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RECORDED VOICE: This meeting is now being recorded.

GREG SHATAN: Hello and welcome to Jurisdiction Subgroup Meeting Number 21, February 23<sup>rd</sup>, 2017. It's 19h00 UTC. I will speak slower once we get past this portion of the agenda. First let me just say that I'm on the road, a place where I don't have an office so I am not in an ideal place to do this call, which means I'll probably speak somewhat less on this call than usual which is actually a good thing.

So, moving on, just to see if we have any statements of interest to be updated? [AUDIO BREAK] Seeing none. Move on. Yes, I'm in Adobe. Secondly, do we have anyone on audio only? I see a couple of phone numbers too, so we need to make sure those are all identified. 7708 and 6206. [AUDIO BREAK] Okay, thank you.

Let's now review the agenda before we turn to working through the agenda. We'll begin with an update on the questionnaire which is now and we'll talk about that and the method for dealing with responses which have started to come in. Next, we have the questions for ICANN Legal which have been edited, hopefully close to final and we can get those moving through the process for them to be sent to ICANN Legal. Next after that Hypothetical Number 1, which we discussed on the last call which I've updated in response to the last call.

Next, we'll briefly see where the small group on reviewing ICANN's actual litigation is. And Scope, Timeline and Work Product of the

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subgroup, I want to cover that at least briefly and I may move that up to make sure we do cover more of a preview of that issue than a full-scale discussion of it. Last and hopefully we get to our long-standing document in progress on “Influence of ICANN’s Existing Jurisdiction”. And any other business. So, I’d like to see now if there is any other business or anything in the agenda you’d like to comment on or, for that matter, move out of All Other Business and move into the main body? I see Avri has her hand up.

AVRI DORIA: I do not.

BERNIE TURCOTTE: Greg, I’m not seeing a hand up on this end so I’m uncertain if Avri has her hand up.

GREG SHATAN: No, I see it’s just a tiny little microphone actually next to her. It’s not a hand. I guess her microphone was open and bad eyes and a small icon don’t make a good combination. Okay, so if there is no other comments we’ll move on to the questionnaire update. Bernie, why don’t you go over where we are on the questionnaire and the possible way that that can help us kind of collate and organize the responses for a more meaningful review.

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BERNIE TURCOTTE: I just want to clarify if the group would like to have staff work on collating responses to the questionnaires, classifying them and just preparing them overall for the subgroup to work on them? This is the standard process we use for public comment. I know this is not a public comment so the staff just wants to be clear on what is expected from us on this one.

GREG SHATAN: Any comments on that? I see a hand from Christopher Wilkinson. I'm not hearing you.

CHRISTOPHER WILKINSON: Particularly because of all the time that is taken up by all our conference calls and the related documentation, I think it would be very useful if somebody, and obviously the staff is the available resource, but somebody classifies and organizes the nature of the responses so that when we do get to them we can look at the substance and not spend too much time trying to organize the information. If the information comes to us "en vrac", unclassified, we're all going to waste a great deal of time.

GRET SHATAN: Thank you, Christopher. I agree. Also, just to make the last step in what Bernie suggested is to put all of this essentially into an online spreadsheet so that things are organized essentially by topic and can be compared rather than just chronologically. Can somebody have some

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open speakers they could use, but that will be good. I think, that I've found very useful in the past.

Just to respond to also the one thing in Christopher's power point, I think the idea actually is that we will try to review these somewhat on a rolling basis rather than letting them all build up until the very end. Nonetheless, I think it's still helpful if they are put into the reposit response review tool on an ongoing basis, so that will be better from a work flow point and we can review them from that tool. So, that is the questionnaire update. Welcome, Becky Burr. Kavouss, please go ahead.

KAVOUSS ARASTEH:

Yes, which agenda item please we are discussing, agenda item 3 or 4? Please. Thank you.

GREG SHATAN:

We're discussing the questionnaire update, number 2. Do we have anything else on the questionnaire? I think we will need to talk about our method for reviewing them in the tool. I think once we have a few responses [inaudible] more helpful and I'll have to figure out how we'll use them to inform our work.

