

Jurisdiction Meeting #4 (21 September @ 13:00 UTC)

Attendees:

Sub-group Members:

Andreea Todoran, Avri Doria, Christopher Wilkinson, David McAuley, Erich Schweighofer, Erin Dorgan, Finn Peterson, Ghislain de Salins, Greg Shatan, Griffin Barnett, Jeff Neuman, Jimson Olufuye, Jorge Cancio, Kavouss Arasteh, Mary Uduma, Milton Mueller, Par Brumark, Paul McGrady, Pedro da Silva, Philip Corwin, Rafael Perez Galindo, Samantha Eisner, Simon Jansson, Tijani BEN JEMAA, Vinay Kesari. (25)

Observers: Ari, John Poole

Staff: Bernard Turcotte, Karen Mulberry, Elizabeth Andrews, Brenda Brewer, Yvette Guigneaux, Nigel Hickson, Veni Markovski

Apologies:

Please let Brenda or Yvette know if your name has been left off the list (attendees or apologies).

Transcript

- [Jurisdiction_Subgroup_Meeting__4_21_September_mp3.doc](#)
- [Jurisdiction_Subgroup_Meeting__4_21_September_mp3.pdf](#)

Recording

- The Adobe Connect recording is available here: [Apologies, but due to technical difficulties, the Adobe Connect recording is not available.](#)
- The audio recording is available here: <http://audio.icann.org/accountability/ccwg-accountability-jurisdiction-21sep16-en.mp3>

Agenda

CCWG-Accountability, Work Stream 2

Jurisdiction Subgroup

Meeting #4

1. Welcome

2. Approach to ICANN's Place of Incorporation and Headquarters Location

- a. Should the scope of the Jurisdiction topic include examining the effects of ICANN's place of incorporation and location (for example, on the actual operation of policies and accountability mechanisms and on the settlement of disputes), or should this be out of scope?
- b. Should the scope of the Jurisdiction topic include the possibility of recommending that ICANN be directed to change its place of incorporation and/or headquarters location, or should this be out of scope?

3. Gap Analysis: Annex 12 includes "confirming and assessing the gap analysis."

- i. We need a common understanding of what this refers to. Does the "gap analysis" refer to a determination in WS1 that there were no significant gaps in the WS1 accountability proposal resulting from ICANN's current jurisdictional framework?
- ii. How should we confirm and assess the gap analysis?

4. Continued Detailed Reading of the Google Docs.

1. First Google Doc: https://docs.google.com/document/d/1UGRQqP5Bs923nmDYekZn5ZL7-DQc_QSa0GSnFoj4Pn8/edit?usp=sharing
2. Second Google Doc: https://docs.google.com/document/d/1N2eCmjbA6bxJxCeIuEHJIBzP_sGPN6krEqDshA0ARVM/edit?usp=sharing

5. Other Potential Inputs to our Work.

- a. More Detailed Review of Lightning Talks (summarized in Staff Paper)
- b. Pertinent Literature (influenced by Scope)
- c. Experts/Legal Advice

Notes

(including relevant elements of the chat):

1. Welcome

Note 29 participants at start of call.

Greg Shatan: no changes to SOI and no participants on phone only.

2. Approach to ICANN's Place of Incorporation and Headquarters Location

a.

Should the scope of the Jurisdiction topic include examining the effects of ICANN's place of incorporation and location (for example, on the actual operation of policies and accountability mechanisms and on the settlement of disputes), or should this be out of scope?

b. Should the scope of the Jurisdiction topic include the possibility of recommending that ICANN be directed to change its place of incorporation and/or headquarters location, or should this be out of scope?

David McAuley: This should be resolved by this group if possible and it may take several weeks. This is essentially the nub of our work.

Greg Shatan: uncertain if this is the nub or a red herring.

Tijani Ben Jemaa: Agree with DM we need to resolve this here. We need to agree on all the layers.

Milton Mueller: David: Are you saying we do not resolve the questions yet, or we do not resolve whether they are in scope or not?

David McAuley (RySG): in scope or not - to me that also takes time and thought - I believe not in scope but understand others don't agree.

Greg Shatan: the objective of the questions was to confirm the remit from WS1.

Kavous Arasteh: Why do we need to discuss this here (2nd question)

Finn Petersen, GAC - DK: Agree with Kavouss - ICANN's entire new structure and the empowered community is all based on California law. Our task is not to change the place of incorporation of ICANN. But if anybody can point to potential problems, we might look into means to address such problems without changing ICANN's place of incorporation.

