
YESIM NAZLAR:

Please start the recording as well as the interpretation, please. Good morning, good afternoon and good evening to everyone. Welcome to the At-Large capacity building program 2018, our tenth webinar on the topic ICANN jurisdiction taking place on Wednesday, 12th of December, 2018 at 13:00 UTC.

We'll not be doing a roll call as it's a webinar, but if I could please remind all participants on the phone bridge as well as computers to please mute your speakers and microphones when not speaking. Please do not forget to state your name before speaking, not only for the transcription purposes but also to allow our interpreters to identify you on the different language channels. We have English, Spanish and French interpretation for this webinar.

Thank you all for joining, and I'll now turn it over to Tijani Ben Jemaa, the chair of At-Large Capacity building Working Group. Over to you, Tijani. Thank you very much.

TIJANI BEN JEMAA:

Thank you very much, Yesim. Good morning, good afternoon, good evening. This is the 11th capacity building webinar in the 2018 program of the Capacity building Working Group, and it is today about ICANN's jurisdiction. As you know, in the framework of the ICANN Accountability review, the Cross Community Working Group on Accountability [in his] Work Stream 2, had one of the topics, which is ICANN jurisdiction. And there was a subgroup working on it, and it was one of the most difficult subgroups.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

Fortunately, the subgroup submitted its final report and we worked into the whole Work Stream 2 [inaudible] final report all the reports of all subgroups, and they are now ratified by the chartering organizations. So Tatiana Tropina accepted kindly to speak about the ICANN jurisdiction today. Tatiana is one of our friends, she's a very skilled person. She participated in the working group and subgroup very actively and with a lot of input, so I think she's one of the best people to speak about it today.

Before I will give the floor to Tatiana, I will come back to the staff for some housekeeping announcements. Yesim?

YESIM NAZLAR:

Thank you very much, Tijani. Let's take a quick look at the housekeeping presentation that is currently being displayed on the Adobe Connect room. As you see, we'll have a Q&A, question and answer pod during this webinar, and it's located on the left bottom side of your screen. So if you have any questions, we do encourage you to type them here, and then we'll be directing them to the presenters.

We also have a pop quiz section, and it will be located on the right-hand side of your screens. So after the presentation, we'll have a couple of pop quiz questions for you to answer, and the last section will be the evaluation questions. So we'll have a seven-question survey at the end of the webinar, so please try to stay around for extra two or three minutes to complete them as well. And this is all we have for now, and over to you, Tijani. Thank you.

TIJANI BEN JEMAA:

Thank you very much, Yesim. And now to T atiana. Tatiana, please.

TATIANA TROPINA:

Thank you very much, Tijani, for your introduction and for your very kind words, and thank you very much to everyone who joined this webinar. It is really my pleasure to accept this invitation and to be here for you.

I'm going to talk about jurisdiction, which, as Tijani said already, probably the most controversial and interesting and challenging topic of the Work Stream 2. But before I move to the recommendations of the subgroup on jurisdiction and explain them, I would like to start with a bit of a history, because as I said, it was so controversial and so challenging that the final report for those who are not aware of the history and of the debates might read like something a little bit tame despite all the controversial and fierce discussions in the group. So sometimes when we look at the report, when we look at the recommendations, we just have to read between the lines.

And here is a bit of history, why Work Stream 2, why did we need the discussion on jurisdiction in the Work Stream 2? We already had Work Stream 1, right? All the accountability mechanisms which were developed to complete the transition. Could someone mute their microphone? I can hear some sounds and a bit of echo. So all the recommendations developed by the Work Stream 1 which were necessary to complete the transition were tailored for an organization incorporated in California, so all the accountability mechanisms were

tailored and developed to be the subject of the U.S. law. Why did we need the discussion in the Work Stream 2 at all?

Of course, as you look at the Work Stream 1 final report recommendation 12 which [inaudible] the jurisdiction, you look through a very fine-tuned, very correct text about jurisdiction having influence and impact on the ICANN accountability [and] operation.

The Work Stream 1 final recommendation 12 which mentions jurisdiction and sets the scope for the Work Stream 2 acknowledges the different level of jurisdiction and state that the Work Stream 2 has to complete a number of tasks. But what was at the background was completely different, because as we know, some of the stakeholders were considering the transition itself the U.S. giving up the stewardship as possibility to maybe relocate ICANN or to reach the immunity from the U.S. jurisdiction, because even if U.S. is not in charge, is not in control of ICANN, it still can legislate ICANN, it still can regulate ICANN. So there were some notions of world dominance or maybe imperialism versus very practical and real issues like place of jurisdiction, place of contract, place of arbitration and so on and so forth.

So while the scope was defined as to confirming and assessing the gap analysis, clarifying all concerns regarding [through] multilayer jurisdiction issue which like multilayer might conclude the place of incorporation, the place of contract, the place of different offices, the place of arbitration and so on and so forth, and also identifying the alternatives and benchmarking the ability to match ICANN accountability mechanisms using the current framework, and in

addition to this, to see what the gaps in the jurisdiction and what can be done.

And of course, the subgroup on jurisdiction was tasked to come up with a set of recommendations. But those of you who have attended the beginning of the work of this group, and even further, maybe like half a year after, almost every call was like a Groundhog Day from June 2016 and maybe for another kind of seven to eight months, because there were too many challenges and controversial issues not related to the tasks which were set for subgroup by the Work Stream 1 recommendation but by certain stakeholders pushing of the debate on the ICANN relocation.