So, I'd like to ask people to think about that and we can cover that in more detail on the next call. But at least I think the front end of the process, as Bernie suggests, is a good way to get our work in front of us. Someone is beeping loudly. Okay, so if there are no hands we'll move on. I'd actually like to reorder the agenda a little bit, as I indicated before. Just touch briefly on Scope, Timeline and Work Product of the

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subgroup, and again, I think this is something we'll need to discuss in more detail on an upcoming call.

But I've been thinking quite a bit about the scope of this group and the mandate of this group and something we discussed in perhaps too much detail early on was outcoming so many exact conclusions. I think that's something we'll have to revisit, but I think the mandate of the group and really the mandate of Cross Community Working Group is clear, in short, our job is to enhance ICANN's accountability.

So, everything any subgroup does ultimately has to enhance ICANN's accountability. So, I think we just have to keep that in mind as we go along. I don't know if anyone disagrees with that but I think that is kind of a mantra perhaps to keep in mind. With regard to the timeline we're going to need to look at where we stand. I think even on the long timeline we have fallen into the yellow zone, if not the red zone, in terms of timing. I'd like to see if we can stay in the yellow zone, perhaps pull ourselves back into the green zone to finish up on the long schedule of other groups. But we do have the very long period open for our questionnaire, another reason to review the responses on a rolling basis.

So, I'll be trying to put together kind of a scratch timeline and circulate that and try to figure out how we, you know, get to the end of this. And that relates to the last point which is work product. We have a number of documents that we have half-finished and nothing that's very close to final, and that's a problem. The Hypothetical Number 1, I think, is a good example of the kind of work that we need to do. But if the hypotheticals are actuals, we need to analyze them. I'm not going to

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say that there are stress tests because I know that word gives people the shivers. But they are, in a sense, a way to look at how what we do reacts to a given (inaudible).

So, the reason it's Hypothetical #1 is that there will be more. And some of them can be Actual Scenarios #1 and such. The document at the very end, "The Influence of ICANN's Existing Jurisdiction" on governing law and venue and disputes is one of our explicit assignments in Annex 12 and I've found relatively little interest in the group in working on it and I really think we need to get back to that or we need to discuss why that document isn't what we should be producing and we should be producing something else.

So, that is kind of an overall observation on Scope, Timeline and Work Product. One other point is that while I had initially thought, or we had initially thought, that we should put off anything that sounds like a remedy until after we have spent all our time identifying issues, I think that is not the best way to go and I think that we can be more iterative in the sense that we can talk about remedies while we're talking about issues.

Clearly if there's a remedy that has no issue attached to it there's no reason to talk about it. But we don't need to postpone discussions forever on things that seem like remedies or recommendations. Because our recommendations will either be that the remedies are needed or that there's some form of a remedy to a problem that will be needed. So, we really need to start thinking about our recommendations.

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So, for instance, we have this question that keeps arising which is the question of immunity. And I think that rather than we wait until we get to some far off remedy portion of our discussions, we'll need to dispose of that, decide whether that is a subject matter for consideration or not. Not going to do it on this call, especially since it wasn't announced as such in advance, but I think we need to address that because it frankly seems to take up a lot more time and get a lot more interest than the documents we're working on that will become our deliverable.

So, we'll either reveal something that needs to go into our deliverable or not, so either way, we should move past that question as opposed to (inaudible) down the road. Any comments on this point before we get to the next point which will be the questions for ICANN Legal? David McAuley, please go ahead.

DAVID MCAULEY:

Thank you, Greg. David McAuley for the transcript. And I applaud you for bringing these comments. And I think maybe we should have what we might call a reset call to discuss the issues that you just mentioned. With respect to scope, I think part of the challenge that we face is the wording in Annex 12 to the final report was a bit unfortunate, especially a phrase "not necessarily Headquarters jurisdiction."

And I took a stab at one point of trying to read the Annex 12 with respect to jurisdiction in a holistic and sensible way and I came out on list and basically made the argument that our scope is really probably limited to looking at dispute resolution, contract kinds of issues, and I still believe that. So I think if we could discuss scope again that might be

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a good thing and maybe we could set the table on list and set up a reset call. With respect to the hypotheticals I don't think I agree with you.

