

Jurisdiction Hypothetical #1

Q. In the following hypothetical, what are the influences of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on (1) the actual operation of ICANN's policies, (2) accountability mechanisms and (3) the resolution of disputes?

A plaintiff initiates litigation, challenging ICANN's actions (or inactions) involving actual operation of its policies – like delegation of a gTLD, and/or acceptance of certain terms of registry operation, on the basis that plaintiff (or a class including plaintiff) would be injured and that ICANN's actions or inactions are in violation of law. The court finds that ICANN's actions or inaction violate the law and issues an order requiring ICANN to change its actions.

Initial "strawman" answers appear on the following pages. These are intended only to spur discussion. Depending on the deliberations of the subgroup, the strawman answers will be freely modified or eliminated. Further proposed answers are expected from the subgroup.

In Hypothetical #1, what is the influence of governing law and venue on

a. The actual operation of ICANN's policies?

- A positive influence, as ICANN will be aware that any actions that violate such policies can be challenged.
- If the court finds for ICANN, a positive influence, as this will increase confidence that ICANN is properly carrying out its policies (and that its policies do not violate the law).
- If the court finds for plaintiff, this could have a positive influence, if the policy or actions of ICANN violated the law.
- If the court finds for plaintiff, this could have a negative effect, if the ICANN's policies or actions were within ICANN's mission and in the public interest and were nonetheless ruled in violation of law.
 - If the case was correctly decided, this could have a positive effect, as ICANN would need to improve its policies to meet its goals while avoiding a violation of law.
 - If the case was wrongly decided, this could have a negative effect, (a) undermining credibility in the law or venue, and (b) forcing ICANN to change policies that were, in fact, legal.
 - ICANN will have the right to appeal the case, and the appeals court may reverse the lower court decision.
- Following such an adverse decision, ICANN will have the option to appeal the case. Assuming that ICANN does not appeal or exhausts its appeals, ICANN will need to comply with the judgment. If the judgment found that ICANN's policy violated the ICANN Bylaws or applicable law, ICANN would need to change the policy to comply with the ICANN Bylaws or applicable law. Similarly, if the court found that ICANN's operation of its policies in this instance was inconsistent with ICANN's policies (assuming that this gave rise to a cause of action in the first place), ICANN would need to change its actions in this instance in order to be consistent with its policies. ~~other than to change its policies and/or operation of its policies as per the court's~~

Commented [1]: Does anyone (other than Parminder) believe that we should not examine and list out positive influences?

Commented [2]: THIS RESPONSE SUGGESTED BY PARMINDER.

Commented [3]: This set of bullet points revised in response to discussion on the prior Jurisdiction Subgroup call.

directions:

- o Some might argue that this is inconsistent with But such an act makes a mockery of ICANN's status role as an organization with global responsibilities governance body (for key Internet resources) because the legality of ICANN's actions will be determined in this instance it will be forced to undertake its "global" governance role as per using the laws of one country.
- o This should be unacceptable in the 21st century, from a global democratic standpoint. It is certainly unacceptable to non-US countries and citizens.
- o Do remember that this is a violation of the human right to equally and democratically participate in any form of governance that one is subject to (paraphrased reading of Article 21 of the UDHR and its elaboration in the International Covenant on Civil and Political Rights).
- o Such changing of its policies and/or implementation of policies by ICANN as applied to the whole world on the basis of the laws of one country thus violates the human right to democratic governance

Commented [4]: Note that the hypothetical does not specify the jurisdiction in which ICANN has been sued.

Commented [5]: Why would it be unacceptable?

Commented [6]: Is there any independent basis for this reading of the UDHR in this particular context?

Commented [7]: Is there any independent basis for this reading of the UDHR in this particular context?

b. ICANN's accountability mechanisms?

- This would have a positive influence on ICANN's accountability, as the plaintiff was able to challenge ICANN's actions and seek to hold it accountable.
- Having ICANN accountable to other governing laws might actually bring additional accountability, for instance related to privacy.

c. The resolution of disputes (including this dispute)?

