

Draft Caption Notes: Jurisdiction Subgroup Meeting #40 – 1 August 2017 @ 13:00 UTC

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>> Good morning, good afternoon and good evening and welcome to the meeting of the jurisdiction subgroup on August 1, 2017 at 1300UTC. First we'll review the agenda. After a minute of administration we'll go to our main event for the day which is the presentation busman that Isner from ICANN legal on OFACT including time for questions and answers, questioning the questions that have been placed on the ICANN list. I don't believe Sam has seen the questions that came in overnight. Perhaps she did. Overnight for me at least in New York. After that if we have time -- well, I would like to take advantage of I think we would all like to take advantage of Sam's presence to discuss the further ICANN legal's position on the back of law provisions and registry agreements then we'll have AOB and then we will adjourn after that until next week. I see a suggestion that we approve the agenda. That has not been a procedure in the subgroup in the past so we're not going to adopt that procedure. Now, I see your hand is up Kaboose. Keep it brief.

>> Good morning. Good afternoon, good evening. Yes, I'm not exactly -- I don't know why this time you go to the [Indiscernible] so I don't think you should decide on that [Indiscernible]

[sound too low]

You have to discuss that. Right now we should do that. The [Indiscernible] so please [Indiscernible] inclusive way to explain [Indiscernible]

[please speak up]

So I'm not in favor of [Indiscernible] some. We have to do something. Then we go to the presentation. However you totally disagreed with what I have suggested, you totally [Indiscernible] arranged the situation. You have the statement of whether people are in a position to make proposals. You should put it in a positive way. They have difficulty [Indiscernible] and you just decided to [Indiscernible] so much time around the world [Indiscernible]

>> It's been 2 minutes. Can we move on, please?

>> No. You should not -- please, kindly allow me to speak. Please, kindly. I beg you. Don't override. Please. [Indiscernible] this is number 1. Number some would like to discuss but not briefly [Indiscernible]. So please kindly don't waste our time. Let's go to the questions and see which are the questio [Indiscernible]. Allow us to speak. Don't override the people.

[speaking at the same tim>> I'm going to ask you to stop now.

>> But we don't want to explain anything at all. We have to go through the questions. What are the specific questions, which ones [Indiscernible] and then she will be given these questions

[Indiscernible] present that at some other time with prior [Indiscernible] on what she presents. If you want to present something --

>> I'll ask you to stop at 4 minutes.

>> I don't understand your way of procedures. [Indiscernible] please [Indiscernible] thank you very much sir.

>> Thank you for your 4 minutes. Is there any support for anything he has said? Is there any opposition? You do not have the floor. Any opposition to proceeding as we have planned?

>> Is there any objection? Who objected that?

>> If you would like to volunteer to be a Rapporteur of a meeting feel free.

>> [Indiscernible]

>> Okay there is no opposition as we go and I will ask Sam to begin her presentation.

>> Presentation -- we don't want any presentation. What issue --

>> I'll ask you to stop now.

>> We don't want -- please [Indiscernible] what is the issue I propose to go through the questions?

>> Kaboose you're out of order.

>> Go through the questions and see which relate then --

>> Acknowledging Rapporteur asks the staff finally close the microphone of all those who are not recognized at this time. Thank you very much. Please move forward.

>> This cannot -- please, this is not a heated --

>> Your objections are noted. You're you explain what she's going to present? That's the question. Thank you.

>> Hi everyone this is Sam Isner from ICANN legal. Greg you want me to go ahead?

>> Yes, Sam. Please go ahead. Thank you.