To me, hypotheticals are looks into the future and I frankly think the looking at the litigation that's already happened in the past, that is fact based, is a better exercise, to be honest with you. I think looking into the future is guesswork and brings out opinions that may or may not come true someday. I think we would be better suited spending our time looking at past litigation as we've started, finding out if there are any holes or any problems with ICANN's jurisdiction based on things encountered to date and if there are, whether the work in Work Stream 1 and the new bylaws have fixed it effectively.

And then with respect to the influence of existing jurisdiction I agree that that's a task that we have at hand but I think it would be good to re-discuss that, take a look at that and see what that means if we do have something that we might call a reset call. So, those are my thoughts and thank you for bringing it up. I think you've done us a service.

GREG SHATAN:

Thank you, David. I see a hand up from Kavouss.

KAVOUSS ARASTEH:

Yes. Maybe you are too intelligent, I'm stupid, maybe. Which agenda item are we discussing? Agenda item 4? And are you going to be opening that document going into three cases that you mentioned? Please kindly tell us which agenda item, number, talking of hypothetical



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issues, is it what you are talking? And what I heard from David is he's not happy with the principle. He said that we should not have a future base on these past litigations.

My idea is different than him. Past litigation would help us how to frame the future in the jurisdictions. So, we have disagreement and we have to be convinced before we are going further. (Inaudible) says that there should be consensus and now there is no consensus. There's a difference between me and David. So, what are we doing? Are we discussing litigations, with the information that you put I have no problem with that if you go, or we are having problems in the principles? So let's just first discuss the principles. Thank you.

GREG SHATAN:

Thank you, Kavouss. This may have been while you were disconnected and reconnected, but we've actually moved item 6, Scope, Timeline and Work Product of the subgroup, up to the current item. And I think actually we're agreeing with David, even though you said it sounded like disagreement, but that may be because you came in to his intervention midstream.

David says we should look at past litigations to see if we have future problems that can be avoided. His concern was dealing with hypotheticals, solely hypotheticals, made up situations that have never occurred and dealing with them. I would say, personally, I partially agree with David, I think our best and most concrete work can be done by analyzing past occurrences to see if there are jurisdictional gaps or problems that hamper ICANN's accountability or the oversights of

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ICANN that leads to accountability. So, that's why the review of current litigations is key, current and past litigations.

I do think that the hypotheticals that are probable and not merely possible or that are reasonably probable, just like the stress tests in Work Stream 1. Or those that are closely based on past occurrences but with perhaps a slight change, a rational and probable and possible change, a reasonably possible change to those facts, is a way to look at things. And then the question is how do the current processes feel with that and do we have an accountability problem based on our jurisdictional setup.

SEUN OJEDEJI: Hello, this is Seun Ojedeji in the queue.

GREG SHATAN: Okay, so that's my point. Why don't you go ahead.

SEUN OJEDEJI: Hello, can you hear me, this is Seun.

GREG SHATAN: Yes, I hear you, go ahead please.

SEUN OJEDEJI: Hello. Okay, yeah, thank you, Greg. I just wanted to mention that I don't think we should necessarily go all up against the... even here in

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the hypotheticals. I mean, if it makes sense, if it's the fact that, okay, there's the current situation, this could happen. And if it makes sense, if it is valid, then I don't see why we should not even give that opportunity for such ideas to be shared. I think we should work on the hypotheticals, let's look at them, of course we're all going to read it and decipher it, if it makes sense, why not. We did discuss this in the WS1 and it was very successful.

I don't see why we need to, from the beginning, start reducing or unnecessarily making this too difficult to progress with. I think I'm of opinion that we should allow those hypotheticals to be shared. If they make sense, if they are based on fact, if there is a current factor to have and it is clear that this could happen then we should think of how to mitigate it. Finish. And that is all, that is my personal suggestion on this, thank you.

GREG SHATAN:

Thank you Seun, and I agree with you in part as well. I think that we do need to look at some hypotheticals but they need to be reasonably likely, rationally based occurrences that could reasonably happen and I think they also need to be as concrete and specific as possible. While we've had some good discussion around Hypothetical #1, it's been hampered by the fact that the Hypothetical's very generic and so at the last page there are some potential extra facts or alternate facts we could add to it.

