorporation, and also of HQ location, has the primary relevance that it makes ICANN subject to that country's public laws -- unless specific immunity has been given in this regard (for which precedence exists in the US as well as other places).

Commented [1]: All law in the US is "public law." The term "public law" is not generally used in the US.

Commented [2]: I've tried to reflect this concept in the end of Sections 1 and 2. I have not referred to the concept of "immunity" from US laws since that is contraindicated by the accountability framework adopted by ICANN, which depends on the ability of the Empowered Community to enforce its actions in court if need be. This is the very reason that the Empowered Community needs to be a legally-recognized entity (specifically, an unincorporated association).

b. ICANN is legally incorporated under the laws of California, as a public benefit corporation (a type of non-profit corporation). This is reflected in ICANN's Articles of Incorporation.

c. PTI is also incorporated in California, and the Empowered Community will be incorporated in California as well. These are required by the current Bylaws (adopted 1 October): see Section 6.1 on the EC, Section 16.1 on PTI.

#### d. Effect of Place of Incorporation:

i. ICANN is subject to the laws of its place of incorporation, i.e., California state law. Since California is located in the United States, ICANN is subject to United States federal law based on its place of incorporation.

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ii. ICANN can sue or be sued in the Federal and State Courts of California.

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### 2. Jurisdiction of Headquarters Location.

a. This refers to the jurisdiction in which an entity's headquarters is physically located.

b. ICANN's headquarters is in Los Angeles County, California. This is required by Section 24.1 of the ICANN Bylaws, which states "The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America."

c. The new bylaws adopted 1 October are very explicit on this matter - see 6.1 on the EC, 16.1 on PTI and 24.1 on ICANN. If there comes a time that the jurisdiction should/needs to be changed there is now a mechanism for doing so in 25.2 (fundamental bylaw). These were agreed in WS1, in the proposal and adopted as such.

#### d. Effect of Place of Headquarters Location:

i. ICANN is subject to the laws of its place of headquarters location, i.e., United States Federal law, California State law, Los Angeles County laws and City of Los Angeles laws.

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ii. ICANN can sue or be sued in the federal, state and municipal courts covering Los Angeles, California.

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### 3. Jurisdiction of other places of physical presence.

a. This refers to other places where an entity maintains an ongoing physical presence sufficient to subject the entity to the laws of that jurisdiction. Under US

law, this would generally be referred to as maintaining a “permanent establishment for the conduct of business.”

b. ICANN has permanent establishments in Singapore and Istanbul (described as “hub offices”); Beijing, Brussels, Geneva, Montevideo, Seoul, Nairobi and Washington, D.C. (described as “engagement offices”).

c. **Effect of Other Places of Physical Presence:**

- i. ICANN is subject to the laws of each of the jurisdictions in which it has permanent establishments, at least to a limited extent. It is most likely subject to each country’s laws only to a limited extent, i.e., ICANN’s activities and employment relationships in each jurisdiction will be subject to that country’s laws, but ICANN’s overall activities will [most likely] not be subject to each country’s laws.
- ii. ICANN can sue or be sued in each of these jurisdictions, at least to a limited extent. However, each country will have its own laws relating to venue and choice of forum, which may limit the subject matter of disputes commenced in that jurisdiction. Laws used to resolve the proper location of disputes are complex, but (oversimplifying greatly) it is likely in most cases that ICANN can only be sued for actions that took place in that jurisdiction or which bear a reasonable relationship to that jurisdiction and in which no other jurisdiction has a greater interest in the dispute.

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I guess that any jurisdiction where ICANN has [important assets] may be considered from a “stress test” scenario, i.e. the risk of [interventions] by any branch of the Government of those jurisdictions directed to unduly influence the operations of the organization.

Commented [3]: Are you thinking of something different than maintaining a permanent office?

Commented [4]: A permanent office is a key asset, but if you intend to intervene against or sue somebody you may look beyond that, right? (financial, monetary assets or other infrastructure)

Commented [5]: Are you talking about looking at these in jurisdictions where ICANN has a physical presence, or in other jurisdictions as well? Do you believe that ICANN has monetary assets or infrastructure in countries where it does not have a permanent establishment? Would it matter if it did? Should we ask ICANN if it does have such assets?

Commented [6]: I’m only saying that wherever you have valuable assets you may be sued with some effect, which in turn may influence your operations and decision-making

Commented [7]: What specific types of “interventions” are you thinking about?

Commented [8]: Do you have any specific scenarios that you are raising here?

**4. Jurisdiction for the Law used in Interpretation of Contracts, etc. (Choice of Law), including contracts with contracted parties, contracts with other third parties, and actions of the Empowered Community.**

- a. This refers to the jurisdiction whose laws will be used to interpret the rights and responsibilities of parties to a litigation, arbitration or other dispute resolution mechanism.
- b. Choice of law may be specified in an agreement. If no governing law is specified, the governing law will be determined in the dispute by the judge, panel or other decision-maker.
  - i. California follows the rules set out in section 187 of the Restatement of Law 2d (1971) 561, Conflict of Laws, and will enforce the parties’ choice-of-law clause, unless either:
    1. the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice; or
    2. application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state.

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- c. It just be remembered that public law will in any case be applicable to all contracts, and disputes related to them. It can be invoked by the state or by an disputant.
- d. ICANN's base Registry Agreement for New gTLDs does not specify a governing law.
- e. ICANN's Registrar Accreditation Agreements?

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Under choice of law, I would highlight the following topics: potential flexibilities to attend and address the different legal frameworks applicable to where contracting parties are established, especially when there are potential conflicts between commitments derived from ICANN and such national/supranational legal frameworks; freedom to choose applicable law, etc. Who has the freedom to choose the appropriate law ???