And frankly speaking, this well-drafted text of the Work Stream 2 still left the gap for those who wanted to relocate ICANN or discuss its place of incorporation, they left different gaps to do so. The text is very tame. It doesn't really provide clarity with regard to what the group should have done. And of course, it gave the rise to all this relocation and immunity debate over and over again.

And of course, it was clear from the Work Stream 2 that ICANN was incorporated in California, all the accountability mechanisms were drafted and designed to be applied in California if something happened. But there was a valid concern, actually, of those stakeholders. Among them were some nation states or even some civil society representatives. It is the possibility for a single state, the United States, right, quite a powerful state, to be honest, just by the virtue of law, just because of the place of incorporation to legislate or to regulate ICANN

even if U.S. government is not exercising the power over ICANN anymore via IANA stewardship.

But on the other hand, any immunity debate finally hit the wall, because those who were supporting them, those who were bringing the issue of relocation of ICANN couldn't come up with any valid options, because again, you will not find it in the report, really. You might find it in the transcript, but I believe it is very important to understand here for you, for all of us, that when we call for immunity for ICANN, it is not clear what kind of immunity, what kind of law would be applicable, what kind of organization ICANN should have been to reach such immunity from the ICANN jurisdiction.

Of course, there is thought of immunity for intergovernmental organizations under the Intergovernmental Organization Immunities Act in the U.S., but this act requires the U.S. Congress to designate these immunities to a specific organization or to designate this organization as an entity to have these immunities.

And the problem for many was that while transition has already happened, these immunity issues should have been considered by the U.S. Congress. And many of us could have imagined that this would just reopen the debate that would allow the conservative forces in the U.S. to reignite, reopen the debate, was the transition right, could it be overruled or overturned? So this was, as I said already, this notion of imperialism, fighting the very practical issues which the group had to consider, and these conversation were going on and on over and over again.

So I'll now move from the very [inaudible] issue to the real life, what subgroup was actually doing among all these debates about ICANN relocation and which were brought up again and again, it did discuss the topic of gap analysis, of confirming and assessing the gaps. Because it didn't really have enough time to consider all the layers of jurisdiction, they had to see what actually are the topics that are of utmost importance that can influence ICANN accountability and operations.

And they had to refine this multiple layers of jurisdiction and see how the place of incorporation, the place of headquarters, the place of contract is actually influencing the ICANN operations and accountability. The group issued several working documents considering the influence of ICANN's existing jurisdiction relating to resolution of [inaudible] for example, the governing law and the venue and contract, and it aimed also to carry out a comprehensive review of the mitigations to which ICANN was a party.

I know that sounds a bit very theoretical, so for example with regard to the last issue, comprehensive review of litigation. So what the group did, they took all the litigations that were on the ICANN website, and the volunteers from the group were analyzing the cases using the template and seeing how the outcome of the case or the process could potentially influence ICANN or potentially have impact on the issues that the group was discussing or the group was tasked to produce the outcome on.

The subgroup on jurisdiction also issued a questionnaire to allow for the input from the community and it did develop a series of questions for the ICANN legal, so to get the input from ICANN org, and at the same

time, to see what community thinks about jurisdictional issues. And if you're interested in this topic, it would be really great actually to read the answers to the questionnaire submitted by the community, because of course, there were answers related to the immunity and jurisdiction and place of incorporation on the world dominance and so on, but sometimes, the issues were very practical, like for example sanctioned countries, the inability to complete payments to ICANN because of the U.S. sanctions with national sanctions, inability to register domains because of this and so on and so forth. And of course, this was taken into account.

So as an interim result among all this noise about different issues, the group which was very short of time, which had to complete the work until a certain hard stop point, decided as an interim result to prioritize the issues, so basically to look at the master list of proposed issues which was based on analysis, responses to questionnaire, answers from ICANN Legal, and all the discussions that the group had.

And they prioritized two issues to be included into the report and to be the subject of recommendations being drafted by the group within this remaining short timeframe, and these issues were OFAC sanctions – I will explain what this is a bit later – and then the choice of governing law and the venue clauses in certain ICANN contracts. Just to explain here what are the venue clauses, it is the clause in the contract which defines the venue for arbitration or litigation.

So with these two issues prioritized which were apparently very topical and very practical issues, the group was able to reach consensus. But while the report was adopted by consensus, it wasn't a full consensus.

There was a dissenting opinion submitted by Brazil who could not support recommendation because they – were not against all the set of proposals related to the sanctioned countries or to the choice of lawful contracts, but they felt like the discussions about the place of incorporation and immunities and possibility of the ICANN Org to obtain immunities were just cut short, that the group didn't put enough effort to reach any consensus on this debate, that this debate just didn't get enough prominence and attention.

But basically, despite this dissenting opinion, in this period of what was actually adopted, Brazil – and I remember that there was Russia, China and Iran supporting this dissenting opinion, they actually supported the set of recommendations but just said that they were incomplete.

So the full set of recommendations we have were related to OFAC and sanctioned countries issues and how this might influence ICANN operation and accountability. So basically, what is OFAC? OFAC is the Office of Foreign Affairs Control within the U.S. government, the office which administers all the sanctions imposed by the U.S. government or international sanctions. And apparently, it does affect ICANN operational accountability when it comes to registrars and registries, and registrants as well.

So this office in the U.S. Treasury is responsible for enforcing any economic sanctions or trade sanctions which are based on the U.S. foreign policy and national security [both.] So there is a list of sanctions against countries or individuals or entities which OFAC has to observe and enforce.