But I think, as we look at hypotheticals they need to be reasonably likely, based on fact and reasonably specific. Not every concoction

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deserves to be considered as a hypothetical. So, I think we'll keep that in mind in reviewing hypotheticals or posing them. So, this is Scope, Timeline and Work Product. You said the scenarios didn't need to be reasonably likely and implausible. We'll look at each potential hypothetical and decide whether it's worth looking at, in any case. Plausible leaves a lot to be interpreted.

So, any other comments on Scope, Timeline and Work Product before we move on to Item 3? I see Kavouss has disconnected again, that's probably what that beeping was. In any case, we do need to move on to the questions for ICANN Legal, so if staff could put up the latest revision of the questions in the chat that would be great.

So, here we have the questions for ICANN Legal which have been edited based on last week's discussion and some discussion on the list. You'll see that I think those that are of any substance in A. Make clear we're talking about personal jurisdiction, not subject matter jurisdiction, and that it needs to be satisfied and maintained at least as to predicates based on jurisdiction. There are ways that jurisdiction can be lost such as by lack of diversity, which is what happened in a certain case involving a (inaudible) related PLD. But there's not a question there about failure to have jurisdiction over the corporation itself.

And as requested, (inaudible) headquarters office and state of incorporation being kind of a separate status from the hub offices. And then Item 2, I've added several other categories of jurisdiction. US States and jurisdictions other than California and the (inaudible) California and DC.

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And also, jurisdictions where contracted parties are incorporated or located, have been added. And then you can scroll down in the chat and see the remaining changes. So, I'd like to see if there are any comments on these changes and I'd like to finalize these on the call and send them on I think to the Legal Committee for review and then ultimately get to ICANN Legal. So, I have Kavouss and then David McAuley.

KAVOUSS ARASTEH:

Yes, Greg, I'm sorry, I've been disconnected several times. It's been difficult to follow at least some of your explanations which may not been good for you nor for me. I don't understand why you're jumping from one item to the other. I think we got back to Section 2 or Agenda Item 2. I have no problem with your Item 2 but I have difficulty with 2A. After 2A I have difficulty with all of them. I have to discuss them before you sending for reply. It is very great questions. 2 is okay, 2A, you have to give some examples.

Countries other than above, when ICANN employees reside and work remotely and are being paid by ICANN. Give some examples, what do you mean by that? Why this question comes from? No problem, but give an example and go one by one. We have to agree in all the parts of this question one by one. 2A I have problem and the remaining parts I have the difficulties. Please take them one by one but not all together. (Inaudible).

I am not following this because the way it is presented is not correct. You're jumping from one to the other. Agenda Item 3 to Agenda Item 6

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to Agenda Item 7. Very good, you are the boss, I am the servant, but I don't like it the way you are proceeding. Please take Agenda Item 2 and go part by part. Part 1 I have no problems. Part 2 I have no problem. 'A' I have problem in 2. Please give some examples of this. Thank you.

GREG SHATAN: Okay. I'll indicate that we've been following the agenda, other than bringing Item 6 up. Otherwise we have been going through the agenda, we have not reached Item 7. So, US States and jurisdictions other than California would be New York, Tennessee, Kentucky, North Dakota, Washington, etcetera. I don't know what the problem you have with this is but if you could explain what it is, that might help.

KAVOUSS ARASTEH: I asked an example please. One example for 'A' please.

GREG SHATAN: I just gave several of them. I hope that was satisfactory.

KAVOUSS ARASTEH: I don't hear any examples.

GREG SHATAN: The State of Washington. The State of New York. Those are examples of US States and jurisdictions other than California.

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KAVOUSS ARASTEH: So, please put, EG, New York, four parties, or I don't know, whatever. Put EG kindly that people understand. Also 2B, I see there is any agreement of the 2B.

GREG SHATAN: 2B, for example, there are people who work for ICANN who work primarily remotely, they're out of their home in, say, Montpellier, France, or in New Hampshire, but they're employed full-time by ICANN and of course they're at ICANN meetings and the like, so that's an example of 'B'.