- The **governing law** could influence the case, as the law of any particular another jurisdiction could (a) view ICANN's policies or actions differently, (b) have different burdens of proof, (c) have different standards of review of ICANN's actions, (d) have different remedies, (e) have different causes of action, or (f) have different rules on who pays.
 - o These could influence the outcome of the hypothetical case, the type of redress, and the financial burden of bringing (or defending) the case.
 - o Assuming US jurisdiction, to the extent ICANN's policies and actions are generally consistent with the governing law US law, this would tend to make the outcome more predictable. Conversely, if the governing law was sharply different from the legal considerations taken into account by ICANN in adopting policies and taking action, the outcome would be less predictable. Since many of the laws of most jurisdictions are fairly similar (due to common legal precedents, treaties, etc.), the difference between governing laws should not be overemphasized in the abstract. However, in any given scenario, the specific laws being applied could be quite different depending on jurisdiction (e.g., libel law).
 - o Assuming US governing law is applied, the burden of proof would likely be "preponderance of the evidence," both money damages and equitable relief (changing actions) would be available, and each party would bear their own costs.
- The **venue** could influence the case, as a different venue could (a) choose to apply a different governing law, (b) cost less (or more), (c) have different burdens of proof, (d) have different

remedies, (e) have different rules on who pays, (f) have different approaches to transparency, (g) have different approaches to appeals, (h) have different evidentiary standards, (i) be more or less predictable, (j) be quicker (or slower), or (k) take place in a different language.

- o These could influence the outcome of the hypothetical case, the type of redress, the financial burden on the parties.
- o Assuming a U.S. court, US conflict of laws rules would apply, the proceedings would be relatively costly, damages and equitable relief would be available, each party would bear their own costs, the hearings and pleadings would be public, the case would be appealable, preponderance of the evidence would apply, the outcome would be relatively predictable, the case would likely move relatively slowly, and the case would take place in English (though translation may be available).
- o In a common law jurisdiction, the outcome of the case would serve as precedent in future cases, assuming the case took place in court and not in arbitration.
 - Assuming a U.S. court, the outcome would serve as precedent, both in cases involving ICANN and more generally.
- The key consideration is that ICANN is headquartered in a jurisdiction with a clear commitment to the rule of law, and that any party with standing can initiate litigation regardless of their home jurisdiction.
 - o As a general matter, it is difficult to comment on a hypothetical with so few specific facts. It may be useful to look at variations on this general hypothetical with more specific facts. This could provide the basis for a more targeted and relevant analysis.

Variables and Alternate Facts

How would the following influence our analysis, if at all?

Unknown Variables:	Alternate Facts
<ul style="list-style-type: none">• What does “acceptance of certain terms of registry operation” mean?• Who is the plaintiff?<ul style="list-style-type: none">• <u>What is their relationship to ICANN’s actions?</u>• <u>What is their nationality?</u>• What law(s) are alleged to be violated?• What harm is alleged?• What governing law is being applied?<ul style="list-style-type: none">• Is a choice of law provision involved?• What venue does this take place in?• Is a contract involved?<ul style="list-style-type: none">• Is the plaintiff a party?• What gTLD is involved?<ul style="list-style-type: none">• Does it matter?• <u>What is the plaintiff’s relationship to the gTLD?</u>• <u>At what points in this hypothetical are actions taken by ICANN, its Board or the Empowered Community?</u>	<ul style="list-style-type: none">• US court applies:<ul style="list-style-type: none">• US law, including California law.• US law, but uses the law of another state.• The law of a non-U.S. jurisdiction• Case takes place in a non-US court.<ul style="list-style-type: none">• Singapore• Istanbul, etc.• Non-US court applies:<ul style="list-style-type: none">• US law.• Non-US law.• Court finds for plaintiff and awards:<ul style="list-style-type: none">• Only money damages.• Equitable relief (causing ICANN to change its actions).• Money damages and equitable relief.• Court finds for ICANN.• Parties settle.