
CCWG-JURISDICTION SUBGROUP MEETING

Wednesday, August 30, 2017 - 13:00 to 14:00

>> GREG SHATAN: Good morning all. It's Greg Shatan, just after the top of the hour. Much I will get started in just a few seconds.

>> GREG SHATAN: Why don't we get the meeting started please.

You can start the recording.

[now being recorded]

>> GREG SHATAN: Good morning, good afternoon and good evening. Welcome to the CCWG accountability Work Stream 2 jurisdiction subgroup meeting number 44 on August the 30th 2017 at 1300 UTC.

Welcome everybody. And first, I'd like to welcome everyone. Secondly, we are have in front of us the agenda. So we will move to the second item which is the review of the agenda. Which I have not updated in text, but I will update as we discuss it. First we have our obligatory administrative minute. After that, we have a discussion of the issues. We will review the proposed issues list. Discuss the process for ordering and considering ordering issues. And then considering them. We have an issue that we decided to tee up last week for this week's call which is the choice of law for registry and registrar agreements. And then we have the first draft of the OFAC recommendation. Which should be added hear. For discussion under item 4. Then we have AOB. And then finally, we will adjourn.

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So that is the agenda.

I'll call now to see if anyone has anything they would like to put in the AOB slot. Not to be discussed you no but just mentioned. Of course it can be mentioned at [indiscernible] time as well.

Seeing nothing, no current nominations for ALB, I of course will look again when we get to that point in the agenda, or in the meeting itself.

So let us go back to number 3. For administration. First I'll ask much there's any changes or updates to statements of interest?

Seeing none, I'll ask if anybody is on the audio bridge only?

I'm not hearing anyone identify themselves as being on the audio bridge.

>> This is Brian Scarpelli. Sorry.

>> GREG SHATAN: Good morning Brian, thank you.

Anyone else on the audio bridge?

Okay.

We have looks like two phone numbers that are that we need to attach to people. So if you are the number ending in 1446, that has now changed to Brian Scarpelli. We have 5316. Who is (703)578 5316?

>> Greg, that's me, Phil Corwin.

>> GREG SHATAN: Thank you Phil.

That takes care of our numbers.

Similar to the DNS, there may be numbers underlining our names, but we use the names.

So that takes us through item 3 and directly into the issues.

So, if I could ask back to put the proposed issues list up on the screen.

Pause a second here. Here we have it.

So this is a list that staff and myself and by staff I have to give a big tip of the hat to Bernie Turcotte. We revise the list. The e mail list and the conversations and the Google Doc and tried to pull out every issue that had been raised in this final call for issues. So we could get them all in one place. This should this is what we need to do first is make sure we didn't miss anything. So really this is a kind of census.

So, that's kind of the first order of business. Kavouss I see your hand is up, go ahead.

>> KAVOUSS ARASTEH: Yes good morning good afternoon, good evening to all of you. I just seek your advice whether you did kindly take into account my suggestion to meetings ago that when you received a list of issue, perhaps if you could find some time, go through them in a class list to see if they are overlapping, whether number they should be used in the way that they are addressed in different way. But the context is the same. So this is a question, I'm sorry I was unable to attend your last meeting. And not gone through this list of issues to suggest you something. But I want to just know when you had been any possibility to do that. I know

you have been very busy and I thank you very, very much for that. But just a question, whether, first of all you agree with that notion, and taken when you have done the or not.

Thank you.

>> GREG SHATAN: Thank you Kavouss. And thank you for bringing up your suggestion. As a matter of fact we did do this. You will see the left hand column is major topics. And then the second column is individual proposed issues. So we did in fact try to group things into major topics and overlapping topics.

So that we could relate them. Also in the notes column we indicated where there were additional overlaps. Or relationships. We did not do this in a completely scientific manner yet. This should be considered a first draft, if you will or at least a working draft. I don't want to over emphasize this document as something we are going to polish. But the point here is to make sure we got everything out. And we did take up that very helpful suggestion and try to group things under kind of major topic headings as reflected in the left hand, most column.

So left hand notes column.

I believe Jorge Cancase sent an email to the list at least to me in New York. Indicating a few things that appeared to be maybe be missing or maybe not expressed clearly enough. I have not what a chance to respond. I think most of those are here. But in any case, we will turn to that.

And respond. And update the list as necessary.

So I'd like to see from everybody else in the room, if there are either any issues that it appears we didn't get into the list. Or if they are on the list, it's not clear how they are expressed. That you can't quite see the issue here.

Again, these are kind of rough title, they are on not intended to be final expressions of the issue, per say, although I hope they have been expressed in a clear fashion. Again Kavouss your hand is up.

>> KAVOUSS ARASTEH: Yeah sorry maybe it is not under this, but I had looked at the recommendations and if you come to that regular state I will limit myself to that time but not taking any action now. Just do we have any opportunity to go through this first draft today, or not. Thank you.