An example of 'C' is, the examples are in 'C', so that's not a problem. I don't know if we need an example of 'D'. Just look at any contracted party and see where they're incorporated. Black Night is incorporated in Ireland, just as an example, so that's the question. And 'E' is anything that's left over.

KAVOUSS ARASTEH: Yes. If that is the case, the 'D' is not correct because you give an example on 'D', in 'A, the same result. And now if you say US a State other than California. So, what is the difference between 'A' and 'D'? You give an example in 'A', New York, other than California, and now 'D' is exactly the same thing. What is the difference between 'A' and 'D' please?

GREG SHATAN: The difference between 'A' and 'D'? 'A' and 'D' as in DOG? That's covering jurisdictions anywhere in the world where any contracted

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party is headquartered, incorporated or located. Such as Ireland. Ireland is not a US jurisdiction. 'A' is only dealing with US States and US jurisdictions. So, that's what the difference is.

KAVOUSS ARASTEH: But 'D' says US State other than California, means 'A'. It doesn't talk about other countries.

GREG SHATAN: No, 'A' does not talk about other countries, 'D' does.

KAVOUSS ARASTEH: But the text is not correct. US State other than California. Other countries than USA.

GREG SHATAN: Not every jurisdiction in the United States is a State. That's the reason that's there. Washington DC is not a State. Puerto Rico is not a State. Guam is not a State. The US Virgin Islands is not a State. But they are US jurisdictions. That's why it says US States and jurisdictions. So, Kavouss, unless you have something further I want to move on to David McAuley.

KAVOUSS ARASTEH: Yes, in that case, thank you very much. Please explain that, US State other than California. You say that that is in DC which is a district? In



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Guam, this is a district? I don't know, Puerto Rico, this is a district, whatever. Give an example. Thank you.

GREG SHATAN: Okay, I can put in examples if it's necessary, I certainly can, it shouldn't be harmful.

KAVOUSS ARASTEH: Thank you. Sorry to raise that question. I'm sorry.

GREG SHATAN: No problem. David McAuley, please go ahead.

DAVID MCAULEY: Greg, hi. David McAuley again. I went through the document not too long before the call and made a couple of suggestions. The first of which was up near the top where you said jurisdiction can be maintained. I think based on what you just said on the phone you can ignore my comment on that. I think that was well explained.

The only other question I would have about the document is, I mean, I see at the bottom we ask about Choice of Law and Venue in Contracts, and I would certainly like to know the answer to these questions, but I'm not sure they're germane to the jurisdiction scope that we're operating to. I see our remit as just jurisdiction rather than venue and also, these questions get into asking ICANN for reasons they do certain

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things which could be confidential. Maybe it's not, I don't know. But I wonder about those questions. So, that's my comment. Thank you.

GREG SHATAN:

Thanks, David. My view on those is that they are among the layers of jurisdiction that we can identify and that one of the layers of jurisdiction is venue and I'm sure ICANN won't share anything with us that's confidential. As a matter of fact, sometimes they under share just a little bit, although mostly a very transparent organization. But in any case, I think we can trust them not to accidentally share confidential information with us.

But I think it is important for us to understand again as fact, you know, where ICANN essentially tees itself up or tees it's parties to have litigation, it's actually if you go and look in the documents, the effective jurisdiction documents, there are potentially some blanks there, they're supposed to be filled by information on where ICANN actually contracts, you know, has contracts that have specified either the place of litigation or dispute resolution and the choice of law, and some contracts don't.

So, that's actually some information we've been needing for some time and Tijani reminded me that we had never actually finished figuring that out. So, that's why that question is there. Kavouss, is that an old hand?

KAVOUSS ARASTEH:

No, a new hand. I have just a question for myself. What is general jurisdiction? It is in the chat, because you are very busy you have not seen that. What is general jurisdiction? What is a specific jurisdiction?

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And then in the Question 5, you said the proper venue. Do we have improper or improper venues? What is proper venues? Or [CROSSTALK]. 4 and 5. Thank you.