>> Thank you. So, staff is getting a short presentation that I put together. I've been watching some of the questions on the list that have come up around OFAC so this is a fairly general presentation but I think it will answer some of the questions and some of the misunderstandings around OFAC and the application of OFAC to ICANN and how ICANN can or cannot require OFAC to be applied to its contracted parties. And then there will be some time for questions at the end. So, here's a general overview of the things I'm going to touch on today. So let's start off just at a really high level, OFAC is our Office of foreign assets control, it's part of the U.S. Department of treasury. It was created in 1950. There were precursors to it dating all the way back to the 1800's and its mission is to administer and enforce economic sanctions programs

primarily against countries and groups of individuals and nationals and individuals which generally are prohibited from dealing. If you go on to the OFAC website and we can put the links into the chat room if this would be helpful for people, you can go and find the different programs that are applicable to countries. Sometimes they're a broader range than others but typically the sanctions go to particular types of conduct. Then the especially designated nationals list, those can be people or entities. So it includes businesses from a broader range of countries than those included on the country programs. at OFAC -- so the U.S. is not the only country that has to the United States. So if you're looking at other jurisdictions you also have to think about what are their sanctions, what kinds of embargoes do they place on So it implies generally OFAC applies to those who fall under the jurisdiction of the U.S. ICANN were to not follow the OFAC requirements you could find an officer going to jail for that. So we take our compliance obligation was OFAC compliance very seriously. And I see your note, OFAC does not only apply to the list but ordinary people as well. I agree. This is when you look at that. The country type -- the country type sanctions as opposed to the SDN list. The country sanction if they're extremely broad will apply to any individual or person who is from that area. And so it does go broader than just the list. Oh. So thisC rules since its formation. I seen some suggestions and questions as to what the relationship has been between ICANN and the NCIA and the requirement to follow OFAC requirements. And there really is no connection. The functions contract had nothing to do with ICANN being obligated to follow OFAC. There's no clause in there that specifically says ICANN must follow OFAC, et cetera. It's just by virtue of ICANN being a business in the U.S. so it must follow it and there's been no change in the obligation to follow OFAC, obligations since the transition. Going back and Jeff, I see your question in the chat. I think that was a follow up from my response to Farzi. Is it people in the area or living in that area? It is indeed in that area. It applies to people -- if it's a country that has a broad sanctions ra-ra beam it's Sudanese national even if they don't live in Sudan but they carry a Sudanese passport. It could have a very broad reach. So what would happen if ICANN wasn't headquartered in the U.S.? Would there be a change in ICANN's obligation to follow the OFAC rule? And that would be a fact intensive issue. But the way ICANN's business is set up now just moving a head quarter out of the U.S. would really make no difference. ICANN has such a large amount of business contacts and conducts so much business within the U.S. that it would probably still keep ICANN under U.S. jurisdiction for the purposes of OFAC. So this isn't something you can -- if you have concerns about how OFAC impacts ICANN's operation, it's not something that you can solve by just picking ICANN up and moving it some place else. These are still things that would impact ICANN and how it does business for years to come unless you really change an overall structure of what ICANN did. And so, I know one of the things I've seen discussed is what's the interplay between ICANN, its contracted parties, the registries and registrars and OFAC. So by virtue of a registrar or registry coming into existence no matter where they do business, do they have to comply with OFAC requirements. But that's not something that ICANN tells them to do. That's their own legal compliance issue. And so how do they become -- how do ICANN's contracted parties become subject to OFAC? Again it goes back to their own personal compliance regime. So it's up to each registry and registrar to determine if they must follow OFAC. But again ICANN does not do anything to make this happen. ICANN doesn't tell ridge industries and registrars where to set up their businesses,