>> GREG SHATAN:

>> Thank you Kavouss. What I'd like to do is to go through this list, briefly, not read the whole thing, that would take too long. But to take a look at the major topics. And make sure that we seem to have covered everything.

Of course, we will want to have comments on the list. Welcome Thiago. And this will continue to be used and can confined. But I think this is far more manageable than is the Google sheet that had many, many columns to it.

So the first set of major topics, falls under OFAC.

And I believe Kavouss, this is where you're what you're referring to resides.

We have several issues under OFAC. Kavouss, I don't know if that's a new hand or old hand. If it's a new hand please go ahead.

Not hearing Kavouss, I assume it's an old hand, or he will come back to us.

>> KAVOUSS ARASTEH: Sorry, sorry, I'm very sorry. It was on not to disturb anybody.

And in several emails I mentioned the need for distinctions between U.S. national registrar based in U.S. and U.S. registrant in non U.S. countries. It might be different. There might be the registrar that is you U.S. national but they are not based in U.S. So I want to address that, when the OFAC applies to them or not. Because I read the OFAC and I have been present and usually talking about U.S. nationals. So, and U.S. residents. So this is two issues together. This is a combination of that. A [speaking French] U.S. national, not U.S. based. U.S. national, U.S. based. Thank you.

>> GREG SHATAN: Thank you Kavouss. I see a hand from Bernie Turcotte. Please Bernie go ahead.

>> BERNARD TURCOTTE: Thank you Kavouss, having gone over the transcripts from our first of August meeting, relative to Sam Isner's answers on this. I'll simply channel her on this. OFAC applies to American. That's not a question.

It can also apply to non Americans if they do significant amount of business in the U.S.

And I believe as Sam has said, for registrars, I ICANN cannot and I discussed sorry you were not there last week, I believe we touched on this last week Kavouss, ICANN cannot apply legal

advice to registrars whether they are meeting the obligations or not under OFAC that's for each registrar to decide. It's just simply impossible to do otherwise. I hope that helps. Thank you.

>> GREG SHATAN: Thank you Bernie. And I think just to, one more point, on the point of fact, it's my understanding that OFAC requirements ascend not only to the U.S. nationals, to the U.S. operations of U.S. nationals but to any affiliated operations by which, I mean those under common control and ownership, with the entity. So a foreign you U.S. entity so a foreign subsidiary to a U.S. company will also may also have applicability of OFAC sanctions and a U.S. division or business unit that is located abroad that is part of the same company, I believe is likely, this is not a legal opinion, but just a understanding of the facts as I know them, that foreign office would also need to comply with OFAC regulations.

So, I see a couple comments in the chat. Farzi said we discussed this issue and provided a possible solutions And that will be in the couple of topics down. This is right now just a census of the issues.

But we will get to that with regard to OFAC in this meeting. I see a question from Wale. Rouse referring to you U.S. registrants operating outside of U.S. but based in the U.S., this is often the case with TLD services.

In this case we are referring to registrars and knot registrants as I understand it.

Kavouss, is that your hand please go ahead.

>> KAVOUSS ARASTEH: Yeah this bring us to the issue that we discussed and that according to Thomas he propose something and so on support.

I think having a commercial or not commercial but having a connection of operations with ICANN it should not be a reason for the application of OFAC.

We should not be impacted by ICANN being incorporation in the U.S. and under the U.S. law. And in that applies. So I don't understand what good does it mean because in someone's recommendation you also address the issue that it doesn't seem to be logical. Having that connection. Everyone has that connection with ICANN. So I don't think we should do that one and that brings us back to the chicken and egg. We decided by consensus, I don't know what type of consensus, but that is that. That we don't come back to the place of incorporation and the article of the law. Provide that does not have any impact and I see that now that's refers to some statement because they have some operational connection with ICANN. OFAC applies automatically. I'm not convinced to that. Otherwise we come back to the issue of place of ICANN. That is not quite satisfactory to this solution. We should resolve that issue.

Thank you.

>> GREG SHATAN: Thank you Kavouss. I'm note sure that I heard what Bernie said much differently. Than you did.

So I think we need clarification. And it looks like Bernie's hand is up so I'll give you the floor.

>> BERNARD TURCOTTE: Thank you Greg. Yes that is correct Greg. That is not what I said Kavouss. I said that businesses that are not American based businesses, if they do a significant amount of business in the U.S., has nothing to do with this, they have a contract with ICANN, if they do a significant amount of business in the U.S., they may be subject to OFAC by OFAC rules.

And it's for each registrar to decide that.

It's not for ICANN to advise them on this. It's simply impossible. So it has nothing to do with the fact that they are an ICANN accredited registrar. It has to do with how much business they do this the U.S. That I hope that clarifies, thank you.