And sanctions imposed on the nations, like for example Iran, might extend to the citizens of these nations or businesses in these nations regardless of their personal characters or activities or [what they're doing, just you are residing there as a business or you're a national] of this country, okay, you're sanctioned. You have no business with the U.S.

However, OFAC has the specific authority to circumvent these sanctions through a particular licensing process, and this licensing process is tailored to permit certain transactions that would otherwise be sanctioned or be banned or prohibited under the OFAC regulations and U.S. regulations to still be performed.

So there is certainly a tension, right? A big tension, because the ICANN's goal and mission is to administer the Internet as a global resource in a neutral manner, and of course, it does conflict with the U.S. law which would be applicable because ICANN is indeed incorporated in the U.S.

And when you look at this issue in the context of registration of domain names, for registrars and registries in sanctioned countries, it really has serious consequences, and the consequences are real, because it does hamper access to domain name system for those who reside in those countries just based solely on their nationality or their place of residence or incorporation.

And of course, as I said already, there is a way around this, but persons who want to transact with ICANN or register a name or ICANN itself for them need to apply for OFAC license, and if we look at the current situation, this situation is of course reflected in the registrar

accreditation application, and it says that ICANN is under no obligation to seek this license for a transaction [that is a non – as the end resident] of a sanctioned country. And in any given case, OFAC could decide not to issue a requested license even if ICANN is going to apply for this.

So the group was considering the issue whether this status quo is actually acceptable, and of course, it came to the conclusion that, no, for the ICANN who already transmitted from the U.S. the stewardship, for the ICANN who wants to administer Internet in a global and neutral manner, this policy is not encouraging.

Even if ICANN formed a subgroup in the past seeking such licenses, there is no sustainability in this approach, and it potentially hampers the ICANN image, the ICANN operation, the ICANN ability to provide services to those who reside in the sanctioned countries. And it is inconsistent with the spirit of the ICANN mission. And it puts those who are under sanctions but still want to have business with ICANN into a great uncertainty, and there is a lack of transparency in what kind of effort ICANN is actually taking to obtain the license. And of course, it might deter potentially the registrars residing in sanctioned countries from pursuing the registrar accreditation.

So what the group proposed, it did propose to amend the [sentence] in registrar accreditation agreement to require ICANN to apply for and use best efforts to secure the licenses if the other party is qualified to be a registrar and if it's not individually subject to sanctions. And it says that during this process, ICANN has to be helpful and transparent with regards to how the licensing process [is going,] what efforts ICANN is undertaking, and communicate with potential registrars.

So basically, there are three elements in this recommendation. The first is that ICANN is clear about obtaining the license. It's not like a direct obligation, but at least it is a promise to do everything like best effort ICANN can possibly do. And not only taking this effort, but also communicating to those who would be the subject of this license in a very transparent manner. So this addresses almost all the concerns expressed by the group regarding the sanctioned countries [inaudible] and RAA.

Then the next issue related to OFAC was approval on gTLD registries, because if you look at the 2012 round of the new gTLD program, it was already difficult for residents from those sanctioned countries to file the application and to make their way through the application process. And the applicant guidebook states that ICANN has sought and been granted licenses as required. In any given case, whoever –and you see here the similarity to registrar agreement – OFAC could decide not to issue a requested license.

The recommendation here was that ICANN should commit to apply for and using its best efforts to secure those licenses. Basically, it is the same as the previous recommendation, but just on a different issue. Commit to use your best effort to secure the license, commit to communication in transparent manner, and commit to transparency of the entire process as a whole.

Now a very interesting issue related to OFAC limitations. It turned out that some of the registrars, which are not actually U.S.-based, were still applying U.S. sanctions. Even they have nothing to do with the U.S., they

were still applying OFAC sanctions based on mistaken assumptions that they must do so because they have a contract with ICANN.

And sometimes, the group also believed it also might have happened just because non-U.S. registrars cut and pasted registrant agreements from the U.S.-based registrars, and apparently no one checked these. And while ICANN here is not in apposition to provide this kind of legal advice to the registries and registrars, the subgroup still recommended to raise awareness about this issue, to raise awareness that if you're a non-U.S.-based registrar, you don't have to apply OFAC sanctions, that the mere existence of the registrar accreditation agreement with ICANN does not require the foreign registrars to apply the sanctions or to comply with them in any way or fashion.

And the group also recommended to ICANN to explore different tools to remind the registrars about this and to understand the applicable law under which they operate to explain this might have nothing to do with the OFAC sanctions and the U.S., and also remind them to reflect those more in their customer relationships. So while OFAC is going to issue the licenses, the absence or the presence of the license would not actually hamper or influence those who have nothing to do with the U.S. or OFAC.

Another issue was the general licenses of the OFAC. The general licenses cover particular classes of [inaudible] or types of transactions. So of course, the group was musing whether it's possible for ICANN just to obtain general license, because it governs Internet as a global and neutral resource. Would it be possible to just obtain the general license and then not to apply for individual licenses, so any residents or

individuals from the sanctioned countries would be just, by default, free of this hassle, free of this concern?

So according to the U.S. legislation, such a license would need to be developed in conjunction with the U.S. Department of the Treasury, which must amend the OFAC regulation to issue this specific license. And of course, it is a very long endeavor, it is a significant undertaking. So while there were voices in the group which said that ICANN should prioritize obtaining general licenses, that was of course a tradeoff, like how long it will take for ICANN to obtain such a license, how costly this would be, including the cost of lobbying, and would they actually outweigh the benefits? And what would be the timeline? If ICANN was going to apply for the general license, what about these particular licenses for particular cases?