where to put their offices, which customers to engage with, et cetera. And so, if you've heard a reported for example of a registrar that's unable to registrar name due to OFAC issues that's not something I can place on become exempt from OFAC. And so, companies don't become uniformly exempt from following sanctions regimes, at least in the U.S. So there's nothing that ICANN can do to just say U.S. government absolve us from having to follow any part of the OFAC regime. But there are types of conduct that's -- that the government either through regulations or through legislation have actually provided general licenses for. So they might carve out certain things. So it could be that in general there's a certain type of financial transaction that's prohibited but it could be written into legislation that if it's about a very particular type, that's actually exempted from OFAC through a general license. So that's one thing that ICANN or any other company could take advantage of and could avail itself of if those general licenses existed. But then also there's an opportunity to apply for a specific license. What a specific license is is that an entity can apply for authorization to engage in a particular kind of conduct or transaction. So I saw earlier Farzi in the chat that you referenced you've heard that ICANN has to get an OFAC license for you when providing travel support. And so not to talk about any individual or situation but in general for our fellows for example and for our whole travel support list indeed we look and we identify if we do need to apply for a license for any of the identified travelers to travel to a meeting, for ICANN to provide the support, the financial support to bring someone to a meeting. Now we don't have to get a license for anyone who might choose to come to an ICANN meeting on their own. We don't look at our registration list that way. But if it's someone who is seeking travel support through ICANN to receive the ICANN funding and support, we do look and we do obtain -- we request and we obtain licenses for that specific conduct. So it is something that we can -- we've done for a very long time and will continue doing to facilitate participation in ICANN meetings. Now, with the ability to apply for a specific license, there's not general, ICANN will not provide goods or services to any country for which sanctions apply or for person or entity on the SDN list unless a general license exists that would exempt the conduct or ICANN granted a specific license. So that in a nut shell is how OFAC applies to ICANN's operations. This is really or compliance and about how we do it and experience has shown we do apply for licenses. We've had, you know, we've been successful in hosting meetings across the world and participating in trainings across the world and bringing people to ICANN meetings from across the world. And in doing our work. So this isn't anything new for us. It's a regular part of compliance just like any other U.S. based business or business that has operations in the U.S. would do. So with that, let me go to -- I see Milton's question in the chat then we'll turn over the question -- I see Jeff your question in the chat too. I'll address those two first then I'll open the floor for questions. So Milton you have a question U.S. congress would have to create a general license with treasury. In terms terms of general licenses they can be created through multiple ways. It could be something written into legislation which would be through the congress. But if it's more of a regulation those

>> I don't understand how a root zone change would require an OFAC license.

>> So Milton I don't know the specifics of why there's been a determination that an OFAC -- that this was applicable under OFAC. However need to seek this type of license for to perform root zone changes, particularly around a CCTLD. But it does happen. So the less broad the sanctions

are that are part of the country specific programs from treasury the less likely it is we would need to do that. So, yeah, basically for the countries that you've mentioned. And the SDN list -- as well. Right? If we had a company on the SDN list that would be something that would require particular attention.

>> Thanks, Sam.

>> Hi. Thank you very much. This is very useful. Just a question on the registries, registrars agreement. You mentioned the agreements with ICANN do not require them to follow OFAC rules if they are not located in the U.S. Are they [Indiscernible] does compliance tell them they are not [Indiscernible] follow OFAC if they're not located in the U.S.? And even one step further if they could -- if it's an option to kind of deter them from applying to OFAC for no valid reason if they don't have to follow it. Because I have two cases that they just -- it seems like in their agreements of the registrants they have copy and pasted from they are registrars and they are not located in the's legal team or ICANN's compliance team ever advises -- sorry, we never advise our contracted parties that we work with as to what laws apply to them or which laws don't. We don't know the specific facts and details about how each registrar or registry organizes their business. So it's really not ICANN -- it's not up to ICANN to tell them whether or not they are subject to the OFAC requirements or not. They really need to look at how their own business is run and they need to get -- they often will need to have counsel give them advice as to whether or not there's a need for them to regularly check -- check against the OFAC list to follow the OFAC compliance laws to seek licenses, et cetera. It's really not a place for ICANN to make a determination because if we were wrong and a registrar relied on ICANN telling them they didn't have to follow it, I'm not sure how that would all fall out. It's very important from the ICANN point of view that registrars and registries are bound to follow the laws they are bound to follow. And so that's why we don't name in our agreement what they must do in terms of specific laws. But on the converse of that, we also don't give advice about the things we think they don't have to do. That's really up to each business that enters the space. Greg, I think we can move --

>> Thank you, Sam. Why don't you go ahead Kavous, with your question.

