
GREG SHATAN: Good morning, good afternoon, good Evening. Welcome to the CCWG Accountability Work Stream 2 Jurisdiction Subgroup Meeting #18 on January 24, 2017 at 13:00 UTC.

Would like to record that we have apologies from Jorge Cancio and Kavouss Arasteh for today's call. Kavouss is going for a medical checkup on his injured hand, wrist. So, hopefully, that all works out well for Kavouss.

Is there anybody who is on audio only?

MATHIEU WEILL: Yes, Greg. This is Mathieu Weill speaking and I will be joining the issue room shortly.

GREG SHATAN: Thank you, Mathieu. Anybody with updates to their statements of interest? I'll take it we have no updates to the statements of interest. So let us begin.

We'll begin trying to round out the discussion of how we'll get our questionnaire out there.

BECKY BURR: Hi, it's Becky Burr.

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.

GREG SHATAN:

Hi, Becky. Welcome. Becky is on audio only, so we'll add her to the roll call. In the last call we discussed a variety of options for getting the questionnaire out there and discussion took place on the list as well. It seems to me looking at the options overall, it would seem to be the most supported option. Although, there was not a lot of discussion from too many people, was to announce it on the ICANN public comments page. Then have that announcement go to a page in which the questionnaire was available and that it would be publicized through all of the usual ICANN methods. In addition, of course, it can be publicized by each of us through any organization of which would have participants.

Are there any thoughts or concerns or alternatives for that approach? Seeing no objections and noting affirmation from David McAuley in the chat that that seems to have been the general conclusion. I think we can confirm that conclusion that we will – assuming that ICANN itself has no objections – publish it on the public comments page have that lead to a page on which the questionnaire is available. Then publicize it through usual ICANN channels and any channels that participants here want to publicize it here through since it's intended to go beyond the SO/ACs and usual suspects for answering such questionnaires.

Next question is the time period for responses to the questionnaire. There we had a number of options and I see a hand from Mathieu who has now joined the Adobe. Mathieu?

MATHIEU WEILL: Thanks, Greg. Just a quick synchronization item we had with staff earlier. It appears that we should be ready to go out to launch the questionnaire basically between 8 or 10 February. That should be sufficient to get [inaudible] in. So if we apply the 42 days standard period that's 15 days that ends on March 24 or something like this, which is 15 days after the ICANN Copenhagen Meeting. I think as a starting point for featuring the questionnaire that would be probably very appropriate to give everyone time to I guess in Copenhagen, go back, submit a response and if there was a need to expand at that point then we would [inaudible] after Copenhagen. But I think that's a starting point [inaudible] into practice and we could work on the first two-day standard period starting around February 8 or 10. Thank you.

GREG SHATAN: Thank you, Mathieu. That seems like a sensible approach to me. But I will take comments, of course, from the participants in this call. So, David McAuley?

DAVID MCAULEY: Thanks, Greg. Thanks to Mathieu for that information. I think one thing that we should look to, much like we're standing up this small group to look up the litigation is that we should be preparing to look at answers to the questionnaire during the period that the questionnaire's open. Because there's that hiatus between it being announced and being closed doesn't stop us from looking at things as they come in in the interim because it'll just help to keep us on track. So we may want to create teams for that as well, too. Thank you.

GREG SHATAN: Thank you, David. That's a good suggestion. We, of course, want to look at all responses equally and favor early arrivals. But certainly in terms of we shouldn't wait necessarily until the end. So how we process as mentioned this is a fact-finding exercise, so we'll look at the facts as we receive them. I think that's a good idea and we'll do that. We don't need to do that yet, but we will make sure that we are ready for the onslaught of submissions.

I think that covers the time period question, then move on to the translation question. It seems now translation has been built into our plan and to launch all at once with translations into the usual ICANN languages. Any comments on the translation issue or on waiting to put it out with the translation so it comes out simultaneously? David, is that a new hand?

DAVID MCAULEY: It is, Greg. I think you just answered my question and that is that we will be translating into the standard ICANN languages. Is that true? I recall that there was at least one, but maybe more volunteers to translate into languages beyond those standard languages and I had a comment on that. But if we're not going beyond then I don't have a comment.