So the consensus the group came to was that ICANN should first prioritize a study of the cost and benefits and details of the process of obtaining this general license, and if it's feasible, ICANN should pursue the general license as soon as possible, unless it will discover significant obstacles to obtain such licenses. And if so, ICANN should report this to the ICANN community and seek advice, seek input from the community on how to proceed with the specific licenses.

And if the application for the general licenses is unsuccessful, ICANN is recommended to find other ways to remove this friction, to remove this tension from the transactions between ICANN and residents of the sanctioned countries because they're basically suffering for no legitimate reason. And ICANN was asked to communicate regularly about this progress on the general license. But then again, please

remember, the general license was a preferred option, but it is a significant endeavor and ICANN was asked only to prioritize study on it.

Now, probably the least controversial set of recommendations, recommendations regarding the choice of laws and choice of venue provisions in the ICANN agreement. Basically, the issue the group was studying is whether jurisdiction-related choices like choice of law provision for the contract and the registry agreements and the registrar agreements and also of the choice of venue provisions were influenced in operations and accountability of ICANN.

So what the group found out is that registry agreement and registrar agreement are the standard form of contracts, which have some exception, of course, they can be changed for an intergovernmental organization or governmental entity, but they imply no negotiation whatsoever in terms of just normal registries and registrars. So any changes to those agreements has to be determined through an amendment procedure which is detailed in each agreement.

And of course, there was a big question, does jurisdiction subgroup actually have any mandate to propose any mandates to the registry agreement and registrar accreditation agreement? And the subgroup came to the conclusion that it actually cannot and would not require ICANN to make any amendments to registry agreement or registrar accreditation agreement through recommendations of the Work Stream 2 related to the choice of law, because it is completely outside of the mandate of the group to require that ICANN must – or like to demand ICANN to make these amendments.

So recommendations in this part are just the mere suggestion for ICANN to study different options to be considered further by ICANN organization and also GNSO and contracted parties of GNSO.

So let's just have a quick and closer look on the current situation with registry agreement and registrar accreditation agreement with regard to the choice of law. So registrar agreement does not contain any provision concerning the choice of law, so the governing law is undetermined here until the judge or arbitrator, so until the litigation happens and the judge takes a decision on this issue, on this matter, or until the parties to any specific contract which is already signed agree otherwise. The same situation is with registrar accreditation agreement. It doesn't contain any choice of law position.

So with regards to the choice of venue provision, as I said already, this is a provision which determines the choice of place for litigation. It is defined in the registry agreement, so all the disputes according to the registry agreement should be resolved under the binding arbitration which is subject to the ICC rules but the venue is defined in the contract, and it's Los Angeles, California, in terms of both being physical place where litigation is located and law and so on, and also the seat of arbitration, although it should be held under the ICC rules.

So what the group proposed here with regard to the choice of law, I'll just leave them here and go through them a bit later. So just to give you an overview, the first approach widely supported was the so-called manual approach, the second was California office law approach, carve out approach, bespoke approach and status quo approach. I'm going to talk about them in detail a bit.

So the most prioritized by the group was the so-called manual approach, so when the governing law would be chosen before the contract is executed from a menu of possible options of the governing laws, and menu could include – and ICANN and GNSO can later decide on this – one country or like small number of countries from each ICANN geographic region, plus the status quo, no choice of law, and registry jurisdiction and countries in which ICANN has physical locations. So just allow the parties of the contract to choose from the menu of the options.

The second approach, which might also work perfectly, is California office law approach, so all the registry agreements would include a choice of law clause naming California and U.S. law as the law which is going to govern the contract.

Another approach would be carve out. Parts of the contract that would benefit from uniform treatment are governed by uniform predetermined law, like for example parts of the contract which – better to have unified provisions would be subject of California law, and other parts can be governed either by law of the registry jurisdiction or by jurisdiction chosen from the menu approach, but this would be a kind of combination of the fixed law California approach and the menu approach depending on the part of the contract.

Then there's the bespoke approach when governing law of the entire registrar agreement is the governing law of the registry [operator.] For me, this option is probably the last preferred by it will give rise to multiple issues related to different approaches and different applicable laws and so on.

And of course, the last option is just to maintain the status quo approach, just retain what is happening now with no governing law clause in registrar accreditation agreement and registry agreement. So the choice of lawful registrar accreditation agreement would be completely the same as for the registry agreement, and I think that this is the easiest point during this training I could have possibly ever made.

As to the choice of venue provisions in the registry agreement, as I said already, the status quo currently is that all the disputes are resolved by the binding arbitration pursuant to ICC rules, but the venue decided as Los Angeles, California, as the physical place and the set of arbitration. So the group recommended that when entering into the contract with registries, ICANN could actually offer a list of possible venues for arbitration rather than just imposing Los Angeles, California, the place where ICANN is incorporated, and then the registry which has entered into this agreement with ICANN can choose which venue it prefers at the time of signing of the contract, before the execution of the contract. So just to give the registrar a fair choice, because right now, this choice doesn't exist.

So this is all the binding recommendation. And the last recommendation, which wasn't actually a recommendation in this report but was just a suggestion to continue the discussions on jurisdiction-related concerns. The reason for such suggestion – please don't confuse it with actual recommendations of the subgroup, it's listed as a suggestion and it is just a suggestion.

So the reason for inserting this part – can those who are so loud mute themselves? That would be appreciated very much. So the reason for

making the suggestion in the final accountability jurisdiction report – and I remember that when At-Large working group was drafting a public comment to the final report, a section with suggestions came up, because when you read it, it's not really clear what is going on, why this suggestion actually was inserted into the report.