>> Hello. First of all I understood that Sam saying for traveling, OFAC may apply and ICANN would seek or some general arrangement. This is quite unusual. The OFAC refers to transactions with a U.S. national. It does not talk about outside or inside U.S. A. Yes they might be subject to ICANN law but the whole issue is referring to the transaction and nationals from the U.S. [Indiscernible] apply outside the U.S. abthey are not national they are not going to ask for an OFAC [Indiscernible] is that right? That should be quite clearly. And there are some things I don't know. So I don't think [Indiscernible] someone should know. And she says yes it's not up to the ICANN -- so it's up to whom? [Indiscernible] users to acquire, to buy and so on and so forth? This is the same thing you need the OFAC license and now it's up to the people [Indiscernible] up to to go to the U.S. and ask [Indiscernible] there is no relation at all. What is that? So we need to look [Indiscernible]. Having said that I think that all the question has been raised carefully and needs an answer without saying that we don't know. Someone should know. And some of the issues [Indiscernible] particular country, it's not location [Indiscernible] so

signing of the question needs to be carefully examined and [Indiscernible] we need to have time to go through that [Indiscernible] so there are a lot of things unanswered. Thank you.

>> Thank you Kavous. Sam, please go ahead.

>> Sure, thanks Kavous. If there are additional questions that you think that answers are required for, you know, please let us know. I hear some frustration with my saying we don't know when OFAC might apply to our contracted parties for example. And that's actually a fully legitimate answer for ICANN to have. ICANN as choices for ICANN to make. And I know one of the things that I know can be a bit surprising and I think this also goes to Milton's question earlier about how can a root zone change be subject to OFAC. And, Kavouss I've heard your focus on transactions. The OFAC regulations are often seen as applying mostly to financial institutions. A lot of them has to do with money. But at face when you go under them they're about providing goods or services. And so, sometimes the things that we do are looked at as providing a service. And so it might not have the general -- when you look at it just on its face it might not look like the transaction that you would think would need to be covered but particularly depending on the breathed of sanctions that have been issued against the country certain conduct might actually cross that line in the U.S. government's eyes into providing services. And so, you can't just take it down to a transaction between companies to make the test of what conduct falls under OFAC and what conduct doesn't. But again, if you have additional questions that you think and that this group believes hasn't been answered through this presentation or outside sources, please let us know. Greg.

>> Thanks, Sam. I'll go to Milton Mueller.

>> Hello. Good morning, Sam. I wanted to ask, I understand that ICANN doesn't want to provide legal advice and doesn't want to particularly make the wrong decision advising registrars and parties. On the sake token is it possible the registrar or contracted party could also make a wrong decision about the applicability of the law to them? And in terms of remedies -- in other words they might out of a conservatism or fear they might adopt or implement certain restrictions when it's actually not necessary. My first question is is that possible. My second question is is there anything we can ask the U.S. government to do to clarify those kinds of situations so that we reduce the restrictions to only people that really they should be applied to.

>> So Milton, thank you. I think that the potential for any company to be too conservative in the application of a law, particularly a law such as OFAC that carries high sanctions to anyone who doesn't comply as well, I think that's a very real possibility. Now in terms of how that interacts with the ICANN sphere, you know, there's always a possibility to ask the U.S. government to help get clearer on conduct. Like what types of conduct would we want them to say should be carved out from this activity. Right? What types of conduct would you imagine to have in a general license for example if one was to be developed? Then the question comes to who would do the asking. What type of funding would there be for that type of lobbying, et cetera. I could imagine from my limited interactions with the U.S. government that trying to move towards such a general -- to having some sort of regulation or legislation promulgated through the U.S. government could be a lengthy thing. It's not that it's not worth doing but then you have the

question of who is the appropriate party to move for that. It would be a question among the ICANN community I think to talk about where the funds for that would happen, where the lines should be drawn, what's in and out. Then of course no outcome is ever guaranteed when you're working with a governmental body.

