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CCWG-JURISDICTION SUBGROUP

Tuesday, July 18, 2017 - 13:00 to 14:00

This is Greg, why don't we get the call started now?

[This meeting is now being recorded]

>> GREG SHATAN: Good morning, good afternoon, and good evening. This is Greg Shatan, Rapporteur for the CCWG Accountability Work Stream 2, Jurisdiction Subgroup, Meeting Number 28, July 18, 2017, 13:00 UTC.

Why don't we begin with the administration? Let's ask, first, if there are any changes to statements of interest. Anybody have a change of statement of interest, please speak up. I'm momentarily away from the computer, so if your hand is up, please speak up. Everyone seems quite stable, I have not seen too many changes in SOI lately.

Seeing none or hearing none, I'll ask if there is anybody who is on audio only.

>> GREG SHATAN: I don't hear anything who is audio only. I'll be back in Adobe Connect momentarily. And now I am back in Adobe Connect. We have no phone number only participants, so that is good.

Okay, let us now briefly review the agenda and then we will work through the rest of it. We'll have a review of decisions and items from the last call. After that, a review and discussion of the last of proposed issues. I've just circulated for this call a download of the Google Doc as it currently stands. We will then move on to review questionnaire status and progress of questionnaire responses. And then a review of ICANN litigation. And if there is anybody on the calling who has completed litigation review and has

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presented it to the group, I would appreciate your putting a hand up or making a note in the chat and I would like you to present that. We have a bit of a backlog of those that have not been presented in past, but I did not specify any particular presenter. So we'll see if there is anybody who is able to step forward for that.

Next we'll have any AOB. And we'll see if there is any does anybody have any AOB they would like to now put in the AOB lot? If so, please put up a hand. Not seeing any hands, so we'll, of course, when we get to the AOB slot, we'll see if there is anyone who has any AOB or if I have any AOB at that time.

That brings us now to item four in our agenda. We made the following decision in last week's call which was to we approved the draft e mail to questionnaire respondents to ask them if they were willing to provide additional statements or participate in a call to further explain or discuss their questionnaire response. Action item was to send out that e mail. With apologies, real life and real work life intruded over the past week and I have not sent out that e mail, but I will work with staff to get that out in the next day or so.

There's also a request on last week's call for participants to include any issues, proposed issues that they have or that they unearthed in any of their work for the group, such as litigation review or questionnaire response analysis. And to put that on the issues list within the next two weeks. That means that we have reached the half way point in this call. So that was last week and this coming week.

So that brings us now to the list of proposed issues and with that, I would ask staff

>> Greg.

>> GREG SHATAN: Yes?

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>> THIAGO JARDIM: This is Thiago, just a clarification please.

>> GREG SHATAN: Thiago, yes?

>> THIAGO JARDIM: Did I hear we have a two weeks deadline to fill in the list of proposed issues?

>> GREG SHATAN: I wouldn't call it a deadline. I had asked that people try to populate the list over the course of last week and this week. The issues the proposed issue was formally open for some time during our work, obviously it has to close at some point. But the idea was to set some timeframe in which people would hopefully be diligent and bring issues proposed issues that they had identified on to the list so that we could work with them. Clearly, it's hard to work from a list of issues that doesn't have the issues on it. But, no, it's not a hard deadline. There will be a hard deadline at some point, but this is not it.

>> THIAGO JARDIM: Okay, thank you very much.

>> GREG SHATAN: So here is the issues list that has been put up by staff that's rather small, so you should zoom in or look at it from the Google Docs yourself.

You will note, if you scroll down, that it looks rather like it did a week ago. And Google Docs shows that nobody has been in the document since the 11th of July, when I went into the document. So unfortunately this past week, it seemed like I was not the only one who was consumed by other work, maybe even other ICANN work. So I will redouble my request that we try to crowd source this list from within the group, as working groups are supposed to do, and that if you identify the list an issue in a prior document we worked on or in discussion or e mail, or if you reviewed a litigation which raised an issue, or if you reviewed a questionnaire response that raised an issue, or if you submitted a

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questionnaire response that raised an issue, that you please bring it on to this list so that we can work on it. I do, of course, want to acknowledge Raphael Beauregard Lacroix, and the Internet governance which I assume would be [indiscernible], at least in part, for putting issues up on to the list. So thank you for that.

Let us do a quick run through the list. Again, this is not the time at which we will discuss these issues in depth. We will give fair warning on the issues or proposed issues since I expect that people will want to make sure they are available for certain issues in which any have a particular interest.