>> GREG SHATAN: Thank you Bernie. And one additional note, it's not that a company has a contractual relationship with the U.S. entity, that subjects them to OFAC, otherwise any company in the world that had a contract with the U.S. entity would be covered by OFAC and this just doesn't work that way. When we are referring to subsidiaries and affiliates, we are referring to ownership relationships part of the same conglomerate or incorporation not on the third-party relationships through contract.

In any case, the last point of course is that what registrars think they are supposed to do to comply with any law of any type is up to them. As it is, so we can offer clarification, perhaps, but cannot instruct them on legal advice or their relationship to their customers.

Thiago, I see your hand is up, please go ahead.

>> THIAGO JARDIM: This is Thiago for the record. I think I touched on whether OFAC applies to U.S. nationals and as it is individuals as opposed to any entity that does business in the United States. I think I asked this question Bernie to close of that and normally he would of asked some to provide clarification in relation on this what point. I'm not sure whether the clarification has been provided.

But I think that I think it might be relevant what I'm about to make. One thing is, OFAC sanctions whose applications are limited to U.S. nationals but may eventually and incidentally apply to any of the entity that is based outside of the United States because it is entered into

contractual relationships with a U.S. based entity that is subject to OFAC sanctions. I understand I may not have been as clear as I could have been. I think it's important to have clear whether OFAC sanctions apply to U.S. nationals only because of that, because those entities based in the United States have business with entities outside of the United States because the contractual relationships between an entity the OFAC sanctions and because of that, sanctions that are not don't have the U.S. national they may be subject as well to the OFAC sanctions only incidentally. I think it's important to have this very clear, to understand that the particular situation of ICANN, being a U.S. based entity is because of that. The that the OFAC sanctions regime has a particular importance to our work. Thank you.

>> GREG SHATAN: Thank you Thiago I think I actually answered that question in what I was saying just before you talked. But Bernie had his hand up so I'll go to Bernie. Then come back briefly Bernie go ahead please.

>> BERNARD TURCOTTE: Thank you. Referring to Sam, I did distribute last week her officially corrected version of the transcript from the August 1st call where she presented OFAC where she took great pain to ensure that her answers and her all of her statements were properly recorded in that version of the transcript. And I believe that if you go through that, you will find most of the answers you are talking about.

Thank you.

>> GREG SHATAN: Thank you Bernie. And just to clarify, my understanding of course we can go back and clarify this further, but my understanding is that merely having a contractual relationship with the U.S. entity is not subject that contracting person to OFAC sanctions if that's other party is a non-U.S. party.

It's being part of the same enterprise.

Now there obviously nuances to this. But, we can get that further. And I think it would make sense to continue discussion of OFAC not while looking at the general census but while we look at the OFAC recommendation which I'd like to get to shortly. So let's move past the OFAC row on this sheet.

And we can take are further discussion of this aspect of OFAC spread your reach to the list for further clarification.

So after the OFAC, issue, or major topic set, the next major topic set is provisions relating to choice of law in certain ICANN agreements. Specifically that the registry and registrar agreements don't have a provision stating the governing law of the agreement. Also, that there are lack of choice in the potential arbitration body and jurisdiction of arbitration in ICANN agreements.

And, also, the concern raised that the lack of governing law provision could leave the courts more likely choosing their own law as the governing law of the contract. So if there's nothing major missing under that topic heading we will just move on.

First I see a hand from par minder though. Parminder please go ahead.

>> Parminder: Thank you Greg, Parminder here for the report. Greg I actually raised the hand while we were still at OFAC and if you permit may I ask a question about OFAC?

>> GREG SHATAN: I would prefer OFAC under the past discussion, but if you want to do it now I go ahead.

>> Parminder: I want to put on record the question I put on email that I wanted a response to, if someone can do it now, that's okay. But if it can be given on email, that's as well. The question was rather there are again license possibilities across all regimes or for every section order. There is generalized language understand the later the is case but I wanted clarification. I don't have a problem, it's not urgent we can do it later but I wanted to put it on record. Thanks.

>> GREG SHATAN: Thank you Parminder we will know that and it's probably best to get that in the OFAC discussion coming up next.

So if there's nothing anyone wants to add or missed rather in this major topic I'll move on to the next major topic. U.S. court jurisdiction over ICANN activities.

First, proposed issue was that jurisdiction over ICANN activities that comply with GAC advice or otherwise based on powers otherwise recognized according to U.S. bylaws. That this is an issue. I think we need to clarify what is meant by based on powers recognized on U.S. authorities according to ICANN bylaws. It's just for some reason that's not scanning to me.

And in other words, I don't understand what it's quite -- what that refers to.

Parminder is that a new hand?