GREG SHATAN:

I'll try and if anybody else wants to add in. Proper venue refers to a place where venue can be maintained. As opposed to a place that is not a place where the case can be heard. So, that's all it means. There isn't really improper venue in the sense but if the place isn't a proper venue the case can't be heard there. As for general jurisdiction versus specific jurisdiction, I could probably write a book on it, but generally speaking, general jurisdiction means you have jurisdiction over the individual or the entity for all purposes. Not just related to, say, the subject matter of the litigation or a particular type of causable action.

And specific jurisdiction means that the court can only claim jurisdiction over a specific and limited area. To some extent it is relevant to issues of waiver of sovereign immunity and things like that, but it also relates generally to cases where a party is being sued in a jurisdiction where their contacts may be limited. And therefore, the court may not have jurisdiction over them for all purposes but only certain purposes.

KAVOUSS ARASTEH:

Do I understand that general jurisdiction in a case, the plaintiffs are public or are general or are community, and the specific jurisdiction plaintiffs are individual or individuals? Is that the understanding? If that isn't please further explain that because not all of the people know everything as you know. Thank you.

GREG SHATAN: Thank you, Kavouss. I think these are questions for ICANN Legal so I think that's why we've assumed a certain baseline of knowledge for those who are asking the questions. But I understand that the subgroup needs to understand the questions and not just ICANN Legal. So, thank you for that. Any other comment on the questions? I'd like to see if there's support for just cleaning this document and putting it in final and sending it on its way? So, if we could see some green ticks. I'm not sure how that shows up on a tablet but a green tick if you support this as a final document.

CHERYL LANGDON-ORR: Greg, Cheryl here, I'm stepped away from my computer but please assume my green tick from the oral input.

GREG SHATAN: Okay, and I see ticks showing up here on my tablet.

KAVOUSS ARASTEH: Yes, I have no problem if we release these questions or questionnaires or whatever. What do you expect from ICANN Legal Committee or Legal Group? What is the time frame on how we react on what they say and the impact of that? How long do we have to wait for that?

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GREG SHATAN:

It's more up to ICANN Legal. I would encourage them to answer as soon as possible. It goes to our question for timeline. But I think they have typically tried to respond as quickly as possible. We could ask them for an estimate when we give it to them. Any other ticks? Why don't I ask for X's as well to see if there are any people that object to this as being final? And I will add in a couple of examples as Kavouss suggested. WE have beeping going on, maybe that means we've lost Kavouss again. Any X's for people that object to this being a final with examples being put into Item 2?

I'm seeing ticks, I'm seeing no crosses, so I will consider this to be a document that can now be finalized as indicated and sent on in the process the CCWG has for getting ICANN Legal to review questions. So, why don't we move on now to the next Agenda item which is Hypothetical #1. Put that up in the screen please. While we're waiting for Hypothetical #1 to come up, I'll just briefly (inaudible) unfortunately to Kavouss, to Item 5, just say Small Group Review is underway but slowly. We've had a couple of volunteers actually sign up for documents but we need everybody who's volunteered to sign up to review documents, please.

I've revised the summary sheet somewhat to account for that but we do need to move it on. Especially, as David indicates, the fact of these litigations can provide us with critical information about how ICANN jurisdiction meets the requirements or enhancing accountability. Speaking of David, I see a hand up from David, I think. Yes, I do.

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DAVID MCAULEY: Greg, thanks, David McAuley. A logistical question while we're on number 5. And that is, where do we post the reviews that we've done? I may have missed it. But I'm finished with two of them but they're sitting in my computer.

GREG SHATAN: That's a good question. I would say to post them initially is back into the Google folder for the Jurisdiction Subgroup where you found those templates and we can take them from there. And perhaps just let people know that you're posting them there and then we can kind of process them from there. But that's as good a place to start. And I know not everyone's going to access the Google drive but if enough people can that we can then we can take it down from there and work at it. Bernie says files sent to the Jurisdiction list. I think that is fine too. So, post it in the Google drive and send it to the Jurisdiction list.

