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ICANN JURISDICTION SUBGROUP

MEETING # 29

2 MAY 2017

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>> GREG SHATAN: Hi, everyone. This is Greg Shatan. It's three minutes after the hour. Why don't we get the recording started and begin the call, please.

>> This meeting is now being recorded.

>> GREG SHATAN: Good morning, good afternoon, and good evening. Welcome to the Jurisdiction Subgroup call, meeting #

29, on May 2, 2017, at 1300 UTC.

Let's first take a brief review of the agenda. After the brief review of the agenda, we will move on to administration, and then review the decisions and action items from the last call, review where we stand on the questionnaire and how we'll move forward on that, and review where we stand on the review of litigation.

Briefly comment on the status of the revised draft work plan and move on to AOB after that.

Any additions, comments, questions, anything now that should be put in the AOB later? We will, of course, ask --

>> Please hold the line.

>> GREG SHATAN: There appears to be a recording speaking to us. Christopher, welcome. I see your hand is up. Go ahead.

>> CHRISTOPHER WILKINSON: Thank you, Greg. Thank you very much for the preparations for this meeting. I will have to leave the call shortly, so I just wanted to make a few general comments which you may wish to take into consideration.

First of all, I think we need to establish more clearly the relevance of this detailed legal analysis that is being conducted to the transition and Work Stream 2. I honestly feel that we are going into some rather almost arcane aspects of ICANN's contractual policies and practices, which may, indeed, be of interest to lawyers in certain cases, but I am not convinced that it's relevant to the transition as a whole and

particularly Work Stream 2.

I also feel, from a personal point of view, considering everything else that I am involved with in Work Stream 2, that this Jurisdiction group is actually taking up too much of the available bandwidth. And in particular, as a general matter, I have advised against extending Work Stream 2 into (Inaudible) and I saw from one of your documents that you were actually planning to extend this subgroup's work well into financial year 18. Again, I don't mind if relevant groups of lawyers have discussed all this stuff, but I really don't see it being part of Work Stream 2 anymore.

And finally, from my previous experience, it has been quite clear for more than 20 years that the jurisdiction issue internationally is not about ICANN's contractual conditions; it is about the risks or otherwise of abuse of U.S. jurisdiction vis-a-vis certain countries. Now, my personal position always has been that to date that this -- the U.S. jurisdiction and the power that gives over ICANN has not been abused, and frankly, I think most of the European interests present have accepted to live with the present situation for the foreseeable future. This is clearly not the case in a certain number of other countries.

But back to the issue, I think that's why we have a Jurisdiction subgroup, and this detailed discussion of contractual conditions strikes me as being ultimately,

politically speaking, beside the point.

Greg, again, I don't want to sound more negative than I am being. I understand enough about the law -- I am not a lawyer -- to understand the interest of some of these questions, but to summarize, first of all, I don't think it's necessary to resolve all these questions strictly in the context of Work Stream 2. And secondly, given the limited bandwidth available, I think it's taking too long. I have advised one or two people against the extension to financial year 18. I believe that the outcome will be a very strong end point in financial year 18, but regarding this subgroup, I am not sure that I can maintain the level of interest which I have tried to sustain to date in relation to the other groups and issues that I have to deal with in parallel.

I thank you for your attention.

>> GREG SHATAN: Thank you, Christopher. I will just make a couple of brief remarks in response.

First, the intent in reviewing ICANN's litigation is to understand the jurisdictional aspects, including how those jurisdictional aspects influence the interpretation of contracts. I think to the extent we've discussed other things about those cases, it's primarily to understand the context of those cases. And this has been our plan for some months now.

Secondly, I would certainly be happy for us to complete our work, but I would not be happy to set a date that at this point

is only a few weeks hence to do so. I think it's up to us to work on the matters in front of us, and I think that if we want to complete this, we just need to work on the projects that we have.

So while we might conclude that the current ICANN jurisdiction issues don't require any further recommendations, I think we need to allow the work of the group to go ahead. And I think this, of course -- these are my views. Is there anybody else who has any views, happy to take them now or in AOB, but I think the important thing here and every other group in Work Stream 2 is to try to work expeditiously toward a conclusion. Which I, of course, look forward to as much as anybody in this group. But not without coming to a reasoned conclusion. And I hope that our review of the cases is not too arcane, since we are trying to focus on how ICANN's jurisdictions affect ICANN's operations and its accountability and, to my mind, at least, and I think others are likely to agree, litigation is a powerful forum for accountability and a real-life example of how ICANN is held accountable or how others might seek to hold ICANN accountable.

In any case, I think that's enough on the moment. I see Phil Corwin's remarks, and while I will not read them in the record, I agree with them 100%.

In any case, let us get back to the agenda. Next item is administration. Are there any changes to statements of

interest?