Old hand, I see. David suggest we should note other national courts jurisdiction over ICANN in this line item. David, I think that has you're correct that has been raised in our discussions of this issue. And I will ask if others have any comments on this suggestion. Something that should be raised here. But I do agree that does seem reasonable. At least as a proposed issue.

So we will note that.

I see a hand from Thiago. Thiago pleads go ahead.

>> THIAGO JARDIM: Thank you they say Thiago for the record. I can there's something missing in the recollection of what is at stake in this issue. And what is missing to my understanding is that U.S. jurisdiction over ICANN is problematic mainly to the extent that U.S. jurisdiction has the United States has exclusive enforcement jurisdiction. So on the one hand there's the possibility that U.S. courts exercised jurisdiction over certain ICANN activities. But this exercise of redistributive activity which is the jurisdiction description by courts is generally followed by the enforcement or execution of court sentences or exercise of enforcement powers that might be in pursuance of a court decision. Right? And the peculiarity near the relation to U.S. jurisdiction is only the United States, because ICANN is situated within the texture of the United States. Only the United States has the necessary powers to enforce court sentences and relative and other sorts of normative prescriptions.

So I think it is important to flush it out there in the table on the table that the problem of U.S. courts having jurisdiction over ICANN activities is links to the fact that United States has exclusive enforcement jurisdiction which flows from its territory sovereignty over ICANN.

Thank you.

>> GREG SHATAN: Thank you this I see a note from David McAuley we might need proof over exclusive enforcement perhaps a legal question to pose.

First as a factual statement, I'm not sure that 1 accurate. First, ICANN can be sued in other jurisdictions other than the United States. At least where it has physical operations.

So that's in terms of exclusive jurisdiction, been not correct.

Secondly in terms of enforcement, in terms of civil cases the judgment is not typically enforced by the Court unless it's not complied with by the defendant. So there's really while there may ultimately be an issue of the uncooperative defendant needing an enforcement issue to be taken. That happens in my experience and actually a very small minority of cases, most cases defendant's, once a case is final comply with it. Also, under international common law it's quite common or at least not uncommon to take a court judgment in one jurisdiction into another jurisdiction for enforcement. So foreign or non U.S. decisions can be brought to the U.S. courts for enforcement. And U.S. decisions can be brought to foreign courts for enforcement in the vast majority of cases they will be full faith and credit given to the court decision of that was given. There may be some examination of it by the jurisdiction in which enforcement is being sought. But, it's not exclusive in that sense either. So, that's just my understanding of this. As far as the Hague Convention, I'm not thinking just of that, but if I have a U.S. court decision in the defendant is in France, I can go to a French court and seek to have it enforced by the courts in France much that's what I'm referring to. This I don't know if it's a new or old hand.

>> THIAGO JARDIM: Thank you Thiago for the record. What I would request you as records are great if you may, is to put it on record, what I said and on the table. The comments that I've just made. And then once we get into discussing that topic and we can get into more detail. But just me let me just try to reply to your comments. In relation to your challenge to my statement, that the U.S. has indeed exclusive territory jurisdiction.

It is, I would say it's quite obvious this is how things are. Would you contend that only the United States could carry out police operations within the territory of the United States?

Obviously no other country could exercise police powers which is an expression of enforcement jurisdiction in the territory of any other country unless that other country that is consented to that exercise.

Perhaps this is a practice you have seen in the U.S. and think that the United States is in a position for example to carry out police operations in territory of third countries. Like extraordinarily renditions this is in breach of enormity of the other states. In fact in law surveys to look at books and discussion of are jurisdiction international and you will see the territory country is the only country with the authority to exercise enforcement exercises within that territory. So this is one point.

In relation to your suggestion, which is partially correct. That decisions by the courts of one country could be enforced and executed, if I by other jurisdictions, this is true but only to the extent that the other courts in other countries have that knowledge that the judgment passed by foreign tribunal is enforceable within that state. This requires another exercise of jurisdiction by the territory of state. By Brazil and courts pass a judgment by ICANN, if it's trying to compel it to shut down ICANN's operations, which are essentially carried out within the United States territory. Obviously for that judgment to be enforceable and enforced within the United States it could be necessary that exact proceedings acknowledge that Brazilian judgment enforceable in the United States so this is a necessary exercises of jurisdiction by the United States. And only once the United States has given it's blessing to, if you will, a foreign judgment that judgment carries out in the United States. See there's that exclusivist of the judgment that belongs to the territory state and I don't think you can challenge that, thank you.

>> GREG SHATAN: Thank you Thiago, I think we have gone off into the off the topic of the agenda for today. And I want to keep it on. I disagree in the fact that I am not seeking to challenge anything I'm just offering my understanding and knowledge as a legal practitioner for 30 years. And having dealt with the enforcement of the enforcement within foreign jurisdictions. To get to the exact issues of the extent of the review, by the enforcing Court is beyond us. But it is not a review Avenisio re litigating the case in the enforcing jurisdiction. Except in relatively rare cases. But in any case, we have gone off topic.