Avri Doria: it is not in our scope and shall not be discussed?

Milton Mueller: .

Jurisdiction of incorporation is a bad idea but not out of scope. Long term we need to address this. My personal view is that it should be out of scope but not against discussing.

Greg Shatan: there are 3 answers to the question: invalid, make recommendations to CCWG.

Jeff Neuman: 2B is out of scope because of practicality. 2A however is in scope.

Milton Mueller: Agree, Jeff, but that is an argument against changing jurisdiction it is not an argument that it is out of scope

Greg Shatan: When we discuss scope we are referring to the scope of this group.

Phil Corwin: My view is that we should enshrine ICANN incorporation in the US. We should not use scope to limit discussions of this.

Milton Mueller: right Philip, it's a question of rationality not scope

Pedro da Silva: I see the two questions as belonging to two different parts of our work. 2A is about scope and I believe it includes ICANN's jurisdiction of incorporation as part of the layers. The second part of our work is about recommendations and there are many good arguments about not moving ICANN and these will be as valid in 9 months as they are now - but at that time we will have much more input.

Jorge Cancio (GAC Switzerland): for the gap analysis we should look at the second draft report available here: <https://community.icann.org/pages/viewpage.action?pageId=53783460>. The relevant pages are 121-124.

Milton Mueller: Jeff, my understanding was that a lot of people wanted to discuss it in WS1 but it was too disruptive a change in the short term so we told them to push it into WS2

Erich Schweighofer: The place of jurisdiction is flexible but it is unwise to change unless the present favourable situation exists. Other options have to be considered, maybe trying with certain activities.

Milton Mueller: Jeff, my understanding was that a lot of people wanted to discuss it in WS1 but it was too disruptive a change in the short term so we told them to push it into WS2

Erich Schweighofer: The place of jurisdiction is flexible but it is unwise to change unless the present favourable situation exists. Other options have to be considered, maybe trying with certain activities.

David McAuley: the remit in 2A is good. 2B is about identifying alternatives. However I do not believe we should look at moving ICANN. But we should have alternatives if there is ever a problem.

Kavous Arasteh: We should be practical, pragmatic and logical - everything is based on California law and there is a provision in the Bylaws to allow the Board to propose moving if necessary. There is no reason and no possibility that in the next few years that this would ever get approved. We do not need anything on changing jurisdiction of incorporation.

Christopher Wilkinson: in 2A my interest is that dispute resolution is available to participants worldwide and not limited to American legal system, mostly about the cost which would prevent many from using it.

Paul McGrady: We have been asked in the GNSO to approve a budget for WS2 and looking at alternative jurisdictions will require significantly more funds. As the WS1 recommendation leaves it open to us if we discuss jurisdiction or not - and if we want to do this optional topic we need a consensus call from this group to take work which will take more than a year and 10's of millions of dollars.

Tijani Ben Jemaa: If we do not reach consensus on anything we simply report it.

Greg Shatan: Given the time left on this call I would ask everyone to read Mathew Shears comment.

Kavous Arasteh: What is the status of 2B?

Greg Shatan: My impression is there is little support for taking place of incorporation off the table as looking at its effects.

Paul McGrady: So we are not talking about the choice of Jurisdiction but rather about the effects of the existing Jurisdiction. If there are issues with the effects the group could recommend modified accountability measures to the CCWG.

Greg Shatan: yes this is what I am asking. Examples looser pays. So if this cannot be discussed please give a red X. None. As such this should be in scope but will ask the list.

3. Gap Analysis: Annex 12 includes "confirming and assessing the gap analysis."

a.

We need a common understanding of what this refers to. Does the "gap analysis" refer to a determination in WS1 that there were no significant gaps in the WS1 accountability proposal resulting from ICANN's current jurisdictional framework?

b. How should we confirm and assess the gap analysis?

David McAuley: the current Bylaws meets the requirements and as such the gap analysis has been done.

Kavous Arasteh: GAP analysis needs to be addressed.

Pedro da Silva: Disagree with DM and believe we have not done a gap analysis. the difference between our accountability requirements vs how they were implemented under California laws. One example of this is the models that were available such as Designator and the Empowered Community.

Greg Shatan: We need to write this up for discussion.