It's not a recommendation, it is very neutrally worded, and it suggests that another multi-stakeholder process of some kind will allow for further consideration and potentially resolution of the concerns related to jurisdiction, and in particular, concerns related to immunity.

What was the reason? As I said already, there were many – well, maybe not many compared to the number of participants in the group, but there were voices, and some of them very strong voices about ICANN immunity from the U.S. jurisdiction, about relocation of ICANN, about possible risks for ICANN if it remains incorporated in the U.S. and subject to U.S. law without obtaining immunity. And even when report was adopted, countries like Brazil didn't participate in consensus and issued a dissenting opinion.

So this suggestion – which is different from recommendation – was a kind of attempt to make a compromise and to allow valid concerns of those stakeholders to be voiced further, because the group of the jurisdiction subgroup had limited time, it had to focus on the very practical and very real issues, it didn't have funding to continue the work, continue these circling, Groundhog Day discussions and the jurisdiction and immunity, but those stakeholders who felt like their concerns were just written off, that they were cut short in terms of voicing something that they considered valid, they still can have a venue

to discuss this concern and they will not feel like the recommendations are already issued, the Work Stream 2 has ended, it's all finished and we close the topic of jurisdiction.

I do believe that many of us who participated in this group would rather prefer to close this topic of jurisdiction, but I do understand that from the broader perspective, from the perspective of ICANN community, if there are valid concerns, there should be a venue and possibility for them to be discussed.

And I guess this was the last slide of my presentation, and we will go to the quiz later today, but I'm ready to answer any questions you might have.

TIJANI BEN JEMAA: Hello.

TATIANA TROPINA: Hello. Yes, so I'm muting myself for now.

TIJANI BEN JEMAA: Okay. Thank you very much, Tatiana. Thank you for this wonderful presentation. I was a member of this subgroup, and I can tell you that Tatiana gave you not only the recommendations but the spirit, what is behind, what are the underground things. So it was, in my point of view, a really comprehensive presentation about the jurisdiction proposed by the Work Stream 2 CCWG Accountability.

A lot of problems, a lot of things. I understand several things. I will not continue discussing, because I think that the best is to have questions from you. We'll perhaps start now with the [inaudible] please. Yes, we will start now with the questions, your questions. So if you have any question to Tatiana, please go ahead. Waiting for your hands. I don't see any.

Okay, let me tell you why – there is a lot of questions. For example, people ask why we don't relocate ICANN and incorporate it elsewhere. It is a very bad decision if we take it, because first, we are doing the transition and we are changing a lot of things. If we add to that a change of incorporation and the location, it may affect the work of ICANN, of Internet, first.

Second, suppose we incorporate it elsewhere. What is the country that doesn't have laws you have to comply with? So we are always in the same situation except that we change the country. So this is not the right thing to do, especially now when we just made the transition.

People say also why we don't have immunity, and this is the request of Brazil. Immunity is impossible to have. The U.S. government will not give it. It will not be possible. So, what is the necessity to make a recommendation that is not applicable? It is not something that ICANN can do, so that's why we said immunity is not possible. They asked about partial immunity, and even the partial immunity is not possible. So all those problems made Brazil make, how to say, a minority opinion in the report. Not only Brazil, a lot of governments.

I have a hand. Okay. Olivier.

OLIVIER CRÉPIN-LEBLOND: Thank you very much, Tijani. Can you hear me?

TIJANI BEN JEMAA: I hear you very well.

OLIVIER CRÉPIN-LEBLOND: Okay. Thank you. I have a question which is to do with the discussions that we had internally, as in, okay, so the ICANN communities have decided on the jurisdiction that it will follow and it will continue as it currently is. How likely, or how possible would it be that ICANN would need to change jurisdiction due to external factors, such as for example if the United Nations had a vote on asking for the ICANN resources to be moved to even, say, New York or Geneva, let's say? How open is ICANN to these international decisions? Thanks.

TATIANA TROPINA: Olivier, thank you very much. I'm a bit lost concerning your question, because first you asked how likely, and my only answer here is that if you don't know what to give me for Christmas, give me a crystal ball so I can see the likelihood of this. Really, I don't know.

And how open ICANN would be in exceptional circumstances, I can only guess here, I do believe that if something severe really happens, ICANN has quite well-versed and developed and capable legal department to deal with these issues. However, of course, it would be a big hassle for the community, because as Tijani already said just a few minutes ago

and as I said in my presentation, the entire mechanism for the Empowered Community was developed to be incorporated in California.

But I do understand here that on the one hand, any business, any governance is risk. There are many risks in this world. But of course, when you are the only entity responsible for the unique identifiers, the risk is high. But I would say that in this regard, the risk would be high in any country. Any country can legislate you, any country can regulate you. You're not above the law unless you are an international organization and you have immunity. But for that, ICANN has to jump through burning hoops with a very uncertain result to reach such a status, which wouldn't be feasible, or really probably would be impossible. Thank you.

OLIVIER CRÉPIN-LEBLOND: Let me just ask the question a different way, and I realize I didn't ask it properly.

TATIANA TROPINA: Yes, you didn't, sorry.

OLIVIER CRÉPIN-LEBLOND: Well, if a resolution was passed in the United Nations to relocate ICANN to Geneva, let's say, would ICANN be subjected to this, or would it be immune to this? I'm not quite sure –

TATIANA TROPINA: I understand what you're saying, Olivier. Let me go into detail. Assuming a general assembly resolution or a security council resolution.