>> Sam I see a follow up question in the chat from Steve. Sam, can you say that contracted parties are not obligated to follow OFAC solely on the basis of their having a contract with ICANN?

>> Steve, yes. That was one of the things I was talking about earlier in, if that's the only contact they have with the U.S. is enough to be under OFAC or not. And we don't require and we don't monitor our contracted parties for whether or not they are complying with OFAC.

>> Thank you, Sam. I'll turn to Jeff.

>> Yeah, thanks. This is sort of a correlary. I have two questions. One is sort of a correlary to that and that would be would ICANN compliance find it a breach of the ICANN agreement, whether it's a registry agreement, registrar accreditation agreements, would it be a breach if that entity did violate the OFAC regulations? In other words, in each of the ICANN agreements it says you must follow applicable law. If for whatever reason OFAC sanctions a contracted party, that would in theory be a breach of the ICANN contract, the applicable ICANN contract. Has that been something you all have thought about? That's question one then I'll go to the second one.

>> Thanks, Jeff. In general, yes. Any contracted party that's been found in violation of a law. This isn't just an allegation of a finding of being in violation of the law could be something that would lead to further compliance action. Now, there would be other questions I'm sure from our compliance department and you might wish to talk to them further about how they handle situations when a registry or registrar has been actually found in violation of a law and whether or not it always leads to termination or if there's other paths on their enforcement based on the materiality of the law that they broke or whatever. But it is something on registrar accreditation and I guess this would also apply to registries for new detailees going forward. So the question I have is it says ICANN generally will not seek a license to provide goods and services to an individual entity on the SDN list in the past. It goes on to say you have been granted licenses but again there's no requirement for ICANN to actually even seek a license and of course we understand that even if you sought a license it's out of your control as to whether one is granted. But I guess my question more, shouldn't it be ICANN to seek a license on one that Z to be a registrar assuming they meet all the other requirements.

>> Thanks, Jeff. The focus on SDN in that contact is actually really important focus. It is a general practice for ICANN when there is an application for a registry or registrar, if it's someone who is an entity obligated to seek licenses on behalf of those who are specifically on the SDN list. That could also raise other issues that might impact fitness to run a registry or to take on that part of being part of the DNS infrastructure like that. So there's a little bit of a difference there. But just in general for just like we do for travelers if we had an entity from a

different -- from one of the countries sanctioned by broad sanctions seeking to open a registry or registrar we would definitely go and seek a license on their behalf to do that.

>> Thank you, Sam. I see Kavouss is next. If you can please ask a concise question it will be easier to get an answer. Thank you. [Indiscernible] and [Indiscernible] it is not decisions, it is assumptions. [Indiscernible] they decide -- so the issue is quite unanswered yet. If it is not [Indiscernible] I don't know how terms and conditions apply to something which is not [Indiscernible]. So this is something very, no. This does not belong to anybody. So I don't understand [Indiscernible] is the DNS [Indiscernible] or not or how it will apply. This needs to be applied deeply and carefully. I don't want to jump to the conclusion [Indiscernible] when you say you are don't know this, you don't know that. So I think I need the reason, logical and legally valid written that applies to these questions. Thank you.