The first issue, proposed issue, that has been identified is that there is no governing law in the registry agreements, with some exceptions, I believe, there were certain CCTLDs. So there are reasons that have been inserted that this is within our remit and we should review that. So I would ask everyone to read what has been inserted there in the sixth column. This is new from last between last week and this week. Thank you, I'm not sure who put it in, but it's here. Of course, this is something that is obviously open to discussion and debate, so we should be prepared to do that.

Next note that there is no governing law in the Registrar agreement, similar issues, similar concerns.

Next is a group of issues that have been identified around sanctions. It may that there are other issues around sanctions, including OFAC sanctions, but these are the issued that has been identified so far.

David McAuley, I see your hand up. Go ahead.

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>> DAVID MCAULEY: Thank you, Greg. David McAuley here. I refer back to your discussion from a moment ago that a hard deadline will appear at some point in the future. So my question is, when an issue is presented, there's two questions, one is, is this issue within our remit? I guess we will have a discussion about that. And then the second question, I guess would be, if we decide if it is within our remit, we would have a substantive discussion about it. So my question to you is, once an issue is posted, is there a different hard deadline for people who would want to argue that this may not be within our remit? Or is that simply subject to whatever hard deadline we come up with at the end?

And then for things that are within our remit, do you envision us having discussions and coming up with positions in our final report? I'm just curious, you know, sort of what the overall process is for the issue list. So thanks very much.

>> GREG SHATAN: Thank you, David. Good questions. So the plan is, yes, it's very much like you outlined, which is that we will go through the proposed issues list, focusing on how common understanding of the proposed issue and whether the issue is within our remit, whether the issue is, in fact, an issue. It's possible that some issues may be just literally not issues when we dig into them. But once we do find an issue is essentially moves from being a proposed issue to being a recognized issue of the group, we'll either move it to a separate list or make an indication on this list that it is now an accepted issue. And at that point, we would look to develop recommendations for resolving or mitigating that issue.

At this point, there are no hard deadlines for those determinations. Clearly it's imperative to the work of this group and any sense of timeliness that we get the proposed issues up on this list and make decisions about which issues that have been positive proposed are,

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in fact, issues for this group to make recommendations about or at least to review. So we will need to consider a timeline for this. And I'll put my mind to that in the coming weeks.

I think it's probably appropriate to give fair warning now that we will begin substantive discussions of the proposed issues and whether they are within our remit on next week's call. I'll also give that fair warning on the e mail list for those who are unable to attend this call.

David, did I answer your questions or was there anything that I overlooked?

>> DAVID MCAULEY: No, it does. I guess what you're saying though is once an issue is posted on the list, forget about hard deadline and go ahead and put your comments on fairly quickly. And so if we're going to take up substantive discussions next week, presumably on the point of whether something is within our remit, then I take your point and I'll proceed along those lines. Thanks.

>> GREG SHATAN: Thank you, David. Yes.

So proceeding with our walk through the issues lists or proposed issues lists, we have three sub issues that have identified under OFAC sanctions, or Office of Foreign Assets Control of the United States, which limits certain transactions between the U.S. entities and foreign entities, certain foreign entities. And first is the are issues relating to Registrar accreditation. Second, are issues regarding the applicability, or not, and the fact that some Registrars appear to be adopting OFAC as a standard even if they are not legally obligated to do so. And last is the issue of approvals of GTLD registries and also accreditation of Registrars, I know this is the second column, so that needs to be added to the title in the first.

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If there are other issues related to sanctions, whether they are OFAC sanctions or otherwise, it would be very good to get those issues in particular on this list so we can have an integrated discussion of OFAC sanction, either next week or the week after, but certainly I would hope to do that no later than the week after. So it would be good to get any other issues related to sanctions. And also anybody's comments on these issues and fill in the rest of the columns with your views.

So next is an issue relating to IQNCTT delegations. As currently phrased, I see a hand from Farzaneh. Timely as I was going to discuss your submission.

Farzaneh, please go ahead.

>> FARZANEH BADI: Thank you, Greg. Farzaneh Badi speaking. It's an issue I want to raise related to the OFAC sanction. One of the problems that I have heard some people face is the financial sanction against one country, it's difficult for them to send money or have transactions with U.S. persons. Now this issue that I have heard that has incurred a lot of cost on those people that want to deal with ICANN financially, that is only, I have heard it only related to people from Iran. I have not I have done some research to see if there is a law that applies to other countries that will make financial transactions harder for them. I'm still in the process of research, but I wanted to know if issue that is specifically about one country can be just added to the list and we can discuss them later. Thank you.