## **5. Jurisdiction for the physical location of litigation of disputes (Venue).**

- a. Types of Disputes
  - i. Contractual disputes with contracted parties.
  - ii. Contract disputes with other third parties.
  - iii. Enforcement of actions of the Empowered Community.
- b. This refers to the type of proceeding (e.g., litigation, arbitration, IRP, etc.), the provider of that proceeding, and the physical location in which the proceeding will take place. It does not refer to the substantive law applied to the dispute, which is covered under Section 4 (Choice of Law).
  - i. For IRP proceedings, there is no physical location of venue. Under Bylaw Section 4.3, the proceedings are designed to be done electronically. The IRP Implementation Oversight Team is close to finishing supplemental rules of procedures for IRPs and those too will likely direct a panel to conduct its proceedings by electronic means to the extent feasible and if hearings are needed then to do those by telephone or video conference.
  - ii. Under U.S. law, the parties are generally free to agree in a contract on a state or country whose substantive law will apply to disputes related to that contract. If the parties have not agreed on a choice of law, the court will engage in a choice of law analysis, which will look at a number of factors, including the place(s) where the contract is performed and the jurisdiction of incorporation/HQ for both parties.
  - iii. The terms "public law" and "private law" have varying meanings in different countries and legal systems. In the US, those terms are not generally used; when they are, "public law" refers to all laws passed by governments, while "private law" refers to the specific concepts set forth in agreements and forming a "private law" that applies only to the parties.
- c. ICANN's base Registry Agreement for new gTLDs specifies arbitration using the International Chamber of Commerce in Los Angeles California (or, if the registry is an IGO, Geneva, Switzerland).

Commented [9]: Please clarify this. I'm not following the issues. Perhaps this needs to be broken down. It also appears this may relate first to the venue/forum in which a dispute is commenced, and then to the choice of laws/conflicts of laws principles of that forum. Or perhaps this does not relate (only) to disputes. It's unclear.

Commented [10]: I'll try: ICANN's main agreements (with registries and registrars) are generally silent on applicable law. This silence may be construed differently by different courts in different jurisdictions, although I feel there is a natural tendency in courts to apply its own laws if the agreement is silent and there are no compulsory rules clearly applicable to the case (as if when in the EU one of the parties is a consumer). This means that the choice of applicable law may be limited nowadays in practice, which in principle may disadvantage stakeholders not familiar with the implicit choice of law. At the same time, registry agreements for IGO/Governmental entities have some flexibilities built in as to applicable law or, to be more precise, as to conflicts arising from diverging obligations coming from the agreement with ICANN and the international law obligations. This is reflected for instance in section 7.16 of the model registry agreement. This flexibility could be extended to other registries confronted with similar conflicts, not only with international law, but also when confronted with conflicts stemming from national law. The flexibility could also take the form of a more wider recognition of freedom to choose the applicable law for the parties in the main agreements ICANN has.

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[Under venue or venues: multiplicity of venues and of providers of dispute resolution mechanisms (be it judicial or arbitration). Flexibilities as to standards, election of providers, language of proceedings, freedom to choose for the parties.]

[I guess that under "venue" we would need to consider the IRP and other internal redress mechanisms and how well they address the needs of a global stakeholder community, in terms of their composition, the language of proceedings, the venue(s), the providers, etc.]

6. Relationships with national jurisdictions for particular domestic issues.

7. Meeting NTIA requirements.

- a. This "layer" was listed as one of the layers of jurisdiction in Work Stream 1. We should clarify what was meant by this.
- b. We should determine whether NTIA's approval of the community's proposals was contingent or reliant on ICANN's place of incorporation or headquarters location remaining unchanged.
  - i. If NTIA's approval was not contingent or reliant, we should be able to remove this layer.

As my audio link in today's meeting was not satisfactory, I take the liberty to submit in writing a somewhat different approach:

Jurisdiction as per articles of incorporation, US legislation or ICANN fundamental bylaws

1. Incorporation
2. Headquarters
3. Fiscal status
4. Federal requirements (DoC, NTIA, California or other)
5. The above point 4 should be replaced with -- Applicable public law requirements (that covers everything tried to be listed here)

Additional jurisdictions which might facilitate ICANN's duties and services outside the USA

1. Human resources management (employment, visas, insurance, pension...)
2. Relations with contract or other parties
3. Dispute settlement
4. Initiatives centered on the global Internet user community, not specific to the USA
5. Link to, and Interaction with different jurisdictions outside the USA
6. Relations with sovereign states, as necessary (NOT in replacement of GAC, which remains the venue for their participation in ICANN's policy process)
7. If necessary, Fund (yet to be set up) for the management and use of funds from auction of gTLDs.

Commented [11]: In this document, we are first defining the layers of jurisdiction and then the effects of each layer of ICANN's current jurisdiction. I'm not sure how this relates to that.

Commented [12]: I'm not sure what this is asking us to do, if anything.

Commented [13]: I believe this is out of scope for this subgroup.

Commented [14]: We have met NTIA requirements. The transition is over; the NTIA contract has expired. NTIA approval or requirements are no longer a factor in anything we do. This "layer" should be deleted.

Commented [15]: Agree with Milton. NTIA is out of the picture now.

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Commented [16]: Jean-Jacques, can you explain what you mean by "Fiscal status" and how it relates to jurisdiction? Thank you.

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Commented [17]: California is a state, not a federal jurisdiction. I also do not see any "federal requirements" pertaining to what we do, as noted in my comment on Greg's draft

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