Seeing none, I will ask if there is anybody on the audio bridge not in the AC room?

I don't see any -- or hear any, rather. We have two phone number participants who identified themselves, and I now see their real names in the participant list, so I think we have taken care of that matter.

We can move on to item 4 of the agenda, review of decisions and action items from the last call. First we did decide on the last call to accept the late submission from Taiwan.

Then on action items, first we discussed circulating a Doodle poll to schedule a call of the questionnaire evaluation Group. We'll discuss the questionnaire evaluation process in item 5.

Next was to circulate the current form to be used for litigation analysis. That has been done. Circulated a link and circulated a Microsoft Word version. I have also asked staff to post the latest one to the wiki as well. Please feel free to use it. We'll get to that in item 6.

Speaking of which, I also said that I would complete analysis of my two cases. Regrettably, the three-ring circus of life in the past week did not allow that, but I am in process on my cases and expect to have them circulated shortly, hopefully in the next 24 to 48 hours.

Last, complete the question, follow-up question we had for ICANN legal, on the lack of choice of law or the absence of

choice of law provisions in certain ICANN contracts, and send that on to the CCWG Legal Committee. That was sent on to the co-chairs, the two remaining co-chairs as we've now bid adieu, at least in the current incarnation or once current incarnation, to Mattia, leaving Lee Anne and Thomas. I sent that to the co-chairs. Lee Anne has sent that on to the Legal Committee. The Legal Committee is reviewing it, and would expect that to be sent on shortly to ICANN Legal, again, probably in the next 24 to 48 hours, although it's not my job, it is in somebody else's timing, which is never completely ideal. So that is where that stands.

Any questions on item 4? Questions or comments, please.

Seeing no hands, we'll move on to item 5. So we did receive one questionnaire, which was in a somewhat -- or rather, I should say questionnaire response from china, particular from the Internet governance research Center workshop on the jurisdiction question. We were presented with transcripts of the workshop, which do not completely match the formal or the form in which we asked for our questions, but the substance I believe is there. So the question is whether we should accept or not accept this submission. My view, as previously expressed, is that we should accept everything possible. So I would like to see if there are any objections to accepting this submission.

David McAuley, please go ahead.

>> DAVID McAULEY: Thanks, Greg. David McAuley for the record.

I can give a comment on this without having looked at this submission yet, so that's probably a good thing. It seems to me we might want to lob this issue over to that team that's looking at these responses with a view towards bringing back to the full Jurisdiction Subgroup recommended treatment. But not having seen the submission, my -- and as a participant in that small group, I think my initial take would be how much work does such a nonstandard submission require? Is it a 100-page legal brief with 125 footnotes, or is it something that's fairly easily digestible? It seems to me that if we thought it was not digestible, we could come back to the group and say we didn't consider it with a link to the submission so the full jurisdiction group could look at it if they wish, but I think in large part it depends on exactly what the submission looks like and how much work it requires because we are all volunteers here, and we all have day jobs, and there was a format to follow. So I think I would leave it in the discretion of the small group. Thank you. [groip](#) thank you, David.

I sent the submission to be put up, and it was sent to the full group at the time, which time was April 17. But I understand that the fire hose of email may cause any one email to not be fully noticed.

In any case, it certainly happened to me.



Bernie, your hand is up. Please go ahead.

>> BERNARD TURCOTTE: Thank you, Greg. If it's of use, I have looked at it. If you want staff to take a stab at trying to transfer it into a response that matches the required format, I personally think it will take a staff person a couple of hours to get that done and give it back to the Jurisdiction group if that's what's desired. Thank you.

>> GREG SHATAN: Thank you, Bernie.

I think, just for those of you who haven't seen it -- and I will recirculate it to the list as well -- it's about five pages, double-spaced, and it's in the form of a transcript, essentially, of answers from the floor, I believe, at this meeting to the questions. So the answers are linked to the questions. There are several speakers in each case. So it is not, thankfully, a hundred-page brief with multiple footnotes or a law review article or anything. That would be significantly off from what we had expected. And given Bernie's remarks that it will not be unduly burdensome to convert it to our format and to put it into the review tool, which I will mention shortly, I don't know that it needs to be recast so much as it needs to be sliced and diced into the review tool, as we do generally.

So seeing support in the Chat and seeing no objections, I think we will accept submission. I'll turn back to Bernie for 5.2, the status on translations. Bernie, please go ahead.

>> BERNARD TURCOTTE: Thank you. As of the last meeting, we

were missing two, the Spanish having been done, we were missing the Russian and the French translations, and I believe those have been completed and posted on the list. Thank you.

>> GREG SHATAN: Bernie, where do these translations currently live? Are they on the wiki, have they been sent to the list, or both?