>> GREG SHATAN: Thank you, Farzaneh. Good question. I certainly would believe that issues relating to one country at least should be on the proposed issues list. That's how we'll be able to debate them fully. So I would note that since this is a proposed issues list, even issues that are may not get the approval of the group for one reason or another,

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should be on this list. So I would encourage you, Farzaneh, to add that to list, and we can discuss it as a group if it deals with the limited effect to a single country or a group of people, that is an issue for this group to resolve. But certainly we can discuss proposed issues in that fashion.

Thiago, your hand is up, please go ahead.

>> THIAGO JARDIM: Thank you, Greg. This is Thiago speaking. Just a brief comment on whether or not the fact that only one country is effected by a particular issue, whether or not this should indicate this should be taken as an indication that the issue is not an issue. As far as I understand the group's concerned not only about the experiences, but they are looking for risks, we have to also discuss and identify certain risks that are real and I think that once we have cases, even if those cases are just coming from one country, it's an indication that there's a risk and that this risk could affect other countries in the future. So, again, I think it should be added if it is an issue that only effects one country because the future might prove differently. Thank you.

>> GREG SHATAN: Thank you, Thiago. Noted. And certainly we have to discuss risk and we'll need to look at the likelihood of probability as well, but, yes, we will keep that in mind. So, Phil Corwin, your hand is up, please go ahead.

>> PHIL CORWIN: Yes, thank you, Greg, Phil Corwin for the record. I always hate to wade into this area, but I think if we are going to look at this, I think we should look at it in a realistic and comprehensive way. My understanding of OFAC is it prohibits from entering into a contract with countries that are on a list compiled by the U.S. Treasury office. Certainly it effects, contracts, but we have to look at, one, how does it effect participation in ICANN's vital functions? And I note for the record that the GAC repetition

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from Iran and Iran is an OFAC sanctions country, they are able to participate in ICANN's activities and GAC activities without any hindrance I'm aware of, but perhaps my understanding is limited. We should be looking at, are there any other effects on ICANN's functions, its ability making functions or is it simply limited to contracting? And it's also my understanding that the U.S. is hardly the only nation which has such sanctions and regimes, so we shouldn't be looking at this in the sense of, well, if we weren't in the U.S., the issue wouldn't exist, I think we have to take some notice of what the practices in other nations in regards to these types of sanctions. And I hope that's a useful comment to lead into a full understanding of the impact of OFAC and how it does or does not effect participation by various parties in the most critical parts of ICANN's operations. Thank you very much.

>> GREG SHATAN: Thank you, Phil. Sorry, I had a little trouble getting off the mute button there. I think those are all good points and I think we should try to get more of an understanding of OFAC. We may see if ICANN legal has some learning on that that they can share with us as well. Maybe they can join us on a call or we can have somebody on who can help us serve.

I see a note that we have a person on the call listed as anonymous. If you are anonymous, can you please state your name for the record, please. Not hearing anything from anonymous, staff, I don't know what our what ICANN's position is on people logging in who are anonymous. These are calls for members of the subgroups, so we have nobody in the group named anonymous in the subgroup, so I would ask if anonymous can reveal themselves, otherwise, I think we may need to remove anonymous from the room, since that would be a non member. Not hearing any identity being announced for anonymous David McAuley, your hand is up. Please go ahead.

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>> DAVID MCAULEY: Greg, thanks. David here for the record. And I'm just picking up on a comment that you just made with respect to ICANN legal. Sam Esner is a member of our group and I know she is quite busy from my work with her, my suggestion to you as chair, Greg, if you could, as early as possible, if you determine one or more of the issues on the issues list is going to be raised, for example, I'll just use the bit about the no governing law, that's something where ICANN legal could shed some light. So my suggestion would be to give Sam as much advance notice of issues that will be discussed on the calls and ask her to come and participate. That way she will have a chance to prepare and it would be helpful for us to get ICANN's legal insights on some of these issues. So that's a suggestion. Thanks a lot.

>> GREG SHATAN: Thank you, David. Good suggestion. Bernie, I see your hand is up.

>> BERNARD TURCOTTE: Yes. We seem to have lost anonymous, so it's no longer an issue. Thank you.

>> GREG SHATAN: Thank you. That was an interesting visitation.

So I'd like to see if there's any objection to having someone from ICANN legal come and talk to us about OFAC from ICANN's view, as well as any kind of explain generally from a legal standpoint anything about OFAC or other sanctions that ICANN deals with. Any objection to that? If not, I'll go ahead and make a formal request.