So, Kavouss, I'll take your hand please.

Kavouss I'm not hearing you. I'll also note the analogy to police powers

>> KAVOUSS ARASTEH: Thank you I'm sorry it's on mute [voices overlapping]

Yes, could you kindly put in the record of this meeting whatever is that United States should not have or shall in no way have any particular unilateral power to enforce in jurisdiction because those are the result of ICANN being located in the United States.

We need to have that assurance, that this would not result that this unilateral super messy power will be given to one state confer with the other states having the jurisdictions. So we should have these sort of equal footing. Otherwise still we should come back that we may not agree that ICANN remain in the U.S. if that would result to dividing a unilateral power to the U.S. for the enforcement of jurisdiction on ICANN activities.

Including OFAC and so on and so forth.

That assurance should be given that text that this will not happen. Thank you.

>> GREG SHATAN: Thank you Kavouss. I'll take up Thiago suggestions we should November quickly through this list and note any comments and things people think are issues and we will get to where they are issues at another time.

So getting through this line, the next aspect of U.S. court you jurisdiction that was brought up was that ICANN policy development and policy development implementation activity which ICANN con norms in the litigation in U.S. court. This was cited as an issue. Or proposed issue.

The next major topic, was non-interference of international actor in ICANN core activity. And a statement that states an international organization, all of them should reframe from exercising concurrent jurisdiction respecting ICANN role in model.

Next I'll go much quicker only because we have other topics. Next that the U.S. executive regulatory legislative and judicial on jurisdiction under everything ICANN and under the U.S. IOA is the next major topic with four proposed issues under the executive regulatory policies under the domain are procedures and could this apply to PLDs U.S. legislators unlimited power over ICANN I'm reading these as proposed. U.S. courts judicial writ under all aspects of ICANN. I'm note sure what is meant by judicial writ, but we will get to that.

Next, is U.S. courts hearing the regarding community TLDs.

Jorge clarified that he was not referring to just e mails with TLD with jurisdiction but any TLD that serves a community. I'm not sure that's a category can be defined but that was what was proposed.

Next, that making sure that hearings of the IRP are location neutral.

Next, that topic of non-interference of state in CCLTDs of other states. Note that and particular issues that were proposed here, courts overriding CCTLD delegations potentially in recommend of U.S. courts over CCTLD but this may have been withdrawn on the list so I hope to clarify that. But I believe that's brought up by Thiago that may already have left. So we will note for the record that we need to clarify whether the contention of in rem jurisdiction is still live.

Next, that enforcement measures by

[echo]

Should put Erich can you mute please.

Enforcement by ICANN CCLD management.

So those are the proposed issues under that topic heading.

And last, on the list, California not for profit incorporation and head are quarters has a positive effect on ICANN accountability mechanisms and operations, individual proposed issues under this are that questioning and attempting to limit ability for third parties to debt gate against ICANN in U.S. court under mines work stream one and note that work stream one mechanisms take advantage of aspects of California law.

Then, questioning and attempting to looks like this next one knees to be edited it's missing some part of it. We will come back to that. Last application of U.S. law to ICANN's actions controls ICANN and subject to the rule of law. And that limiting this makes ICANN less accountable.

So, subject to cleaning up that third bullet point those are the proposed issues under this. Which might call positive effect of ICANN's current jurisdictional set up.

So, if there are any either major topics or specific issues that we are completely missed by Bernie and I as we combed the list, please say so.

Otherwise I'm hopeful that we captured the major headings.

So, seeing nobody making comments on this, we will leave this to the list for further discussion and move on to the next item in the agenda. And we can either take the last 15 minutes and discuss the OFAC initial recommendation or we can discuss the issue of lack of jurisdiction clauses in ICANN contract. Apologies, I didn't leave enough time for both.

Given the ten you are of the discussion so far I would like to propose we move to the OFAC recommendation and then we will begin the next meeting hopefully very close to the top with a discussion of the issue of contractual clauses or lack there of relating to choice of law.

And Raphael I apologize since this is an issue you brought up and you are here. Kavouss, I see your hand please go ahead.

>> KAVOUSS ARASTEH: Yes I have no difficulty. If reading next 10 or 12 minutes you can just review that not debate on that.

You can fix, explain that or describe that people understand what was put in that I think we need more time to carefully examine that noted to avoid making irrelevant comments that may complicated your work. If you want to just present those, we have no problems.

Thank you.

>> GREG SHATAN: Thank you Kavouss and thank you Raphael and for your remarks in the chat, if we can put up the OFAC recommendation.