>> BERNARD TURCOTTE: They are on the wiki page for the questionnaire. In the same line where we have the original response, you'll notice that there is an English version also noted in there. If you click on that, you get the translation. We can send them around if you want.

>> GREG SHATAN: Thank you, Bernie. Why don't you send those, each of the translations, around to the list so that people have them in multiple modalities.

And if I could also further impose upon you, if you could let us know where the tool or spreadsheet that is boiling down all of the questionnaires into at least a unitary, if not easier-to-read format, if you could let us know the status of that document and where it lives and how that can be accessed by the group, recognizing we may need to make a certain plan for that, that would be helpful.

Bernie, please go ahead.

>> BERNARD TURCOTTE: Thank you, Greg. I sent that draft to you to see if it was okay to distribute to the group. We are awaiting instructions on what you would like to do with it.

>> GREG SHATAN: Thank you, Bernie. I will say here that it looks good to me. It just needs to have the translations in and late submissions added in. But as long as it lives in a place where it can be updated, we might as well circulate or post the current version or whatever version of that can be posted reasonably expeditiously, and then iterate it as necessary with regard to the translations and the Chinese transcript submission.

Any other questions on the translations or on the review tool? Or any other remarks? Bernie, I don't know if that's a new hand.

>> BERNARD TURCOTTE: Yes, just wanted to confirm. So we will post that summary on the wiki page after this meeting, and we'll send a copy to the list as it stands now, and over the course of the next day we'll update it with the new elements.

Thank you.

>> GREG SHATAN: Thank you, Bernie. Much appreciated. Thank you for effort and, of course, the results. Thanking someone only to the effort seems to comment negatively on the results by implication, and I want to make sure that it's not my implication.

I think that moves us to item 5.3, discussion of approach to analyzing responses. We did, in fact, form, as David mentioned, the small group, questionnaire evaluation and response team, or court. A questionnaire was sent out on how to handle the

questionnaire and response. There were no responses on the list. So I would like to ask whether the group believes that it's best to have the evaluation and response team be a separate small group with its own list debating these things. List, of course, is publicly archived. Or should we bring the evaluation and review back into the Subgroup as a whole? Given that we -- while we received a healthy number of responses, we did not have, perhaps, the largest number we might have expected, and I think in forming the small group, we formed that in part because we expected a very large -- or I should say a larger number of responses which would require more behind-the-scenes work, so to speak, to deal with it. I think we have a manageable number of responses that we could review and evaluate them in the plenum of this Subgroup, so to speak. But that's my view, and I'd like to see other's views, especially if those in the Subgroup or otherwise, the sub-subgroup, would like to have the small group continue, that would be helpful.

David McAuley, please go ahead.

>> DAVID MCAULEY: Thanks, Greg. David McAuley here for the record.

Maybe I'll suggest a possible hybrid here, and that is to keep the small group as constituted, but rather than have the small group work through these things is perhaps parcel out to small group members the task the taking the lead on responses and bringing the response to the full jurisdiction group as a

discussion leader. If there is a response from party XYZ, one of the small group members will have that read to them, and in the full group meeting, they will have the job of leading that discussion rather than you having to lead the discussion. Maybe that hybrid will work. That would be my suggestion. Thank you.

>> GREG SHATAN: Thank you very much, David. Appreciate that. I see Tatiana commenting in the chat: As we do with court cases? Is

David responded: Sort of, yes.

I think that's a good idea to have a discussion leader for each of them. Some of them or a number of them are very short, but a number of them are more substantial. And it would be good to have that and also good to have someone other than myself lead the discussion or be prepped to be the most up to speed on a particular submission. So I think that's a good idea, so I think we can put up a sign-up sheet for the COURT and just have everybody sign up to review more or less equal number of everyone who has responded to the Court list or who is a member of the Court to -- just for the purpose of the transcript, where it says Court, I am saying QERT. So if we could note that for the transcript. Apologies to the transcriber for not making clear in advance that I am saying QERT, and I am pronounce pronouncing it QERT. In any case, that's the questionnaire evaluation and response team. So we will get members of the team to sign up and take on at least hopefully one of the more

substantial ones. It would not be good if somebody signed up and only took the ultra-short answers since that wouldn't necessarily require much in terms of discussion.

In any case, are there any objections to this process? Any other comments on the revised process? Please, hands up. I see Bernie has a hand up.

>> BERNARD TURCOTTE: Thank you, Greg.

The group may wish to consider the following. There are quite a number of submissions that are single-word answers, as in yes or no or close to that. I am not really certain it's worth handing those out for analysis. So maybe we could produce a second list of the responses that do actually require more in-depth consideration, and then people can sign up for those ones. It will just avoid a lot of wasted time, in my opinion.