OLIVIER CRÉPIN-LEBLOND: Yeah, let's say something like this. That's right. I mean, do they have anything over ICANN?

TATIANA TROPINA: [No, there is no something like this,] because security council resolutions are binding, and general assembly resolutions are rather a recommendation. So, Olivier, okay, I have to be honest here. I don't consider this question valid. I do not think that UN will ever pass this resolution, and if UN is to pass this resolution in some different, imaginary world, I do not believe that ICANN will have to immediately pack its things and relocate to Geneva, because we are not in the 20th century where you are given 24 hours to be kicked out of certain places. If there is any international event – now let's speak theoretically, not about the United Nations – if there is any decision of the intergovernmental organization which will imply ICANN relocation, even if this is going to happen, it's not arbitrary and subjective decision. There would be some circumstances and some rationale for this, and apparently, if ICANN is ever to be the subject of these decisions, I would never believe that ICANN would not be given time to consider this relocation and develop the mechanisms for accountability and for relocation itself. But I do consider this situation highly unlikely, highly improbable and very imaginary. Thank you.

OLIVIER CRÉPIN-LEBLOND: Okay. Thanks for this.

TIJANI BEN JEMAA: Thank you very much, Tatiana, and thank you, Olivier, for your question. And I confirm that your question is not in the frame of this webinar first, and of the CCWG Accountability also remit. That's why you cannot have an answer to your question, an affirmative or negative answer to your question. Thank you very much, Olivier.

Now we have a lot of questions on the chat, and I'll give the floor to Yesim to ask them. But before that, I will ask you a question in French because Yesim cannot understand it and it is almost the question of Olivier. Gabriel asked why we don't give ICANN to the United Nations. So I think that this is – I repeat that it is not in the remit of the CCWG Accountability and not in the framework or in the scope of this webinar, and it is not a question that we think about and it is not a question that is asked now in ICANN. Tatiana – no, excuse me, Yesim.

TATIANA TROPINA: Yes, can I –

TIJANI BEN JEMAA: Yes, Tatiana. Okay.

TATIANA TROPINA: Yes. Can I actually say a couple of words about this, why we don't give ICANN to the United Nations? There was a requirement of NTIA, of U.S.

government before the transition that control over ICANN should not go to the intergovernmental organizations. This is the answer to your question. There was a requirement for U.S. to give up control over ICANN. Thank you. Looking forward to Yesim reading the questions. Thank you.

TIJANI BEN JEMAA: Yesim, go ahead, please.

YESIM NAZLAR: Thank you, Tijani. As I said, we have a couple of questions. The first question was from Satish Babu. He's asking, is there any precedent for the OFAC general license? Does existing OFAC regulations permit such a license? He's asking.

TATIANA TROPINA: Yes. There are certain examples, and there is Greg Shatan on the call, maybe he knows a bit more, but as far as I remember, there were some general licenses which were issued by OFAC together with Department of Treasury concerning some of the Ukrainian companies under the sanctions. So this is possible, there are precedents, there are mechanisms for this, but it is not clear how much would it cost for ICANN, how long it will take for ICANN to obtain such a license, whether it's worth it. So this is the only question. Otherwise, general licenses are possible and they have been issued regularly. Thank you.

TIJANI BEN JEMAA: Yes, but I would like to complete what you said, Tatiana, by saying that we were told on the subgroup that this kind of license should go through the Congress, and we know the composition of the Congress, we know how the transition passed and we know what happened after Trump come. So if we go this way, I don't know what will happen for the whole transition also perhaps.

TATIANA TROPINA: Yes. It is certainly a risk. Anything that might include U.S. conservatives or those who were against the transition, there's certainly a risk, be it immunity or anything connected to sanctioned countries which implies the communication with elected representatives in the U.S.

TIJANI BEN JEMAA: Yes. Yesim, please.

YESIM NAZLAR: Thank you very much, Tijani. The second question is from Abdeldjalil Bachar Bong, he's asking, "What do you think about OFAC sanction impact on development of Internet in the world? And my second question, could you give us some examples, cases of impact of OFAC in some companies or countries? Thank you."

TIJANI BEN JEMAA: Tatiana?

TATIANA TROPINA:

I'm sorry, I forgot to unmute myself, like of all the possible mistakes on the call. So yes, I can give examples. Basically, the concern with the examples were expressed in the answers to the questionnaire. Like for example, Russian Federation submitted an answer giving the examples on how registrars and registrants in Crimea were affected. And it's not only about registering the domain name, it is also for example about the payments, about the funds transaction, how do you pay to the company which is in the U.S. for any transaction under the contract? So suspension of domain names, not being able to transfer the payments. There were cases like this in Iran and there were cases like this in Crimea.

As to the development of the Internet in the entire world, well, it is a very abstract question for me here, because we're talking about ICANN jurisdiction, and ICANN has unique and narrow mission as to the entire development. Of course, I do believe that sanctions do lead to localization of data. Sanctions might possibly lead to the fragmentation in terms of economical fragmentation, financial fragmentation, legal fragmentation and so on, and it does contribute to the development of the Internet.

But if we are talking about ICANN jurisdiction, it influences it only in a very particular way, in the way when those who reside in the sanctioned countries cannot register domain name or cannot transfer the funds. And this is how it has impact on ICANN. Thank you. Ready to answer next question.

YESIM NAZLAR:

Thank you very much, Tatiana. The next question is from Alexis Anteliz. Do you think that the current jurisdiction of ICANN could be impacted by the turn of the foreign policy of President Trump's government? Thank you.