GREG SHATAN: Well, there was one participant and I think may have been supported by another participant who suggested the questionnaire be translated into Farsi. But, it was clarified that they were not volunteering to translate it

themselves, rather they were asking that it be translated into Farsi. That's the only translation issue that I saw raised on the list. I've not explored how we would deal with translation beyond the standard languages. I don't know how ICANN deals with that if it does. So David, if that then triggers your hand.

DAVID MCAULEY:

Thank you, Greg. Before we go down that path very far, I would like to make a comment. I'll try and keep it brief. First of all, the participant that made the volunteer was as I recall Farzaneh and I thought that that was a very noble and welcomed idea. But I would urge caution in this respect for a couple of reasons. One is there's standard ICANN languages. There are standard UN languages for a reason, that they seem to be efficient coverage of the globe for all practical purposes. I recognize it's not perfect.

But if we were to translate beyond those, putting a question in a language is an invitation to people to respond in that language. I would suggest that we need to have a plan in place and to have some idea of budgetary impact to know that we can handle that. Otherwise, it would be unfair I think. My caution would be to stick with the standard languages, make sure we have budget for that, but stick with the standard languages unless we formally address this and understand what it involves.

Another issue with this is why some languages and not others. It's fraught with certain concerns. The instinct behind it is very noble. I'm not being critical and I certainly don't want to impede people's ability to

hear these questions and to answer them. But I just think we have other considerations that we also need to attend to just to make sure that we're on proper ground. Thank you, Greg.

GREG SHATAN: Thank you, David. Cheryl?

CHERYL LANGDON-ORR: Thanks, Greg. Your points are well taken and my concern on volunteer translation is what I wanted to raise. But I also wanted to point out that language services, the professional [inaudible] language services is now okay and it operates very effectively, very efficiently and has a network that they can access well beyond our outstanding UN languages does provide ICANN on request [inaudible] from time-to-time. But in the case of some of the At-Large work quite frequently, additional languages to the UN.

For example, within the At-Large community it is almost expected for an example that we do the six UN languages and Portuguese. That happens to meet the needs of the requests that come in from the community at the current time. Now, as community need changes, so do those requests. You are right. There is the if you put it out in languages the probability of getting answers back in language [inaudible] so proper [inaudible] English is required. That's one of the reasons I am always an advocate of sticking with the professional language services provision.

Having individuals well meaningly offer to make local language copy of material which is of a natural outreach is a different situation. That's

something that I'm quite supportive of, particularly within the Asia-Pacific area where we have huge numbers of [inaudible] languages to deal with should we decide to not choose to work as we do choose to work primarily with English.

That said, if we believe that putting out in any of the languages, just recognizing if we put it out in the six UN languages and I support that we do so [inaudible] get them back in the six UN languages. So there is going to be the reverse translation issues regardless of [inaudible]. It does have to be considered [inaudible] for it takes some time and a little money. But if we stick within the gambit of the actual expectation for language services to deal with as well, then they're prepared, we're prepared and we can offer it within an ICANN-based plan.

So I have absolutely no problem should we decide to support the request for Farzi as well. But should we do so and I'm very supportive of doing that, I think we have to stick with it as a planned operation which includes as it would for any of the languages the likelihood of us having to bring a language questionnaire back from whatever language supplied to us back as a copy that will be a comparative master copy for use in English as well. Thank you.

GREG SHATAN:

Thank you, Cheryl. Turn to Avri Doria.

AVRI DORIA:

Quickly. Unless there's really a specific reason why we need for the professional translation to go beyond the six and, I guess, I'd be

supportive of translating it into whatever. But I actually know why specifically one needs to add more languages in at this point. I think that if it's going out as part of the official it needs to be done by the professional outfit as explained. I do, however, see if somebody does want to translate it as part of their... this group encourages them to pass it out into all their networks, all the relevant networks. If they want to translate it informally in terms of passing it on to their network, I see no problem in it as long as there's an expectation that this group is dealing with responses in one of the six languages that it is. So we could have an [inaudible] between the number of languages that people read the questions in because there were informal translations and the number of responses that are only translated in the one that professional services are providing services for.

So I can see us having that asymmetry. I don't think it's a bad thing for people to translate something that they want to push into their network, but I do think we have to take a care with making sure that the responses are within the formal set of languages. Thanks.