>> Thanks Kavouss. So the reason there isn't a clear answer to this is that it's not ICANN's to answer. So the treasury department has historically deemed that for example ICANN's work in relation to the root zone is something that requires a license. That's not ICANN's decision. That's the treasury department's decision. Does that mean that in the future the treasury department could make a different decision, that the treasury department could say that actually upon further review this is just a service and it's not actually providing or it's just a function and it's not something that you need a license for. Yes, of course that could happen. But we can't require the treasury department to take that position. So I understand why, you know, having a court look at the asset situation and the question around whether or not the DNS is property or whether individual CCTLDs or others might not seem aligned with the treasury department decision that a license is necessary for such conduct. But that's not ICANN's question to answer. That is something that the U.S. government and the treasury department has said, yes, you need a license to do that. They have the ability to say to us ICANN, you know what? You don't need a license for that anymore. We don't think it's necessary. Have they done that? No. And so we can't answer the question of why the two parts don't go together Kavouss and I understand the heart of your question, it's just not a question we h

[speaking at the same time]

>> The U.S. governing law blocks everything. What is the distinction? [Indiscernible] with the idea let's agree that locations [Indiscernible] so you cannot solve the problem. We are really wasting our time, our valuable time. Thank you.

>> Thank you Kavouss. I don't know Sam if you have a response to that. If not, if you do please go ahead, if not we'll turn to Carzon.

>> Even if ICANN were picked up and moved out of the U.S. OFAC would apply. There would still be registries and registrars that do business in the U.S. such that OFAC would still apply. And there are other countries that also have sanction regimes that likely would apply to conduct and could in some instances be even more restricted than OFAC. So there's not a magic tool in just picking up ICANN. And I think we have to keep that in mind.

>> Thank you, Sam. Please go ahead. We have about 5 minutes left.

>> Thank you. Sam, just following up on when I look at the registrar agreement that was in January, it was said that the applicants acknowledges that ICANN is under no obligation to seek such licenses, meaning OFAC licenses. Now I hear that's only about the ones that are SDN list or is ICANN just not obligating itself to receive -- to request for an OFAC license in general based on its own assessment? Thanks.

>> So, I know there are gen Winestein. The appeals court basically reframed from re delegating the domain because they not it would mess up the system of internet guns and I wonder if you could Opine, I know you are opining and you're not the Supreme Court making the law but what is your opinion of the precedent value of that appeals court decision? Influence the way things are decided in the future?

>> You know I would have to go back and look more at the appeals court decision Milton. Typically when courts retrain from reaching certain issues that the press denies value isn't so high but to the extent and this is where we get into the world of ICANN is often gets courts to break new ground, looking at how other courts have thought about issues or have refused to think about issues becomes somewhat precedential on its own because trying to explain to a court what we do with the DNS and how CCTLDs are managed and allocated, et cetera becomes a very difficult thing for a court to understand. And so, to the extent there's any precedent that gets developed even it's not squarely on point with law tends to be helpful to inform future courts. But, to the extent we can have a decision that was a little bit more squarely on point with law for a legal reason to not allow for a transfer in that case that would of course be preferable for building the type of precedent that we like to see.

>> Thank you, Sam. I'm sorry the cue has been closed. We reached the top of the hour. We have time for some closing points. Sam I want to thank you very much for joining us here. It's been very helpful. I think that this has given the group a lot to discuss on a number of points raised here. We may of course ask you for a return engagement. There are also a number of questions that were raised both on the list which were sent around with the agenda and during the call and I'm hopeful that we can see about how we can get answers to those to the extent they weren't answered in the chat. It may be the questions need to be made more concise or less ambiguous but it would be helpful to get those answered. Even more, I think you may be able to come up with some better questions, if you will, having had this discussion and enabling us to have a discussion in the group on these points. So I want to thank everyone for participating today and thank Sam for this. So, with that Sam unless you have any closing remarks, we'll proceed to end the call. Yeah?

>> Thanks, thanks for having me and please let me know if you would like me to come back again or anything, if you have other questions that you think could be addressed. In terms of closing thoughts I think it's really important to remember and I know the subgroup is really trying to deal with a lot of sensitive points. But to focus on conduct that the community and ICANN can actually change as opposed to focusing on obligations of how a government might interact with us would probably be helpful. Because it has to be something we can actually implement and not just a desire to see something framed for example in a general license. Because we

>> Well thank you very much, Sam. I think with that I will adjourn this call. We can