>> GREG SHATAN: Thank you, Bernie. I think that is a good suggestion. We really don't need to sign up for the single-word answer ones. So we'll note that as we sign up. And of course, I'll ask that those who have volunteered for the QERT team to -- I realize that's redundant of the word "team." Apologies. -- to actually sign up to speak on or be a discussion leader for each of these.

So any further comments on the questionnaire? Seeing no hands, move on to the review of ICANN litigation. I'll note that this is 15 minutes in the agenda, but we will probably not take 15 minutes on this because no one, including myself,

prepared any new summaries for this week's meeting. Nor, as far as I can tell, did anybody sign up for the remaining cases.

Since we have decided this is a worthwhile effort -- and I believe based on the conversation we had at the beginning that other than Christopher do believe it is a worthwhile effort to understand how ICANN's jurisdiction may or may not have influenced resolution of court cases involving ICANN, we need to actually do the work. David McAuley reports: I still have one case to report on but have not yet done it.

David, you have been a stalwart who has, in fact, already reported on multiple case. And I will note that Mathieu reported on several cases, but he is no longer in this Subgroup, so we will not be able to count on him for further summary.

So I think it is really important so that we do keep things moving along that we finish this project, and I would like to challenge myself and the rest of this group to finish the remaining cases in the next two weeks, which may require two or three meetings to actually discuss, but it would be really significant if we could have all of the summaries done in the next two weeks by the meeting two weeks from now, so that we can continue this. Obviously, we all have bandwidth issues, but since we have signed up for this group with an understanding that we are going to devote some of that bandwidth to this group, it's really important that we do this.

So I would ask everyone who has signed up to complete what

they have done, and if you haven't signed up, please do so. Obviously, if you have a particular facility in reading legal documents, particularly U.S. law or English language legal documents, to please volunteer your particular skill set. But even if that is not your skill set, as long as you feel you can take on a case, please do so, and you can ask other members of the group or post questions about what you are looking at if you don't understand something or just need, you know, a check on a particular aspect. It would be better to have something moving forward that might need a little more guidance rather than not having it move forward at all. But particularly, if you haven't yet taken on a case and you are afflicted with the legal profession, please do so, even if you are a recovering lawyer, and I see a couple of recovering lawyers in the participant list. I thank you. And I thank you, Tatiana, for volunteering to sign up.

So that is enough in terms of just flogging the point that we need to complete the work. Same think with questionnaires. We need to complete the work on those so that we can take those inputs and the ICANN legal input and reflect it back into the document that we are working on. That is the point.

Anything further on the review of ICANN litigation, item 6?

Seeing none, I'll move on to revised draft work plan. This was circulated for the last meeting, prior meeting, and that was the second time it had been up in front of this group. It is on



our wiki page, dated April 24. It's also a Google Doc which has been put up, was put up after the last meeting for any further comments or questions. There were no comments or questions on the work plan. So unless there are objections, I will consider the revised draft work plan to be our current work plan. And we will treat it as such. Obviously, as a work plan, it will be somewhat of a living document, but I think we can take it as being a stable document for the moment, unless there are any objections to our plan.

Seeing no objections or comments, I would just encourage everyone to look at the plan. The first couple of pages are more historical, so you may want to -- you don't need to read those if you have been along for the ride on this group all along, but do turn to the back half, which discusses the plan from here on in. And especially, given Christopher's remarks, I agree entirely that we need to bring this to closure. I don't agree that we need to cut it off prematurely for budget reasons. I do think we need to be efficient and do what I think the work plan sets out a reasonably efficient standard. So please do familiarize yourself with it.

Anything on the work plan for the moment?

I see no hands or comment. So I bring the meeting next to the AOB section of the agenda. Is there any other business for the "all other business" section? Any hands? I see none, so I think there is no other business. We did, of course, cover a

little bit of other business in the front end of the meeting.

Is there any other comments on there? Happy to take them now.

If there's none, we can move on to item 9, which is merely to announce that our next meeting is a week from today at 1900 UTC. That's the 9th of May at 1900 UTC. And I would once again strongly encourage all of those with pending jurisdiction litigation reviews to finish them and circulate them, ideally at least 24 hours in advance of that meeting, maybe a little more if possible, and also within, between this time and then, we'll also parcel out the substantive responses to the questionnaire and be able to begin discussion, evaluation, and review of the questionnaire responses. Perhaps by then we'll have a response from ICANN legal as well, but that would be a fairly short turnaround. So that is what I look forward to us doing on the next call, at the minimum. So if there is nothing further with regard to the next meeting, I'll see if there are any final comments from the group or subgroup.

Seeing none, I will call this meeting adjourned, give you back roughly 17 minutes of your life, and ask that we stop the recording. Thank you all. And good-bye. Have a great day or night. Bye.

(End of session, 1343 UTC.)

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