GREG SHATAN:

Thank you, Avri. I don't think there's anything that we can do to stop people from translating it into any language they wish and distributing it themselves. But I think that Cheryl points out, I think you did as well, that for an official ICANN output even if of this you would want to go with professional translators. And I agree that in terms of responses we need to get them back in languages that we can have translated efficiently and authoritatively.

So that would be my view and I note, too, that if one looks at the distribution of languages in the world. And, of course, there's six UN languages, plus Portuguese aren't necessarily the top six though they're close-ish. We run into Hindi, Bengali, Punjabi, Javanese, Malay, Telugu, Wu, Vietnamese, Korean, [Marachi], Camo, Urdu, Turkish, etc. I'm sorry if I did not get to a language which you speak before I stopped. But the point is even at that point we're still talking about over 70 million speakers or so, 63 million. So, in any case, it kind of gets us into a bit of a slippery slope. But, again, if somebody wants to distribute it themselves. I was just reading off Wikipedia, I'm not encyclopedic myself, therefore, footnote.

So it seems to me that just take the temperature of the room that in terms of the formal output and, I guess, Avri's been watching the young pope asking when we'll do the formal liturgical Latin translation. I'm also going to have it translated into Hebrew and Yiddish for that matter. Let's just take the temperature of the room and see the general support or objections to having the output that goes on the ICANN page be the seven ICANN languages.

Give me a check if you support that and an X if you object to that for any reason. Let's have one, two, three, four, five, six, six checks and no Xs. Let's clear those checks and after clearing the checks we'd just like to add if there is anyone who supports going beyond the ICANN languages and seeking additional professional translation to be placed on the ICANN page. If you support this, please give me a green check. If you do not support or object give me a red X, please.

I see one red X, no green checks. So there does not seem to be support for that. So we will translate it then into the ICANN languages and, again, no objection if anybody informally translates it for their own network or own use. But responses will need to be in the ICANN languages. That takes care of that issue.

Any other comments or questions or concerns on the questionnaire before we move on to other items? I see none. We'll move on to Item 3 on the agenda. The small group review of ICANN's past and current litigation. As discussed in last call on the list leading up to this call, we've asked for a small group to review the roughly 35 litigations, I think one of them is in arbitration, that are posted on ICANN's litigation page which is, the link is at 3A your agenda.

So far I believe the volunteers that we have for this are David McAuley, Kavouss Arasteh, Phil Corwin, Avri Doria, Doaa Shendy, Mathieu Weill, Adebunmi Akinbo, Greg Shatan, and I believe Erich Schweighofer as well. Erich, if you could confirm that in the chat, that would be helpful.

I have prepared a suggestion for a draft summary form which is posted as a Google Doc. This is just to get the small group started and we can work on it further. And I've also created a signup sheet which is also up as a Google Doc. I've sent PDFs of both of those along. Let's put up the summary form in the Adobe Room and just see if there are any comments here. We have our first volunteer as well, volunteering for the State Attorney General versus the NTIA U.S. Department of Commerce, [inaudible] Lawrence E. Strickling, the volunteer Mathieu Weill.

So here is the summary page. See if there are any suggestions here on whether there are other items that should be recorded. Obviously, there are other items that can be derived from it, for instance, the date the case began, the date the case ended. We can derive the length of the case from those two pieces of information. The size of the field is not intended to be a limitation. Fields can be long as they need to be, but we should not be too [prolix], it's just how it displays here. Mathieu?

MATHIEU WEILL:

Thanks, Greg. I think that all information here are relevant. I actually have a question on the one on the bottom, "The Influences of Jurisdiction." It may be a little ambiguous. Maybe we will need to clarify exactly what we expect in this part of the summary because it may not be perfectly obvious to fit in. Could you expand what you're expecting on that part of the summary of any of the cases?

GREG SHATAN:

Thank you, Mathieu. I agree that is the one item here which cannot be derived in a purely factual necessarily or derived from the documents without any judgments by the case summarizer. But the intent there was to see what, if any, way the jurisdiction and by that I would refer to all the multiple layers of jurisdiction. But essentially if there was any influence on the case and how it proceeded because of the jurisdiction in which it took place or which I think would be the court and venue and the choice of law or governing law question.