That would be helpful. Looks like it's coming.

So here we have it. My apologies for bringing this to the list so close to this meeting overnight for participants in north and South America.

So, but in any case, I present to you rough and ready, the first draft of the OFAC related recommendation.

So, I'll open the floor, I think we had a question reserved earlier from Parminder. And for any other comments have on this document and I think Farzen also had a comment with the regard to the solutions which hopefully have been expressed here in this document as well. Kavouss your hand is up. Please go ahead.

>> KAVOUSS ARASTEH: Yes, if you allow me. I have some comment on the background part. Is it okay that I raise that? Or do I have to wait?

>> GREG SHATAN: By the backlog I'm not sure what you are referring to.

>> KAVOUSS ARASTEH: Background. Background recommendation.

>> GREG SHATAN: Yeah go ahead.

>> KAVOUSS ARASTEH: Yeah you mentioned something in the second part of OFAC has delegated so on and so forth and goes to the menu countries. This is not subject of our meeting. We are not dealing with OFAC's in general other than OFAC applications to DNS. So

I don't think that this should go to the reason of the OFAC or those national policies political issues and so on, so forth. I don't think that we should have. So I guess we do not mention that many of these sanctions are based on the United Nations and other international mandated therefore. So I don't think that you as private sector never referred to the most later is this time very specific. I don't think this is it's very reticent but not here. If because we are not dealing with the general application of OFAC, we are dealing with application of OFAC in regard to DNS and nothing to do with the multinational and non-multinational. So on and so forth. This is a very complicated issue it can go to that same string what does the United Nations resolution. So it's then who created that, what was the discussion. This is very, very difficult. So please cleaned if possible delete the second part of the background or at least the part relating to this international organization's multinational and United Nations so on and so forth.

We don't have to give justification of OFAC application to DNS because of the flicks application of OFAC non-DNS situation this is outside of mandate and we don't wanted to discuss that. If possible, it doesn't help us to really disturbing this at least myself. Thank you.

>> GREG SHATAN: No thank you four your suggestion Kavouss. I see a hand from David McAuley. David please go ahead.

>> DAVID McAULEY: Thank you Greg it's.

>> DAVID McAULEY: For the record. If you are stretching for comments on this I want to make one or two. I agree with you after the plenary last night there's not too much to looker at but I've taken a quick look and offered a few comments of personal opinion on it. One is it's a promising start what I like about it, it dials with as I see it specific limited license requests rather than a general license. I think a general license would be a bad idea. I attend to agree with

what Nigel Roberts said on the list. Why would we spend years creating accountability for ICANN to simply throw them away.

The other thing I would mention is if there's ever a move to put the burden on ICANN to go ahead and seek licenses for applicants I think the applicants need and I recognize this language about you know that they appear to be well qualified but they need to have some skin in this game and I think that would be financial based on their ability. But free services tend to be used rather generously. And I think that would be a mistake.

And ICANN I think Bernie said earlier ICANN can't render legal advice to third party's legal services so anything like this that came to be would have to be on an as is basis for the applicant to go themselves if they asked ICANN the on do it they simply step sass is but I think they should have some skin in game thank you Greg.

>> GREG SHATAN: Thank you David. I'll note to you in the response in this chat to Kavousss that a bit on OFAC doesn't hurt. I'll turn to Parminder. Parminder, go ahead.

>> GREG SHATAN: Parminder, we are not hearing you net.

Okay Parminder is having an audio issue. I'll go to Farzan. Please go ahead.

>> FARSENAH: Speaking. I did of course understand did David was saying whether getting a general OFAC license is not an option? What was he disagreeing with getting an OFAC license? I know ICANN cannot just go request one. But it can find out the ways that this could be done and in general OFAC license can for ICANN functions can solve a lot of the problems. And it does not really hamper the accountability that are predicted which are based on California law. So I [indiscernible] if you can clarify that would be great.

>> GREG SHATAN: I see clarification from died and plus one from Kavouss. I think there is towards the end of the document is discussion of general licenses and a discussion for path forward in dealing with and given the fact that it is complex process and [indiscernible] and Lexis if you could mute. I'm not sure who you are.

Okay thank you.

So that is in fact proposed there is a movement forward. Last I'll just note that general licenses are in fact fairly specific. Specific to classes of persons and types of transactions. So they are not blankets in that sense.

In any case, enough for me. If Phil Corwin go ahead.