TATIANA TROPINA:

Thank you very much for your question. Again, it is like having a crystal ball, which I don't have. If I look at the political situation, of course, it can be potentially impacted. But there is also the entire context. Whatever country you choose, ICANN operations can be potentially impacted by the jurisdiction, but there are advantages that U.S. jurisdiction being impropriated in the U.S. has for the accountability and transparency of ICANN, because the community could develop the mechanisms to keep ICANN accountable.

So we are looking at positives and we are looking at negatives. And of course, U.S. can potentially legislate ICANN, regulate ICANN, impose more sanctions on different countries which will definitely influence the operations of ICANN, but at least for now, I see the ways out, I see how ICANN with applicable law can potentially cope with this, potentially remedy this with the current regulation.

As to the future, it is hard to guess here. My guess would be that at least for the next few years for ICANN, it stays as it is. But if something happens, well, I guessed wrong. Thank you.

TIJANI BEN JEMAA:

Thank you very much. Before I give the floor to Yesim, David McAuley just noted that these recommendations are not yet approved by the ICANN board, and he thinks that this is because it should be first ratified by the chartering organization. It is already done, and it is already ratified by the chartering organization. The problem is that now the board should have other things to do, and that's why in my point of view, it didn't release a resolution approving this final report. Yesim.

YESIM NAZLAR:

Thank you very much, Tijani. The next question is from Harold Arcos. Harold is asking, "How would a relationship with registrant potentials come from the Bolivarian Republic of Venezuela?" Thank you.

TATIANA TROPINA:

It is hard for me to talk about particular country, right? But I know that Venezuela has problems with payments and so on. So I do believe that in this particular case, if there are sanctions or if there are problems on the U.S. side, it would be covered by the recommendation, by either recommending ICANN to do their best efforts to obtain specific licenses.

But if the problems are on the side of Venezuela and these problems are not related to ICANN place of incorporation and the law governing ICANN, it is outside of the remit of this jurisdiction recommendation, because the only thing subgroup could actually do, they could draft specific recommendations to the specific ICANN-related programs which are caused by ICANN residing in the U.S. and not by some economical or other problems in different countries. So it is hard for me to answer this question if the problem is on the Venezuela side, because

recommendations have nothing to do with this. ICANN might be helpful, might be not, but this would be just a goodwill. Thank you.

TIJANI BEN JEMAA: Yesim?

YESIM NAZLAR: Thank you, Tijani. The last question I have for now is from Chokri Ben Romdhane. He's asking, "Perhaps we need a regulation process that will regulate USA sanctions and give the opportunity to community to breach these sanctions." Thank you.

TATIANA TROPINA: Well, why do we speak about regulation? We are speaking about regulation in terms of governmental issue, right? ICANN can only regulate its parties by the contract. The problem here is that ICANN is still subject of law and regulation in the United States, because it's incorporated there. And as long as U.S. have this regulation about sanctions, ICANN cannot issue anything contrary in its contracts. And then these regulations cannot be actually overruled by other countries, by other jurisdictions, because ICANN is incorporated in California.

So while I would be all up for allowing ICANN to breach these sanction regimes, we have to obey the law and regulations existing in the U.S. And also, because there is a way around this. U.S. [inaudible] sanctions does allow to obtain specific licenses, general licenses. So this used to be a goodwill of ICANN and OFAC, now ICANN will be, after the approval, perhaps more binded by the recommendations issued by the

jurisdiction subgroup, but I don't believe that ICANN or anyone else except the U.S. can produce regulation allowing to break the sancitons regime. Thank you.

TIJANI BEN JEMAA: Thank you very much, Tatiana. And Yesim, no more questions, isn't it?

YESIM NAZLAR: No more questions, Tijani. Thank you.

TIJANI BEN JEMAA: Thank you very much. No more hands? Any other question for Tatiana?

YESIM NAZLAR: Tijani, I'm so sorry, I've just received another question from Harold Arcos.

TIJANI BEN JEMAA: Go ahead, please.

YESIM NAZLAR: Harold is asking, "Venezuela has sanctions, that is the problem, not lack of money. [Have you recommend adopt some way about treatment on case of contract with ICANN?]" Thank you.

TATIANA TROPINA:

Thank you very much for this question. So basically, that's what I was talking about when I was talking about OFAC-related recommendation on jurisdiction which were issued by the jurisdiction subgroup. So basically, there are two recommendations around this.

First of all, ICANN is recommended to apply for the licenses in case of registries, registrars, registrants related issues in the sanctioned countries. So ICANN can apply for specific license in this case concerning a particular person, legal or natural.

With regard to the gTLD application, ICANN is now recommended to do the same. However, ICANN might – might, I know that most of us are skeptical about this – take this endeavor to go into treasury and U.S. Congress for the application for the general license, and in this case, whatever sanctioned country there is, anything related to ICANN mission and ICANN operations would be exempted from the sanctions. But as we already discussed here on this call, the first way would probably be the most feasible, so ICANN would apply for apply for specific licenses for every single case. Thank you.

TIJANI BEN JEMAA:

Thank you very much, Tatiana. And now perhaps, Yesim, we can go to the pop quiz questions.

YESIM NAZLAR:

Yes. Sure, thank you, Tijani. Let's move on to the pop quiz part. So our first question is, what is the choice of venue for dispute resolutions in the current registry agreement? Is it, A, Los Angeles, California, is it B,

no provision on the choice of venue, or is it C, location of the registry?
Please cast your votes now. And I would like to ask Tatiana for the
correct answer, please.