So, for instance, a case could be taking place in a California court applying Dutch law and it could be that because Dutch law was applied a particular standard or cause of action was allowed. I guess the question is how do we relate the summaries and the cases to our work and to see in what way there was a relationship between litigation and the ability to either carry on the dispute or settle the dispute. That's my thinking and it's a little bit unformed. But I think that if we think about how we want to derive value from these summaries I think it will need some sort of analysis.

I think David McAuley suggested a question, "Was jurisdiction contested in any manner?" I think that's a fair question. I don't think that necessarily replaces the relevance to our work. And perhaps that's a way to phrase it, taking that from Mathieu here, rather than influences of the jurisdiction which is both ambiguous and somewhat provocative.

So I would suggest the following two changes to this one is to ask was jurisdiction contested and also relevance of the case to our work. So any further comments or suggestions on that? [Inaudible] your comment in the chat. Our influence doc has three categories, we could map the cases, Influence on operations of ICANN Policies, ICANN Accountability Mechanisms and the speech involving ICANN. I think they're all going to be disputes involving ICANN on this list. But I think the other two, I think that makes sense to tag it to those items, Influence on Accountability Mechanisms and Influence on Operation of ICANN Policies because that really is the mandate of the group to look at those aspects of jurisdiction. So we should add that as a tagging item.

Any comments on this? Farzaneh asked, “Are we going to discuss arbitration cases, too, if there are any?”

There is one reported arbitration on the ICANN list and that would be summarized. I don’t think we are going to summarize IRT cases, however, or UDRP cases or other cases where ICANN is not a party. We’re sticking with the 35 cases which include at least one arbitration that are on the list.

So I think that covers it. Any comments on the summary sheet? Hearing no comments, I think we can go back to the agenda and I’ll change the summary sheet according to the discussion. I would encourage everyone who has volunteered for the small group to go to the signup sheet and sign up themselves for the cases that they wish to summarize. The links in the summary form should be live, so you should be able to go directly from the summary form to the case that you’ve chosen. So you could start right away.

One other question was raised and then raised again, which is the time scale for this effort. There are 35 cases and we now have nine volunteers. If one were to assume the equal distribution that’s roughly four cases per person. I’m thinking three weeks should be ample for at least get the summaries done. Any comments on whether that’s too much time, not enough time? Seeing one okay from David McAuley who’s in the group. Bernie Turcotte’s hand is up.

BERNIE TURCOTTE:

I just find it easier when putting action items in the notes if you actually pick a date for when you mean three weeks.

GREG SHATAN:

Good point. So let's see. Today is the 24th so why don't we say three weeks would be the 14th of February. So why don't we say the 14th of February then?

Okay. So I think that covers the litigation project. Obviously, the group should communicate amongst themselves and should see whether this is a workable timeline or not and not trying to be a slave driver.

Let's move on to the Influences of ICANN's existing Jurisdiction document which we have not looked at for a while. If we could put that up in the Adobe Connect Room and go to Section C of that document. I think you all have scroll control. The reason I suggest going to Section C even though there's quite a bit before that is that the first couple of sections really go over the the layers of jurisdiction. I would like to get to, rather than issues about the layers of jurisdiction, issues about jurisdiction itself that have been raised and see if we can actually start discussing those. There have been some suggested – so hopefully you have looked at them, but if not we can be in here with E1-A on the bottom of Page 3.

I think that in terms of reviewing suggested issues or problems we'll need to consider whether this is actual or hypothetical, the likelihood that it could occur under what circumstances and whether it's relevant to our mandate, whether it seems like an accurate statement of the question. And, of course, the substance of the question itself and how the question relates to accountability and operation of policies or settlement resolutions and disputes.

So the first populated question is that a U.S. Court may find ICANN's actions involving actual operations of its policies, like delegation of a gTLD and/or acceptance of certain terms of registry operation to be in derogation of U.S. law and instructed can change its actions. There are a number of comments after that in the document itself which I wrote. The initial Section A was written by Parminder.

So I'd like to see if there any comments on this issue, whether this is in fact an issue or just a feature of jurisdiction. Whether there are problems that arise from this or that relate as this question does to operation of policy or to accountability. Any comments on this? I don't know if that's a new hand. We have a hand from David McAuley. David?