>> PHIL CORWIN: Thank you Greg. Speaking to the draft recommendations regarding speaking OFAC licenses for registrar and regular story applicant, on Fay I had previously articulated the view that that should be the biased for ICANN to apply for such licenses but it should have some out if there's a particular reason it doesn't want to be associated or otherwise seek such a license on behalf of particular parties. So I'm a glad to see that the draft recommendations going that direction by saying that ICANN should apply for an OFAC license if the party is otherwise qualified unless it makes a determination based on well understand criteria. But I did want to point out two things. One, on page 3 that the draft recommendation regarding registrars goes to the say ICANN community should develop this criteria and determine how it will be applied and how the decision will be communicated and I assume that's to the community and options for the potential registrar and then in the next sentence it talks about letting the potential registrar appeal to the board. It seems to me it's jumping the gun if it's going the discuss what options the registrar would have if I can decide not to apply.

Then I will point out while there's all this additional qualifying and explanatory language for registrars on page 4 the recommendation for registries is a much shorter and doesn't refer to any process by which the community helps to develop those criteria means the communication. And appeals process, I was wondering if there's a reason for the lack of that specificity in the registry, in the registry applicant recommendation and if not it should mirror the registrar recommendation. Thank you very much.

>> GREG SHATAN: First I want to see if people are capable of holding this meeting over for another 15, 20 minutes may be even 30 minutes so we can continue this discussion.

Hopefully we can do that. I understand some people may have hard stops. But if we could, we will have no reason to stop artificially at this point. Even though time is not artificial, it's absolute.

Subject to be I'm not a scientist.

So Phil to briefly answer your question I think I'll say primarily this is these are aspects of this being a first draft. I think the registry registrar section could be much more parallel. And I think that's the escalation of refusal. Could be flushed out and don't directly to the board probably skip a bunch of steps. So this is very much a work in process especially as we get to specific.

So what I intend to do after doing some cleanup based on this call and comment on the list is to post this as a Google Doc for folks to comment on. So, that can be cleaned up. So there's nothing unintentional about this so I will turn to Parminder, looks like his audio problems have been hopefully solved. Parminder please go ahead.

>> Parminder: Thank you Greg I'll have to leave immediately but I thought I would mention two points. Parminder for the record.

One is what I asked earlier. Is I wanted to know when I understand general license is for a particular sanction order and not across all future and existing orders. I wanted a clarification on that. Which I hope I can get.

And second is as I mentioned, I would support making a recommendation that general I think is sought. But not just a recommendation of exploring that process.

So yeah that is it thank you so much.

>> GREG SHATAN: Thank you Parminder. On the first point I don't believe this was something Sam was asked or answered, although we can go back to the now conduct transcript of that meeting. And I don't have knowledge to answer the first question.

So we will take that back and come back to the group on that question of how general licenses work, versus various sanction regimes.

Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes my comments I think you are going quickly the matter and no problem with half hour to be staying.

I think on page 5 the recommendation, when you first discuss the issue or the case is very well described. When you go to the recommendations too weak.

Because it is mentioned that however, that never the word however comes it means try to give negative. However ICANN could bring awareness to this issue. I don't think that we are looking for awareness. We are seeking something that could be implemented and applied. And I think we could. But not awareness. We are not making a training for the religious and making

awareness of the [indiscernible] and could seek various tools to encourage registrar. I don't think we are looking for encouragement. Encourage is might request these are not working.

You have to have more stronger. So I suggest that perhaps you kindly look at the recommendation on page 5. This is very important one. Among others. And reword that to not be too rich and not going to encouragement not to word like this as bringing awareness. Trying to put in more constructive and positive objective ways.

Thank you.

>> GREG SHATAN: Thank you Kavouss. If you have any specific suggestions I would be great to have them.

On this point.

I think this goes back to the issue discussed somewhat earlier of the limits that ICANN has in actually mandating that registries or registrars do certain things. And especially with regard to whatever legal advice they are getting from their counsel.

So, there they is an issue of there that has to be dealt with and flushed out. I think if there is a limitation in this regard it needs to be more explicitly stated.

And we can look at the limits of ICANN's powers over the activities of registrars and see how to try to deal with that in the context of this recommendation.

Since the specific topic here is application of OFAC limitations by non-U.S. registrars I think it would be very helpful to know of any specific instances in which this has occurred. And I know that Horzono in the governance project brought up terms and conditions that seemed to cite

this as a possibility but we don't know if those registrars have acted on that with any applicant. And Kavouss in your document you were quoting from someplace but I don't know what it was that seemed to indicate that there was knowledge of specific cases where registrants had their domain canceled by non-U.S. registrars based on OFAC concern get more about that it will be helpful.

>> KAVOUSS ARASTEH: Okay I will do that from the document of generally I have quoted I had mentioned in the beginning of the document part of that is quoted or paraphrased in there.

However I'm just dealing with this specific recommendation. I suggest that the first line, when you say that it can do directly with the [indiscernible] directly. And we do not afterwards compare to the ICANN. Afterwards we say registrar in these circumstances should not take any action to exclude the [indiscernible] but not putting on the ICANN shoulder, ICANN can do this, ICANN can do that.