Tijani Ben Jemaa: there are two interpretations - if there is a need to do one we should have a small group on this.

Philip Corwin: @David--Agree that ICANN is free to agree to using law

/courts of a jurisdiction other than CA for contract disputes -- but also think it is most unlikely to do so for standard agreements with contracted parties. Why would it want to take on risks of different laws and adjudication systems, not to mention cost of hiring local counsel?

jorge cancio (GAC Switzerland): from the 2nd draft report: "1043 Initial gap assessment based on current CCWG-

Accountability proposals: 1044 At this point of the work of the CCWG-

Accountability, taking into account the comments received, the following issues have been identified for further investigation: • Requirement 4 (ability to sue and be sued to enforce Bylaws or accountability mechanisms): while some consider this requirement to be necessary, others would avoid as much as possible the use of any single country's legal system. • Trade-off between CCWG-

Accountability requirements and options under California law, particularly when discussing the community empowerment model. • Whether IRP decisions against ICANN would be binding despite local jurisdiction decisions. • Requirement 3 on governing law for contracts with registrars and registries may require further investigation. 1045 While these issues require further investigation, the CCWG-

Accountability has not yet conducted a substantive examination of alternative jurisdiction

jorge cancio (GAC Switzerland):

jurisdictions that would better fit its requirements. While some commenters suggest that incorporation of ICANN under other legal systems, such as Swiss not-for-profit, would be beneficial (yet the basis for their assumption remains uncertain), further analysis and deliberation is needed on a fact-based approach to be entertained during Work Stream 2. "

jorge cancio (GAC Switzerland): at least now its on the record :-)

David McAuley (RySG): agree @ Phil

Greg Shatan: Strongly encourage participation on the list. Also ask for people to work on the Google docs.

4. Continued Detailed Reading of the Google Docs.

a. First Google Doc: https://docs.google.com/document/d/1UGRQqP5Bs923nmDYekZn5ZL7-DQc_QSa0GSnFoj4Pn8/edit?usp=sharing

b. Second Google Doc: https://docs.google.com/document/d/1N2eCmjbA6bxJxCEluEHJBzP_sGPN6krEqDshA0ARVM/edit?usp=sharing

5. Other Potential Inputs to our Work.

a. More Detailed Review of Lightning Talks (summarized in Staff Paper)

b. Pertinent Literature (influenced by Scope)

c. Experts/Legal Advice

Documents Presented

[Jurisdiction Meeting #4 Agenda.docx](#)

Chat Transcript

Yvette Guigneaux: Welcome to the WS2 - Jurisdiction Subgroup Meeting #4 21 September @ 13:00 UTC

Kavouss Arasteh: Dear Yvette

Kavouss Arasteh: Pls kindly do not forget to advise that I should be called in

Yvette Guigneaux: hello there Kavouss, will do =)

Kavouss Arasteh: bONJOUR Tijani

Kavouss Arasteh:Guten tag Erich

Kavouss Arasteh:Wie Gehts?

Erich Schweighofer:Sehr gut, gerade in Dresden angekommen.

Bernard Turcotte Staff Support:hi all

Bernard Turcotte Staff Support:All reminder to mute if not speaking

Pär Brumark (GAC Niue):Hi all!

Avri Doria:there will always be second of non mute between signing on and getting the cursor up to the mute key.

David McAuley (RySG):Brenda, I am 4154

Pedro da Silva - [GAC Brasil]:Hello everyone

Brenda Brewer:Thank you David!

David McAuley (RySG):Hi Bernie

Brenda Brewer:If your phone number is listed in Attendees, please identify so we can include for attendance purposes. Thank you!

nigel hickson:good afternoon

jorge cancio (GAC Switzerland):HI ALL

David McAuley (RySG):Greg you are breaking up

Pedro da Silva - [GAC Brasil]:Cannot hear Greg

Finn Petersen, GAC - DK:noise on the linie

David McAuley (RySG):nowis ok

Brenda Brewer:Once again, please identify you name if you phone number is listed. I can update phone number to names. Thank you!

Milton Mueller:Agree with David

David McAuley (RySG):Maybe not Hyderabad but not now as i see it

Milton Mueller:David: Are you saying we do not resolve the questions yet, or we do not resolve whether they are in scope or not?