DAVID MCAULEY:

Greg, thanks. I just have a question and I will admit that I have not been in this document in a while. So, are we also to compare what would happen elsewhere or is this just a question about the U.S.? I'm just trying to get a context of what we're doing here. Thank you.

GREG SHATAN:

Thank you, David. That's a good question. I think we'll need to refine our working method as we determine how to look at the issues. Whether we generate them within the group and put them into this document or other documents where they receive them from the questionnaire. So I think it is certainly a valid comment that this would be a feature of any jurisdiction in which ICANN could find itself may or may not be subject to U.S. law in addition to other laws.

So I think it's a fair question right now that could be posed that we could go to. I think in terms of how we proceed I think it's something that could be brought up in the initial analysis of the potential concern or issue or for that matter, positive influence. The reason that the word influences was chosen is that it is not a positive or a negative word, so they are both potentially advantages or disadvantages.

Any other questions or comments on this particular hypothetical? I phrase it as a hypothetical because it is phrased as a hypothetical. I did ask had there been any such cases in the past, that hasn't been answered yet. David McAuley comments in the chat, "I think it is a good comment on my comment, right? This asks us to wonder about the future when we have past performance to judge by. Why not go by that?"

I'll just read my comment on this hypothetical and why I find it a little bit inaccurate or at least incomplete which is that U.S. Courts don't act on their own initiatives, they only act if there's a case that's been brought. There has to be a plaintiff who believes they've been injured or that they represent a class of injured persons or entities and if they have a cause of action to bring a case. Then that dispute is heard by the court, hearing from both parties, attorneys and witnesses and also potentially from third parties who [inaudible] or intervention or otherwise and then ultimately the case will be resolved by the court. Or it may, of course, might be settled by the party.

I think at the heart of this is that there is some law that is being violated or at least the plaintiff believes that there is a law that has been violated or that there is a breach of contract which itself knows a tort, which is in

violation of law or that ICANN has violated its Bylaws. So there's a problem at the heart of this. The question is is it a problem that people can go to court in the U.S. which is the current jurisdiction, but not the only jurisdiction where ICANN can [inaudible] to resolve that problem.

Any comments on this? I would love to hear other people's thoughts since this is kind of in many ways the heart of the kind of work that we need to be doing. So, please don't be shy.

MATHIEU WEILL:

My suggestion would be, because your point is really good, that we make sure we rephrase these items that say something like [inaudible] if I do this or that in the way you just mentioned which is a plaintiff may go to court seeking injunction or decision with this or that. I think that would be more accurate and it's also going to help us when we look at the actual cases and feedback we get from the questionnaires. It will help us identify which type of case we are in in the various cases we'll be reviewing. So I think that would be my way of moving forward with the comments you make. Thank you.

GREG SHATAN:

Thank you, Mathieu. I think that's a very good suggestion. I'll take a hand from David McAuley next.

DAVID MCAULEY:

Thanks, Greg. You just made a comment that I think prompts me to make this comment. And, that is, you said that ICANN can be sued in the

United States and the other countries, I mean, I'm paraphrasing. But the other places where it has offices.

One thing that might be useful for us at some point is to ask a legal question of our outside counselors to speak about norms of jurisdictions. I believe they're changing in the digital age whereas it used to be that some presence was required for jurisdiction. Now that there's economic impact that can be visited over the Internet, I think there's a lot of nations that may be looking at targeted actions as opposed to presence. So I think it's possible that the answer to the question on where ICANN can be sued is actually much larger than where it simply has offices. I think that would be helpful.

I don't know the answer to that question, but I think it would be helpful to have maybe some legal advice along that point at some point. This isn't urgent but we'll be working for the next couple months, maybe it'd be nice to hear about that going forward. Thank you.

GREG SHATAN:

Thank you, David. I think that's a good suggestion. And, perhaps, if I could trouble you to put that out on the list as a suggestion and a potential question for outside counsel, then we can refer that e-mail to the Legal Committee for review as to whether we would authorize the question. But I think certainly you can put all... be more knowledgeable about where ICANN or for that matter any party can be sued and knowing that there are things such as long arm jurisdiction and other ways to reach folks and hale them into court. I think it's worth

understanding. Thank you, David. I concede you probably have other things to do other than this, but I appreciate that you will do that.