Okay, so can we put up Hypothetical #1? Here we go. I thought had a frozen screen. Adobe Connect has been a little bit difficult these days. Okay, so, here we have Hypothetical #1 and Jorge has asked in plain English to sum up the meaning of Hypothetical #1. You have a case where somebody has sued ICANN and they claim that have been harmed, what you'd need to sue them, something about ICANN's operations of its policies harmed them and then the plaintiff wins.

And the court issues an order, whether or not there's money damages, I don't know, but they issue an order that says that ICANN needs to do something different than it did. The court will tell it what to do. Not delegate that TLD or turn over that TLD, or whatever it might be. So,

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there needs to be harm to a party and there needs to be something that can be found to be a violation of law.

And then an order requiring ICANN to do something consistent with the law having found that ICANN violated the law. So, that's a reasonably plain English explanation, I hope. I see a hand from Steve DelBianco. Steve, go ahead.

STEVE DELBIANCO:

Thanks, Greg, can you hear me alright? Can you hear me okay? Thank you very much. Yeah, when I read this Hypothetical, it's a plausible scenario, similar to those which we use for stress tests. I just wanted to make an observation. It certainly would qualify as a plausible scenario. But the way you've explored it in the Hypothetical on the screen is to walk through the different 'what ifs' of what the court might do and that's an entirely reasonable approach.

It isn't however a stress test approach. The stress test approach would take the scenario, the stuff in italics, and do two things. It would say, well how does this scenario play out under ICANN's current place of incorporation and locus of jurisdiction and venue. And then next to that, try some other alternative for ICANN and to see how things would play out. It may not make any difference at all if the tethers of jurisdiction are based on activity and have nothing at all to do with place of incorporation. I mean, I guess that would be the whole point of showing that the results of the stress test don't significantly depend on the place of incorporation.

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So, that's another way to think of it. Think of it as columns next to the scenario and you examine in column one how do things play out in ICANN's current jurisdictional layout and in column two, how would things play out in a different jurisdictional scenario. It was easier to do for Workstream 1 because we had two explicit cases. We had the old ICANN versus the new ICANN, the one we designed in CCWG. You're in a different dilemma here because you certainly have the old ICANN, the current ICANN post transition, but there's no clear idea for what column two would be to do that same stress test approach here in the Jurisdiction Subgroup. And so, without specifying what change one is trying to make it would be difficult to apply that stress test to a different legal setup. Thanks, Greg.

GREG SHATAN:

Thank you, Steve, that's a very helpful suggestion and I think it also brings it down to a more concrete level. I think it also points out the problem with a very generic Hypothetical, because without knowing who the plaintiff is, and what their claim of harm was, and what the action that ICANN took or didn't take was, it's very hard to look at how a US jurisdiction or any other jurisdiction will look at it and in a sense that's asking us to put ourselves in the footsteps of judges around the world. And the Hypothetical is looking at the result end of the litigation, not nearly at whether a litigation can be maintained there.

You know, certainly, one of the questions that we're dealing with is that ICANN can in fact be sued in a variety of other places besides California and has been sued in a variety of places other than California and those



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cases have been maintained and not dismissed for lack of jurisdiction over ICANN.

But nonetheless, I think it is a good idea, but generically one would have to say that to the extent the laws of country X are similar to United States, the result will be the same, to the extent they're different, the result might be different. So, without more, it's a little hard to know. So, I'll ask perhaps for some specific scenarios.

There is the idea here of a delegation of a TLD or acceptance of certain terms of registry operations, like signing a registry agreement. We can look at those as more specific and then we'll try to come up with more specific hypotheticals based on this very generic hypothetical which is that there's some litigation somewhere and ICANN's the defendant, which basically is every hypothetical that we'll have. Because we're looking at dispute resolution issue.

Any other comments on jurisdiction Hypothetical #1. I would like to actually take a look at it, deal with some of the comments in the side. In 'A' the first bullet point, it was suggested that we should not examine and list out positive influences from a given jurisdiction, but only look for problems. I think to the extent that we're weighing pros and cons of a jurisdiction, we need the pros. But if anybody disagrees and thinks we should not think about the positive influences of a given jurisdiction please let me know, let the group know. Kavouss, I see your hand is up.