David McAuley (RySG):in scope or not - to me that also takes time and thought - I believe not in scope but understand others don't agree

Milton Mueller:OK I will comment on that

Philip Corwin:FYI, I am the 703-5316 phone

David McAuley (RySG):I will also, if time allows, clarify what I meant

Finn Petersen, GAC - DK:Agree with Kavouss -ICANN's entire new structure and the empowered community is all based on California law. Our task is not to change the place of incorporation of ICANN. But if anybody can point to potential problems, we might look into means to address such problems without changing ICANN's place of incorporation.

Avri Doria:it is not in our scope and shall not be discussed?

Avri Doria:sounds good to me.

Avri Doria:and this is an issue where we can find a solution that can satisfies everyone?

Milton Mueller:seems to me a gap analysis presumes that place of incorporation is an open question

Milton Mueller:i.e. not out of scope..

Milton Mueller:Agree, Jeff, but that is an argument against changing jurisdiction it is not an argument that it is out of scope

Greg Shatan 2:The contours of the gap analysis are something to be discussed.

Avri Doria:we also have to understand how that intersects with the various forms of presence ICANN has in other jurisdictions.

Avri Doria:since bylaws are essentially mutable, though with the input of a lot of energy, that fundamental issue remains open forever in a general sense.

Avri Doria:Changing the articles are fundamental

Milton Mueller:right Philip, it's a question of rationality not scope

Jeff Neuman:@milton - my argument that it is out of scope is because it is my belief that WS1 never intended us to discuss that option

jorge cancio (GAC Switzerland):for the gap analysis we should look at the second draft report available here: <https://community.icann.org/pages/viewpage.action?pageId=53783460>. The relevant pages are 121-124.

Milton Mueller:Jeff, my understanding was that a lot of people wanted to discuss it in WS1 but it was too disruptive a change in the short term so we told them to push it into WS2

Erich Schweighofer:The place of jurisdiction is flexible but it is unwise to change unless the present favourable situation exists. Other options have to be considered, maybe trying with certain activities.

Erich Schweighofer:Sorry - not unless - better: as long as

Jeff Neuman:@milton - I think that is why Greg wanted to bring it to the CCWG yesterday to clarify....but we ran out of time

Jeff Neuman:This is meeting #4 and I believe that we have been talking about the same thing over and over again. Some have said that there are arguments to move ICANN, but no one has presented those...

Erich Schweighofer:We can use a German concept - deciding on principles of a "good" ICANN jurisdiction and leave it for later .

Milton Mueller:right Jeff, we need to do the gap analysis (maybe there are no gaps)

Erich Schweighofer:It is called Solange jurisdiction here.

Milton Mueller:we should "examine the effects" of existing place of incorporation

Jeff Neuman:I agree on the "effects", but the way you do that is by referring to specific situations as opposed to in the abstract

Milton Mueller:but this must be done objectively, not with a presumption that we will retain the status quo

Erich Schweighofer:Right - and hopefully agree that everything is fine at the moment.

Milton Mueller:even if everything is not perfect, we must also take into account the costs, disruptions, burdens and risks of moving

Greg Shatan 2:

Milton Mueller:and of course the alternatives must be enumerated and evaluated

Erich Schweighofer:I can provide some input - based on my experience as international lawyer in the Ministry of Foreign Affairs (and get further input)

Pedro da Silva - [GAC Brasil]:Exactly, Milton. Let's not make recommendations upfront and evaluate all available alternatives objectively, taking, i.e., costs and burdens into account.

Philip Corwin:@CW/Christopher--thanks for noting my "flexibility". I have no interest in driving this group to engage on a divisive matter. To the contrary, if it is clear that no consensus can be reached we should move on to other more fruitful jurisdictional questions where we are likely to reach consensus.

Greg Shatan 2:I prefer Beyonce jurisdiction to Solange jurisdiction.

David McAuley (RySG):We need not assess all alternatives but should "identify potential alternatives and benchmark their ability to do the job - but as I believe and said, this is as a future backup

CW: @Phil: Noted thank you. CW

Philip Corwin:@Greg--so long as we do not discuss Kayne jurisdiction ;-)

Erich Schweighofer:Greg - I will clarify later.

Philip Corwin:Paul correctly noted that Council's current discussion of the proposed legal budget for WS2 has gotten very entangled with whether this subgroup is going to wade deeply into the ICANN organizational jurisdiction issue

Vinay Kesari 2:Tijani, I think it's important to have this discussion now, as opposed to later, because it relates to a scoping issue broader than the 'layers' themselves.