Thiago, your hand is up, please go ahead.

>> THIAGO JARDIM: Thank you, Greg. On the question of having someone from ICANN legal to come and participate in the call no clarify issues, that might be useful. I think it also might be useful to have someone not from ICANN, an independent expert from

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outside. And another thing I would like to make relates to Phil's comment, he mentioned that OFAC sanctions is a problem that is related to a best practice, but that other countries might legislation of other countries might have an impact similar to OFAC's impact. And that's a fair point. But the fact that other countries do certain things that are not permissible shouldn't be taken as an indication that what the U.S. does, I think somehow it becomes permissible because other countries are doing it. If we imagine that other countries might do things that effect ICANN's activities in a negative way, we should also consider ways of mitigating those negative impacts. And, of course, if we think, for example, immunities, those immunities could obviously present U.S. [indiscernible] from doing things against ICANN that the same immunities could also achieve the same result with reference to other countries. Just a reflection. Thank you.

>> GREG SHATAN: Thank you, Thiago. I'm not sure I understand all of your remarks. I think Phil was just trying to put OFAC in a larger context and indicate there may be other sanction, regimes in other countries that could affect OFAC as well. And you said something about countries doing things that are not permissible. Are you proposing that Government sanctions ?

[The host has left the meeting to speak with meeting support and will rejoin soon]

>> GREG SHATAN: I believe many, if not most, countries do have sanction/regimes of some sort, are you suggesting those are not permissible?

>> THIAGO JARDIM: No, what I'm saying, Greg, is that yes, so if we identify things that happen within the United States because of OFAC sanctions and those things are reproduced in other countries and considering that we take U.S. practice to be something that shouldn't happen, obviously we should also take other country's similar practices as

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something that shouldn't be happening either. I'm not sure whether I've clarified my position, but my concerns are that we shouldn't be taking singling out U.S. as necessarily the problem. You see, if any country in the world adopts certain position that effect negatively ICANN's core functions, obviously we should strive to find remedies that would make sure that ICANN is not so negatively affected by the rules of the United States or any other country.

>> GREG SHATAN: Thank you, Thiago. I think that's a bit clearer. So I know Phil Corwin has put in the chat that he views OFAC not so much as a problem as a fact and the facts are something we need to work with and work around in any case. But I'm sure we'll be back to this discussion in more detail.

>> THIAGO JARDIM: Just one more remark, if I may.

>> GREG SHATAN: Yes, please, but briefly.

>> THIAGO JARDIM: Yes, thank you. In relation to the OFAC sanction, I think OFAC sanctions is a problem of concern and more that sanctions that other countries might adopt because of the circumstances. The circumstances are that ICANN is located in the United States. One of the consequences of this, and we have discussed this a bit before, is that Courts tend to consider assets located in the country as subject to the jurisdiction of that country. So we have the problem of inland sanctions and if you can see that the OFAC sanctions allow certain measures to be adopted against certain countries, the fact that ICANN is located in the United States adds to the problem because as a consequence of that, Courts could eventually, and this is one problem that we will be discussing in the future, hopefully, could order, for example, re-delegations or somehow effecting more heavily on the activities of ICANN. Thank you.

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>> GREG SHATAN: Thank you, Thiago. If that is a proposed issue that you have mentioned, and it seems like it is, I would encourage you to put that on its proposed issues list so we can discuss whether that is an issue. And I note Farzaneh has commented as well, noting ICANN is located in the U.S. and sanctions effect people on the non SDN list. Of course, ICANN, while it is headquartered in the U.S., does have locations in other countries and it would be worthwhile exploring whether locations, ICANN's other location, for example in Singapore, would be, I believe, Brussels, a couple of other countries, whether there are any sanction in that country. But we'll get to that when we do.

So the next issue on the list [busy signal]. If we could clear that line, maybe the person has fallen asleep. The next issue on the list is that of ICANN's CCLTD litigation. The ICANN's currently posted, how essential [indiscernible] ICANN's decisions about property, seizures, challenges. That probably needs a bit more setup for discussion of a full discussion, so perhaps we can revise that so that we can have that a little bit more flushed out. That is kind of maybe act three, if you will, of the issue. And the issue, I think, is not just an issue of the Weinstein case, but the broader concept. But in any case, maybe I'll try my hand at putting a little [indiscernible] in that and that brings up that question as well.