KAVOUS ARASTEH:

Yes. I think it is a difficult document, very difficult. I'm talking about the (inaudible). I have difficulty with the last bullet. (Inaudible) because

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ICANN then it should have recourse to the appeal for advising. It talks about ICANN (inaudible), it's not an objective actor. After the two bullets, I have difficulty with the third one, ICANN will have the right to appeal and so on. Why we discuss this? What is the relation to the jurisdiction? ICANN can do anything that they want. Why we are discussing the ICANN options in any of these cases? Can you clarify why we need to go too far in this (inaudible)?

GREG SHATAN:

This is Greg Shatan again. I think that the reason for that is to show what the options are in a jurisdiction and also make it clear that the decision of the trial court or even an arbitrator is not the final decision. So, this Hypothetical is looking at a trial court decision so it needs to be clear that this is not the only decision or opinion that's available to ICANN as well.

And frankly we've actually left out maybe the most common scenario in litigation, maybe not ICANN's litigation history, but overall, which is settlement. Prior to judgment or between judgment and appeal or the like, so maybe we'll deal with that as well, but I think it's Jermaine that ICANN can seek to have the decision reversed on appeal and not merely have to comply with it. You could also seek a stay of the order pending the appeal. So, it doesn't have to comply with it at all. Any other comments on 'A' here?

KAVOUS ARASTEH:

Yes, just understanding, do you mean by law orders, the US law? All this law, which law you are referring to? This law, responsible law, and

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consistent with law, which law you are talking? It has not been decided?

GREG SHATAN: No, the answer here is generic. It does not refer to laws of a particular jurisdiction. As Steve DelBianco suggested, we should look at specific jurisdictions and see what differences there may be. But the ability to appeal a judgment from a trial court to an appellate court is broadly true in many, many jurisdictions, I assume nearly all. This is, I think, a generic answer at this point. But we'll look at particular as well.

KAVOUS ARASTEH: Then what do you want to do with this particular case? What do you want to do with this document? To send to someone?

GREG SHATAN: No, this will be part of our deliverable so the question is whether there are any other analytical points that people have, whether people agree or disagree with the analytical points? If you go into the next page, there was some additional points that were put in that on the last call several people objected, felt that they should be taken out, that they were not appropriate answers or analyses. And those are tentatively crossed out now, so, we'd like comments on that.

So, I think the point is to go into this document and try to work on it or if you can't work in the document itself you send an email with comments and we'll work it into the document. And I think lastly, we'll need to think about how to deal with these suggestions of getting

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specific jurisdictions referenced in here rather than just referring to a generic legal occurrence.

So, we're two minutes before the hour so I think we will need to wrap up. I will ask people to continue to go into this document and work on it. This is something that will be part of our deliverable. And if you want to analyze it in a given jurisdiction or propose a more specific version of the Hypothetical rather than this generic version, then feel free. We can have something with a few more concrete facts. So, Kavouss is that a new hand?

KAVOUS ARASTEH:

Yes, a new hand. Thank you very much. It is very, very complex and we need to digest that so we could not comment now very good. We will look at that one, we will sleep over it, we think it over, we analyze that and have comments, even we have additions, we have deletions and so on and so forth. But we could not do any other feedback at this stage. It's very difficult to digest. Very, very difficult. Very complex for the people that have not gone to that (inaudible) as you do. Thank you.

GREG SHATAN:

Thank you, Kavouss. I'm not sure I find the Hypothetical too difficult. Basically, ICANN did something. Somebody felt that they were injured by it. They sued ICANN and they won. And now ICANN has an order that they need to do something different than they did. The problem with that Hypothetical is it's way too generic. The answers, of course, are a bit complex for the rest of the document, I will give you that certainly.

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So, I think we've reached the top of the hour and we haven't quite reached the end of our agenda but the point of these Google docs and the point of them being in Google docs is to allow for collaboration and work on the document. And that really is in many ways where the bulk of our time should be spent. We have one hour on these calls and many hours to work on these documents. So, with that I will close this call. I look forward to next week's call and ask now that we stop the recording. Thank you.

**[END OF TRANSCRIPTION]**