

CCWG and jurisdiction

14 July 2015

Mathieu Weill 9/7/2015 18:30

Deleted: - draft Requirements

Status of this paper:

This paper is based on previous CCWG discussions as well as input received during the first public comment. It is anticipated that this paper provides a basis for incorporating more details on the jurisdiction issue in the 2nd draft report of the CCWG.

The importance of addressing the jurisdiction issue was stressed during public comment 1 by several contributors (India, Germany, France, Spain, Danish Business Authority, Brazil). One commenter (Roberto Bissio, Advisor) expresses disagreement on the overall approach and calls for incorporating ICANN under International law.

'Jurisdiction' influences directly the way ICANN's accountability processes are structured and operationalized. The fact that ICANN today operates under the legislation of the state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms but also imposes some limits with respect to the accountability mechanisms it can adopt. The topic of jurisdiction is, as a consequence, of relevance for the CCWG Accountability.

However the CCWG is not tasked to change jurisdiction but to enhance Icann's accountability. The relevant question for the CCWG is therefore :

"Can Icann's accountability be enhanced depending on the laws applicable to its actions ?"

Current situation :

To date, ICANN is a not for profit corporation incorporated in California and bound by California laws. This is how ICANN was incorporated in the first place but it is also a provision included in paragraph 8 of the Affirmation of Commitments (AoC) signed between ICANN and the U.S. Government, through its Commerce Department, as follows:

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 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.

Pedro 15/7/2015 18:29

Comment [1]: This sentence is a bit misleading and may imply that considering alternative options for ICANN's jurisdiction is completely unrelated to the work of the CCWG-Accountability. This is not the view of some of the group members/participants, in particular the Brazilian government. SUGGESTION : to start the paragraph directly with the sentence – « The relevant question for the CCWG is therefore : «

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ICANN's bylaws also state that its principal offices shall be in California, which in fact make ICANN subject to California laws and Court jurisdiction, as follows:

ARTICLE XVIII: OFFICES AND SEAL

Section 1. OFFICES

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. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

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Issue statement : The jurisdiction issue is a multi layered issue. The following "layers" have been identified by the group :

1) place and jurisdiction of incorporation & operations, including - tax system, human resources, etc.

Associated requirements :

- a) strong corporate governance legislation, providing efficient accountability,
- b) but at the same time, enabling flexibility so that the multistakeholder model can be translated into this legal framework.

2) jurisdiction of places of physical presence

Associated requirements :

- a) Places of physical presence need to provide stable labour legal frameworks(to hire staff)
- b) some level of flexibility for visas (to accomodate international staff and travel by community members)
- c) Physical presence should also take into account security concerns, both for the sake of staff as well as for operations.

3) governing law for contracts with registrars and registries and ability to sue and be sued in a specific jurisdiction about contractual relationships

Associated requirements :

- a) stable and predictable legal regime
- b) affordability of legal actions for parties other than Icann (both in terms of costs and in terms of understanding the legal system)
- c) balancing the need for level playing field amongst contracted parties across the globe and the necessity of each contracted party to comply with national legislation

4) ability to sue and be sued in a specific jurisdiction for action & inaction of Staff, and for redress and review of Board Decisions, IRP, and other Accountability and Transparency issues, including AoC

Associated requirements :

- a) On the one hand, some stakeholders consider that the ability to enforce the accountability mechanisms in front of a court of justice are essential
- b) On the other hand, other stakeholders do not find acceptable that the legal system of a single country would play such a role in Icann's accountability framework. Their requirement would be to avoid as much as possible the use of any single country's legal system.

5) relation with the national jurisdictions for particular domestic issues (ccTLD's managers, protected names either for International Institutions or Country and other geographic names, national security, etc.) , privacy, freedom of expression,

Associated requirements :

- a) No specific jurisdiction should be in a position to over-rule domestic jurisdictions when dealing with particular domestic issues (for example jurisdiction of incorporation interfering with a decision regarding a specific ccTLD policy)

6) Meeting NTIA requirements

An overarching requirement of the CCWG Accountability is represented by the criteria set by the NTIA at the outset of the IANA Stewardship transition.

Associated requirements :

- a) Support and enhance the multistakeholder model;
- b) Maintain the security, stability, and resiliency of the Internet DNS;
- c) Meet the needs and expectation of the global customers and partners of the IANA services;
- d) Maintain the openness of the Internet.
- e) The proposal can not replace the NTIA role with a government-led or an inter-governmental organization solution.

Initial gap assessment based on current CCWG-Accountability proposals:

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

- Diverging views on 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
- CCWG-Accountability found the association of all its requirement under California Law possible, but challenging, and requiring some forms of trade-offs, especially with regards to the Community empowerment model
- Some concerns were raised with regards to the possibility that IRP decisions might prevail over local jurisdiction decisions. [TO BE REFINED ONCE WE FINALISE IRP PROPOSAL]
- Some concerns are expressed regarding requirement 3 : governing law for contracts with registrars and registries, which might require further investigation.
- Some concerns were raised with regards to the legal viability of government representatives participating in a "community empowerment mechanism" under a membership or designator model (according to the legislation of California)

While these issues require further investigation, CCWG-Accountability notes that it has not been provided any alternative option that would better fit its requirements at this stage. While some commenters suggest that incorporation of Icanm under other legal systems, such as Swiss not for profit, would be beneficial, the basis for their assumption remain uncertain, and initial review led the CCWG-Accountability to believe that the gaps above would remain in such a system.

Timeline and next steps :

Consideration of this issue within work stream 2 will include :

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue
- Identifying 2-3 potential alternatives and benchmarking their ability to match all CCWG requirements them with the current framework
- Consider potential Work stream 2 recommendations based on the conclusions of this analysis

The timeline considered for this work is consistent with the overall approach for work stream 2. A specific subgroup of the CCWG Accountability will be formed and, while reporting to the CCWG as a whole, tasked to undertake the steps described above. Two periods of public comments are envisaged, around Icanm 55 and Icanm 56. Recommendations would be submitted by Icanm 57.

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Comment [2]: As this section introduces issues identified for further investigation, the concerns raised by many government representatives during PC and in the GAC input to the Paris meeting should also be taken into account.

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Comment [3]: Given the fact that the CCWG has decided not to deal with alternative jurisdictions during work stream 1, it is rather obvious that the group hasn't come up with another option that would better fit its requirements. This paragraph, as it is, implies that the group has already done some effort in this regard and that no results came out of it. SUGGESTION : « The CCWG-Accountability has not yet conducted a substantive examination of alternative 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, the basis for their assumption remains uncertain and requires further investigation. »

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Comment [4]: At this stage, it would not be advisable to indicate the exact number of potential alternatives, as in the future the group may come to the conclusion that perhaps more (or also less) options would be interesting to consider. SUGGESTION : remove « 2-3 »