And the next lines of the issues list are blank. We have many more issues or proposed issues that have been raised in the course of our discussion. Some even today. So I would strongly encourage all of you to put issues that you have raised or you helped bring to the list in another fashion on to the issues list. If for any reason you enter things into Google Drive, put your submissions to the staff and someone will enter them in. But I encourage you to do the work and get them in. So I thank you in advance for continuing to advance the list of proposed issues.

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Anything further on the list of proposed issues before we move on to the next item in our agenda? Seeing none, I'll move on to the next item which is the questionnaire review. Apologies in that I did not circulate the questionnaire sign up sheet in advance of the call. You all can look at it on Google Drive. Just a brief review of the status. It looks like it is being brought to the screen. Thank you, staff.

Okay, so we are still awaiting two reviews to be sent to the list. One is one that was submitted by Jorge Cancio on behalf of the Swiss [indiscernible]. [Indiscernible] is supposed to be preparing that review. And then there is a review of submission by I apologize for pronunciation Ling Yu, Chinese Academy of [indiscernible] and Technology, to be prepared by Vidushi Marda. And it has been noted due to clerical error, there is one response that should be on this list and also needs to be reviewed. So if anybody would like to put a hand up and volunteer or volunteer in the chat to review that submission, that would be very helpful. I will, of course, put this out on the e mail list as well, if nobody on this call is available so summarize the EU response.

And finally we have a few short submissions that we'll deal with as a group. We'll try to wrap up the questionnaire response review in the next week or two because we do need to move from inputs to outputs, if you will, or from our analysis of the field to the issues discussion that we have just kind of previewed over the last 20 minutes of the call or some of the

So at this point, we don't have any questionnaire responses that are ready for discussion. Hopefully by next week's call that will change. So let us move on to item to the next item in the list, which is item seven, and that is what's in front of you on the screen, which is the review of ICANN litigations.

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We did have a number of new volunteers, who I thank very much for having volunteered for analysis. I don't have any of those available yet. They still are in the analysis portion. We do have a couple of items in the queue, but I don't believe, unfortunately, that those who prepared them are on this call. We have the ruby Glen versus ICANN case, a review was sent to the list shortly before ICANN 59 by Vidushi Marda. Hopefully we can discuss that next week.

And then we have Subramania sent to the list by Bartlett Morgan. Bartlett just sent in his apologies this morning that he was under the weather and would not be able to make this call. So we wish him a speedy recovery and hopefully we can discuss that next week as well.

The ICANN versus RegistrarFly, that was, in fact, discussed last week on the call, thank you to Paul Rosenzweig for that. So we'll update the chart to reflect that those are now reviewed.

As you can see we still have very few cases that have not been claimed by anybody, only half a dozen or so. Seven to be exact. If anybody would like to volunteer, please go to the list, we would like to get the last cases reviewed so we can see if they do raise issues and so we can essentially complete that portion of our work as well.

Any questions or comments on litigation review? Or any volunteers for any litigation? Smiley versus ICANN seems like a happy, upbeat case that somebody could review, for instance. Apologies for the leveraging. Seeing no further comments on the litigation review, I would hope to finish that. I do believe it's Smiley versus ICANN, third up from the bottom on the list. Jeff Neuman says he knows about that case, maybe he can prepare

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the review for that. I'm trying to volun tell you to do that, Jeff. If you take me up on it, I would be most appreciative. Jeff is typing. Jeff has a lot of ICANN related responsibilities.

Anyway, moving on, I think that brings us to all other business, AOB. Does anybody have any AOB? I'm not seeing or hearing any AOB, so we can give everyone back a few minutes of their time. I would ask you to use that time, whether right now or sometime in the next few days, to bring proposed issues up to the issues list. That is really our centerpiece job right now. Also, wrapping up the litigation and questionnaire review. So if you have an outstanding litigation review, please complete it, bring it to the list. If you could go back to any of the documents that you worked on, any e mails you sent to the list in the past, now is the time to get those proposed issues up on the list. Again, noting there is no hard deadline yet, but we can't really deal with proposed issues until they are on the proposed issues list. Everything, up to that point, is preparatory, but if it's not on the list, we are not going to be discussing it. We will try to make the list as comprehensive as possible, but many hands make light work, so I would like everyone to do their part.

In any event, I know I'm somewhat preaching to the choir as those who are on the call right now tend to be among the more dedicated and active participants.

In any event, since we have reached the end of our agenda, I will adjourn this call now. Thank you all for your participation. We can stop the recording. And I look forward to next week's call and to all the work between now and then. Goodbye, all.

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