We said that this non-U.S. there's no where there's no specific OFAC compliance obligations. Therefore this should not exclude or ask or prohibit registrant to having access to the domain name. So this could be in that way. But not going to ICANN and saying that awareness of the people or encouraging. If I'm registrar I always look for 100% security and I say okay, thank you very much this is encouraging but I don't agree with that. That's that. We would not be happy with that. They are registrar that without any reason they prohibit the resistance to having access. Because of non-U.S. registrar and they are not clear of the OFAC obligation unless they interpret it in the very, very specific or unless they want to have a double safety walls. So ICANN do whatever. But that would be very insufficient. We should put it in the way

that it works. So in that case we should do more. specific and registrar shall not or should not prohibit the registrant in so doing. Thank you.

>> GREG SHATAN: Thank you Kavouss. Fazaneh please go ahead.

>> FARZANEH BADI: Thank you Greg so the document that Kavouss is referring is a blog I wrote in January. There's nothing wrong in introducing the block to me, I wrote it. So you can call it IGT blog or Farzaneh Badi blog. Not blog written in January I need acknowledgment for written the blog that's one thing. Not to distract us from the other issue.

When I looked at in my research I welcomed at other registrants terms and conditions and tried the look at whether the non U.S. based ones actually have like OFAC's term like paragraph in there. Terms and condition I came up across like two. That read that this could be simple because they copy paste and American registrars terms and conditions. It has been seen before. They might not apply it to the registrants. They might not confiscate the OFAC's the countries that are subject to OFAC domain name. But it's exist in their terms and condition with no reason whatsoever.

Because I also Sam said it was because only merely because after contract with ICANN they do not have to follow OFAC.

So we have to find out the reason and I think instead of like finding out the reason, we could just come up with this solution that I think these also like worded it and put it forward. That I think it's in the document as well that registrars because of their solely because of their contract with ICANN do not have to follow OFAC. That said. So I think that would be a solution just as we are not so ICANN is not enforcing anything and not providing legal advice but just

saying by just merely having this contract with me, you are not obliged to follow OFAC. Then we don't have to go through like which registrars do these things or if they complicate domain or not. That's it.

>> GREG SHATAN: Thank you Farzi.

Do we have any other comments on that? And before I make any closing remarks?

First I would just say in direct response, on the last couple of interventions, that this is definitely something that we can flesh out in this draft as it turns into a second draft. How far we can go in mandating actions by registrars, you know something we need to be mindful of. But and it's unclear whether and why these actions might be taken. But for instance, is it possible that if the U.S. based registry is involved it needs to be, you know if it is a second level domain under a TLD of a U.S. based registry that there's an issue separate from the registrars relationship to ICANN. I don't know exactly.

Something to be explored perhaps.

But I think generally we can try to flesh these things out. Ultimately we will need to come to a common agreement of and I'll avoid using any terms of art with regard to how decisions are made. But we will need to decide what this how this reads and how far it goes. And we will do that over the course of the very next very few weeks obviously.

So, you know that's something that needs to be made in that regard. And not to shy away from saying things we can say but also things that are how far we can go. If Kavouss please go ahead.

Kavouss we are not hearing you yet.

>> KAVOUSS ARASTEH: I have to put an acknowledgment in part of the document we first quoted. I quoted them and put them in inverted comma and italics and mentioned clearly that's a quotation. I have not written that. If and by doing a quotations and inverted comma, but never the less I should of at the end say that acknowledgment for the part which we are quote from others document. So that is something. But please look at to the document. You see the inverted comma and inverted and see that this part has been quoted and I put quote, unquote. But that is situation. But acknowledgment formal was not put and here by I formally acknowledge that very valuable and good essential work that has been done by the author, author authors of those documents and I thank you. Thank you.

>> GREG SHATAN: Thank you Kavouss for that clarification. And it was understood that things were quoted from another source. The issue is we need to reveal our sources. And cite them so we can know what where they are coming from. So that a note in the chat. Right thanks author's name is Farzaneh last name probably Badii. Thank you for clarifying that. So I see no further hands. It's now 10:15 so we are in over time. Rather than resorting to penalty kicks I think it's time to call the meeting to a close. First, just in terms of next steps, we will look for further comments on the list about the list that occupied the first half of this meeting. The overall sensitive issues. And, also, for further comments on this OFAC recommendation, which will be posted as a Google Doc. Both will be Google Docs.

And next week we will be preparing to discuss the issue of jurisdiction. As expressed or not expressed in contracts and related to arbitration and the like.

So I'd like to thank you all for your participation. And indulgence and please let's keep up the good work on the list and continue to respond to each other's suggestions. So we can try to determine which ones will in fact be adopted by the group.

Thank you and goodbye all you may stop the recording. Bye.