Kavouss Arasteh:Grecm what happened to 2.a

Kavouss Arasteh:Grec, what about discussing a

David McAuley (RySG):The one question we might seek clarity on from full CCWG is to what extent do they wish us to proceed on para 30 "Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework" - that discussion /decision will tell us about costs going forward

Erich Schweighofer:Sorry, I have to leave for a meeting. Bye.

jorge cancio (GAC Switzerland):Dear all - in order to find and understand where the idea of "gap analysis" come from we should look at the second draft report available here: <https://community.icann.org/pages/viewpage.action?pageId=53783460>. The relevant pages are 121-124.

David McAuley (RySG):that language I quoted is in the context of focusing on settlement of dispute jurisdiction issues

Kavouss Arasteh:SOMEBODY IS TYPING

Kavouss Arasteh:PLS PLS STOP TYPING . I CAN NOT HEAR V

Milton Mueller:mute

Greg Shatan 2:Thata may be wind.

David McAuley (RySG):i cannot hear typing - seems odd

Milton Mueller:i think it is wind

Kavouss Arasteh:WHAT WIND

Greg Shatan 2:I think Paul is in a car or on a bkie.

Milton Mueller:see, when Paul stoppe dtalking the "typing" ended

Kavouss Arasteh:I DO NOT GET WHAT HE IS TAKING DUE TO THE WIND

Milton Mueller:sorry.

Milton Mueller:Next time I shall command the wind to stop

Milton Mueller:Kavouss: see written notes taken by staff

Avri Doria:is there an assumption that legal action can only be taken in calaifornia, and not all jurisdiction where ICANN has presence?

Milton Mueller::-)

David McAuley (RySG):I don't think so Avri

Avri Doria:ok, it was sounding that way from some of the comments.

Greg Shatan 2:Avri, good point. I don't think that's the case.

Avri Doria:or that contracts with those not in the US could not be made under the law of other jurisdictions?

jorge cancio (GAC Switzerland):As we see in the second draft report and the prior history in the CCWG we started an "initial gap analysis", but we did not complete it but pushed it to ws2.

Kavouss Arasteh:For better understand GAP ANALYSIS pls read the information cross referenced by Jorge

jorge cancio (GAC Switzerland):thanks Kavouss - feel a bit like talking and writing to a wall

David McAuley (RySG):I think ICANN is fre to choose other jurisdictions for contract law language but that is all down to negotiation i assume

Kavouss Arasteh:Pedro! 1

Kavouss Arasteh:yes PERDO ,I agree with you on that

Avri Doria:i think we need to understand how that all plays together.

Avri Doria:i think that this understanding falls in the gap.

David McAuley (RySG):Tijani broke up in that last statement

Kavouss Arasteh:Grec, we need to address a0 as well as Gap Analysis

Philip Corwin:@David--Agree that ICANN is free to agree to using law/courts of a jurisdiction other than CA for contract disputes -- but also think it is most unlikely to do so for standard agreements with contracted parties. Why would it want to take on risks of different laws and adjudictaion systems, not to mention cost of hiring local counsel?

David McAuley (RySG):agree @ Phil

Avri Doria:well Regiries and REGISTRars in other jjurisdictions might find it favorable.

jorge cancio (GAC Switzerland):from the 2nd drafzt report: "1043 Initial gap assessment based on current CCWG-Accountability proposals: 1044 At this point of the work of the CCWG-Accountability, taking into account the comments received, the following issues have been identified for further investigation: • Requirement 4 (ability to sue and be sued to enforce Bylaws or accountability mechanisms): while some consider this requirement to be necessary, others would avoid as much as possible the use of any single country's legal system. • Trade-off between CCWG-Accountability requirements and options under California law, particularly when discussing the community empowerment model. • Whether IRP decisions against ICANN would be binding despite local jurisdiction decisions. • Requirement 3 on governing law for contracts with registrars and registries may require further investigation. 1045 While these issues require further investigation, the CCWG-Accountability has not yet conducted a substantive examination of alternative jurisdic

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jorge cancio (GAC Switzerland):at least now its on the record :-)

David McAuley (RySG):Thanks all, good bye

CW:Thankyou everyone. B'ye. CW

Bernard Turcotte Staff Support:bye all

jorge cancio (GAC Switzerland):bye all

Philip Corwin:farewell

nigel hickson:bye\