

## Multiple Layers of Jurisdiction

The primary purpose of this document is to define the various layers of jurisdiction, both generically and specifically as they apply to ICANN. The Subgroup used the list of layers of jurisdiction in Annex 12 of the CCWG-Accountability Work Stream 1 Final Report as a starting point. This document also contains some observations on the effect or influence of each layer of jurisdiction, with reference to ICANN's current jurisdictions. However, these observations are intended to be relatively brief, as they are not the primary purpose of this document. This document is a work in progress, and should not be viewed as the consensus of the Jurisdiction subgroup.

### 1. Jurisdiction of incorporation.

- a. This refers to the jurisdiction in which an entity is legally incorporated.
- 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.
  - ii. ICANN can sue or be sued in the Federal and State Courts of California.
- e. Immunity:
  - i. These effects could be negated by "specific immunity" for ICANN from US law.
  - ii. [GS: However, immunity could block key Accountability mechanisms -- enforceability of actions by the Empowered Community and enforceability of IRP decisions<sup>1</sup>].

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<sup>1</sup> JC: Before jumping to such conclusions we would need to debate them in depth. Immunities can be specifically tailored to protect only certain operations under certain conditions. And they do not necessarily have to impact accountability mechanisms. GS: Do you have any specific information and examples of specifically tailored immunities? The Empowered Community must be able to enforce its decisions in court if ICANN refuses to abide by them. IRP decisions must also be enforceable against ICANN in court. JC: I wonder why you shift any burden of proof on to me. If that is done as rapporteur I feel you are overstepping your remit. If it is done on a personal basis, please clarify. There are multiple instances where immunities and privileges are narrowly tailored. This means, as a principle, that nothing impedes that the accountability mechanisms could be exempted from the effect of any immunity granted. And I would request that you answer my initial question/comment: before concluding anything we need a debate in the group. I'm not aware of any such debate. Hence, I take your initial contributions here as a personal one, which I feel you should have identified as such. GS: One of the rapporteur's tasks is to ask follow-up questions to get participants to flesh out their statements. This has nothing to do with "burden of proof." It has to do with providing a good explanatory document. There's nothing "personal" about that. In terms of organizing our work, we need to concentrate on defining the layers of jurisdiction and moving on to the other document, in which the "effect of jurisdiction" in a particular context is explored in depth. Discussions of "effect of jurisdiction" in this document are intended to be quite brief, as the primary purpose of this document is to define the layers of jurisdiction. The "immunity" issue need only be

- iii. It has been suggested that immunities could be narrowly tailored so that they do not impact accountability mechanisms.
- iv. [GS: Any immunity would require US (or other national) legislation and could potentially require multilateral treaties/conventions.]
- v. [GS: For this and other reasons, the issue of immunity is likely out of scope, or at best premature; the topic can be revisited if a concern within the remit of this subgroup is identified that does not appear to be resolvable by less significant means.]
- vi. [JC: Immunities and privileges can be narrowly tailored to adjust to the specific needs of an organization. They may cover only certain acts of that organization and protect it only against certain interventions. Hence, there is a priori no basis for affirming that such instruments would block key accountability mechanisms. In addition, such immunities and privileges do not require as a condition an international treaty or convention and can be granted by national legislation.]
- vii. [PJS: It is possible to obtain jurisdictional immunity for ICANN without entering into multilateral treaties/ conventions. This can be done under United States International Organisations Immunities Act (see <https://archive.icann.org/en/psc/annex9.pdf> ). There is precedent of such immunities being given to organisations that, like ICANN, are registered as a non-profit. [This study commissioned by ICANN](#) cites the example of International Fertilizer and Development Center which was designated as a public, nonprofit, international organisation by US Presidential Decree, granting it immunities under the mentioned US Act.

## 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:

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reached if we identify a concern where immunity must be considered as a way to alleviate that concern. JC: Dear Greg. Your initial conclusions on immunities, ruling them out, were conclusive without any basis on group discussion. They were not identified as personal inputs. I don't think that that is proper handling. At least a credible explanation would be apposite.

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

### 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.
  - iii. I guess that any jurisdiction where ICANN has important assets<sup>2</sup> may be considered from a “stress test” scenario, i.e. the risk of interventions<sup>3</sup> by any branch of the Government of those jurisdictions directed to unduly influence the operations of the organization.

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<sup>2</sup> GS: Are you thinking of something different than maintaining a permanent office? JC:

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) GS: 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?

JC: 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.

<sup>3</sup> GS: What types of “interventions” are being raised 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.
- c. [PJS: 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.<sup>4</sup>]
- d. ICANN's base Registry Agreement for New gTLDs does not specify a governing law.
- e. ICANN's Registrar Accreditation Agreements?
- f. [PJS: Disputes can be governed by private law (which could be one chosen by the parties at the time of contract) but also as likely by public law which is applicable as per jurisdiction of incorporation/ HQ.]
  - i. 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,
  - ii. 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" does not refer to law at all when it is used -- rather, it refers to the specific concepts set forth in agreements and forming a private "law" that applies only to the parties..
- g. [JC: 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

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<sup>4</sup> GS: This does not accurately reflect US law. It's unclear what the point is here.

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???)<sup>5</sup>

## 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.
- 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).
- d. [JC: 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.]<sup>6</sup>

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<sup>5</sup> GS: 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. JC: 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.

<sup>6</sup> GS: 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. I'm not sure what this suggestion is asking the subgroup to do, if anything.

- e. [TBJ: They are belligerent, so how they will reach agreement on the chosen standard, provider and language? GS: In the case of contracts, these are often chosen when the contract is entered into. If there is a dispute, these will depend on the venue chosen by the plaintiff, unless the defendant is able to remove the case to a different venue.
- f. [JC: 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.].<sup>7</sup>

## 6. Relationships with national jurisdictions for particular domestic issues.<sup>8</sup>

- a.
- b.
- c.

## 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 on reliant, we should be able to remove this layer.
- c. [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.]<sup>9</sup>

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[JJS: As my audio link in today's meeting was not satisfactory, I take the liberty to submit in writing a somewhat different approach:<sup>10</sup>

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

1. Incorporation
2. Headquarters
3. Fiscal status (Need explanation of what this refers to)
4. Federal/State requirements (DoC, NTIA, California or other)<sup>11 12</sup>

<sup>7</sup> GS: I believe this is out of scope for this subgroup.

<sup>8</sup> GS: This topic (from annex 12) needs definition/explanation.

<sup>9</sup> GS: This needs to be discussed, and we need to determine whether this layer is no longer a concern.

<sup>10</sup> GS: The Subgroup needs to determine how and to what extent to reflect these suggestions in the document.

<sup>11</sup> MM: I do not see any "federal requirements" pertaining to what we do, as noted in my comment on Greg's draft.

<sup>12</sup> PJS: 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.