Now, any other comments on this hypothetical? Anyone who believes this is a amendment, if you will, in terms of identifying the initial act more accurately? Anyone who has comments on whether this is a problem, isn't a problem, how we should analyze it?

I'll just go on for a moment then and note that with regard to the two specific examples that are given, delegation of a gTLD or acceptance of certain terms of registry operation, who is the plaintiff in this case, who's rights are being... who's feeling that they've been injured and what law is actually being violated here. I think it's important to try to identify those things and any hypothetical as well. Actually, because that goes to the issue of how likely it is that it could in fact be realistic as a hypothetical. And then I've also asked and I can ask that question to the group, in what way would this be a positive, negative or neutral influence on operation of ICANN's policy? Any thoughts on that?

I'll advance my own thought. We should be thinking along these lines. To my mind this is a positive influence in that it goes to keeping ICANN accountable. One way that any party is kept accountable is that they can be sued and that if someone experiences an injury or believes they've experienced an injury due to that party's actions or inactions that they have redress and recourse to the courts. Additional recourse and redress to things like arbitration such as IRP and other internal recourse is also good, of course, but those are not necessarily equivalent as we've noted extensively in Work Stream 1 they still need to be enforced in court as well even if you get a ruling in an IRP.

My first comment is that this is a positive influence on the operation of ICANN's policies. I don't know if there's an implication in the question being asked, but there's also a negative influence on the operation of ICANN's policies as well. I would appreciate anybody's thoughts on that or even neutral influences, if you will.

Hearing nothing further, the next question that I ask there was had there been any cases in the past? I think it is important to see if we are dealing with things that are truly hypothetical or if we have any actual activity that fall into these categories. Any comments?

Since we only have four minutes left. I don't think it makes sense to get into the second hypothetical that's here. But I'd like to help understand if I could, this is an important aspect of our work and I realize that people may not have read this hypothetical or had a chance to really reflect on it before, but I'm hopeful that we can have more robust discussions about these issues. Because essentially this kind of issue or ones who think of it as a gap analysis which we need to go back to, to find exactly what that gap analysis is. I'd like to understand how we can have robust discussions about this that can involve folks regardless of their background or whether they have the legal training for better or worse. David?

DAVID MCAULEY:

Greg, thanks. I will admit that I'm one of those who have been... as we focused on the questionnaire and then the legal review I have not been back to this document in a bit. So I think you raise a good point. This is an important document. There's a lot of comments in it. Some people,

like myself, may struggle with Google Docs but we have to sort of get through that.

So my suggestion would be that if we're going to discuss this in the next week, two weeks or whatever it might be is that even before the agenda you might put out a short e-mail saying, "Now, we are turning to this document. It's got lot in it, so here's a week's notice that it will be on next week's agenda." That'll give folks some time to get back into it. Just a suggestion. Thanks, Greg.

GREG SHATAN:

Thanks, David. And I think I'd take that suggestion a step further even and extract a question or questions that we're going to discuss and put them into the agenda or into a document or e-mail text that's sent along well before the agenda to kind of tee things up. And so for those who aren't getting into Google Docs or having issues with Google Docs that we have a very specific assignment, if you will. So I will do that. That way we can also get the discussion started on the list as well. So I realize it's a bit of jumping into the deep end of the pool, to just flip to this question halfway through our call and ask people to comment on it cold. I think that teeing up questions, making it clear what we're going to be discussing and giving people time to formulate their thoughts and to ask questions and engage in some discussion on the list beforehand, I think will either result in issues being wrapped up on the list more or less, or at least more fruitful discussions on the calls. So I think that's a good amendment or detail to our working method.

So it now being 8:59, I'll just see if there is any other business from anybody. Seeing no other business, I will thank you all for attending. I will thank those who volunteered for the litigation summary project, ask them to go sign up on the list. And, I will publicize the issues to be discussed on the next call well in advance so that we can discuss some... with as much preparation as possible.

I thank you all again. This meeting is now adjourned. We can turn off the recording. Good-bye and have a good day, evening or night.

[END OF TRANSCRIPTION]