TATIANA TROPINA:

Thank you very much. Yes, I know that this is a bit of a confusing
question because there is no choice of law provision in the registry
agreement, but there is a choice of venue provision. So the answer is
the right one, Los Angeles, California.

YESIM NAZLAR:

Thank you very much, Tatiana. Moving on to the second question. With
regards to obtaining a general OFAC license, the jurisdiction subgroup
recommendation is, A, ICANN must apply for a general license, B, ICANN
should first prioritize the study of the costs and benefits for this option,
C, ICANN should maintain the status quo. Please cast your votes now.
And over to Tatiana once again for the correct answer, please.

TATIANA TROPINA:

Yes. The correct answer is B when it comes to the general license and
not specific license. Because it's such an endeavor which might be costly
and time consuming, it was recommended that ICANN should prioritize
the study of the costs and benefits. The answer A says ICANN must
apply for the general license. None of the license recommendations say
that ICANN must do something, only prioritize or do the best effort. So
that was the key. Thank you. So the correct answer is B. Thanks.

YESIM NAZLAR: Thank you very much, Tatiana. I'm moving on to our last question, question number three. With regard to ICANN seeking immunity for the U.S. jurisdiction, the subgroup, A, suggested to continue discussions and address these concerns beyond CCWG Accountability work, B, recommended the issue of immunity not to be considered in the future at all, and C, recommends ICANN to obtain partial immunity. Please cast your votes now. And once again, I would like to turn the floor to you, Tatiana, for the correct answer, please.

TATIANA TROPINA: Thank you very much. The correct answer is A, it was recommended – suggested that the discussion will continue. Answer B is a wishful thinking for some of us, but it didn't happen. Thank you.

YESIM NAZLAR: Thank you very much. Tijani, this was the end of the pop quiz section. Please let me know when you would like me to move to the evaluation part. Thank you.

TIJANI BEN JEMAA: Okay. Thank you very much, Yesim. We still have time to have questions to Tatiana. We have also Greg Shatan, who used to be the chair or the coordinator of the subgroup, and so if you have any question, you can ask it now. You still have time.

TATIANA TROPINA: Sorry, even if there are no questions, maybe Greg can say a couple of words, because I'm very happy that he's on the call, and he did a tremendous job of guiding this group through the process, [chairing the misery and sharing the misery] with all of us, and it was really mounting on his shoulder, and I would like to thank him for this fascinating, amazing job of chairing this group. Thank you.

TIJANI BEN JEMAA: Okay. Greg, please. You want to say something? Greg Shatan. Might be muted.

YESIM NAZLAR: Tijani, I don't see Greg on the AC any longer. He was, but I think he has left.

TIJANI BEN JEMAA: Yes, okay. No problem. So if you don't have other questions, I will ask Yesim to start the evaluation question.

YESIM NAZLAR: Shall I?

TIJANI BEN JEMAA: Yes, please.

YESIM NAZLAR:

Okay. Thank you very much, Tijani. So let's move on to our evaluation part. Our first question is, how was the timing of the webinar, 13:00 UTC? Is it too early, just right, or too late for you? Please cast your votes now.

And I'm moving on to the second question here. The second question is, how is the technology used for the webinar? Is it very good, is it good, sufficient, bad, or very bad? Please cast your votes now.

Moving on to the third question, did the speaker demonstrate mastery of the topic? Is it extremely strong, strong, sufficient, weak, or extremely weak? Please cast your votes now.

Moving on to the fourth question, are you satisfied with the webinar? Extremely satisfied, satisfied, moderately satisfied, slightly satisfied, or not satisfied at all? Please cast your votes now.

Moving to the fifth question, what region do you live in at the moment? Is it Africa, is it Asia, Australia and Pacific Islands, is it Europe, is it Latin America and the Caribbean islands, or is it North America? Please cast your votes now.

And I'm moving on to the sixth question. How many years of experience do you have in the ICANN community? Is it less than one, one to three, three to five, five to ten, or is it more than ten years?

Thank you very much for your answers, and I'm moving on to our final evaluation question. What topics would you like us to cover for future webinars? Please type your answers in the blank space, and don't forget to quit the button next to it so we can receive the answers. I already see

one answer coming through. So this was the end of the evaluation part. I'll leave this open as you keep filling in the answers, and would like to turn the floor back to you, Tijani. Thank you very much.

TIJANI BEN JEMAA:

Thank you very much, Yesim, and as Yesim said, this question is very important for us as working group, as Capacity Building Working Group, because this will tell us what are the topics we'll cover next year. So please give your preference here. And even if you remember later other topics that you want, you wish us to cover in our program for 2019, please send us an e-mail so that we include it. It is very important to have your preference, because we are doing this for you. So thank you very much for giving us your preference.

We still have four minutes, and I will give you the last chance to ask any question you want. I don't see hands. So if there is no more questions, I will thank you all very much. My big thanks go to Tatiana who, as usual, answered with a positive answer and came to our webinar and made a wonderful presentation.

Tatiana, as I said, is one of the most active people in the subgroup on jurisdiction, and she was one of the most contributors on this subgroup. So thank you very much, Tatiana, and this is very kind of you. I would like to thank our interpreters and our staff, and thank you all for coming and for attending this webinar. This webinar is now closed. Thank you.

YESIM NAZLAR: Thank you all for joining. This webinar has now ended. Please don't forget to disconnect your lines, and we'll be disconnecting the audio of the AC room as well. Have a lovely rest of the day. Bye.

TIJANI BEN JEMAA: Bye.

[END OF TRANSCRIPTION]