
CCWG-JURISDICTION SUBGROUP

Wednesday, September 27, 2017 - 19:00 to 20:30

>> GREG SHATAN: Hi this is Greg Shatan why don't we get started. It's 3 minutes after the hour.

[This meeting is now being recorded]

Hello and welcome to the latest meeting of the jurisdiction subgroup of ECWG Work Stream 2.

And on September 22nd at 1900 hours. I've just the agenda recently. If apologies for sending something that was not the agenda that was not the agenda in this the email last night. We have the agenda now, let us review it briefly. Then get into discussion of things. I'd like to suggest two things. One I'd like to switch number 4 and number 5. So that we discuss applicable law before OFAC.

In part because I need to make sure I circulate the recirculate the right version of the OFAC document. Unfortunately the rest of life intruded and I was unable to recirculate the documents for one last time.

To review the agenda first after the administration we will have applicable law and choice of venue recommendation. Followed by completing discussion of the OFAC recommendation. Much then, if time permits, we will review the proposed issues list to see what is left that we have not dealt with yet.

And, also, review schedule and timeline, finally we will have AOB. And I'd like to suggest that if there's any need to have discussions of process rather than substance, we could have them at that time. Since we have a lot of substance on the list. And it's important that we complete our discussions of substance.

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So, any questions on the review of the agenda?

I'm not seeing any hands.

First let me remind all of you this meeting is for 90 minutes. And that our subsequent meetings will be 90 minutes much hopefully this will allow us to work through as much as we can of our workload and get something out to the list.

So, let's just see, first if there's any changes to statements of interest.

>> THOMAS RICKERT: Greg this is [indiscernible] speaking unfortunately I'm not in the Adobe so I can't raise my hand. I'm on the audio bridge participating I'm not able to join the AC room and I might be disconnected because I have to jump on a train soon. Add me to the roll call.

>> GREG SHATAN: Absolutely. Aside from Thomas is there anyone else who is audio participant only?

I see none. I note a partial apology from Avri in the sense she has a meeting on the hour. So she will miss our extended time. Fully understood and thank you for letting us know Avri. I see no phone number participants. So we can get directly into the applicable law and choice of venue recommendation. This was circulated yesterday for some of you today early today for others.

And I've just recirculated in the last few minutes, a slightly revised draft of this document. So if we can get that up on the screen that would be helpful.

If staff can confirm they received the latest version that was attached.

>> BRENDA BREWER: Yeah I got it. I'm uploading -- one minute Greg. Thank you.

>> GREG SHATAN: No problem, take your time.

Great, thank you. We have the document up now.

First I'd like to thank Raphael and Jorge for all of their contributions to this draft of the document. And would just ask that we start taking a look at it.

Jorge when Raphael first put this document together, it was a skeleton if you will. So a lot of things have been added in the last week or so. And you know thus basically all of the almost appears as suggested text.

Just to follow along since this does not have does not indicate who made what suggestions, on the first page, the red is from Raphael and the blue is from me.

And then, the purple I believe it is Jorge starting on the second page. Of course we hope we get much more in the way of contributions to the document unless the three of us somehow together have managed to do a spectacular job. But nonetheless it is a collaborative document. And it is nonetheless in Google. It's a snapshot of where it stands now.

Given that we have not spent much time looking at it and many people a may not have looked at it, let's do an actual read of this. I hope that makes sense.

It's actually not that long. But I think everyone needs to know what it says.

So it begins with the background section.

In keeping with its stated mandate. There's a footnote this subgroup has considered how ICANN's jurisdiction related choices in the registry agreement here after RA as well as registrar accreditations here after RAA may have influence on accountability. The footnote states in quotes from the work stream 1 report in this point the main takes need to be investigated in work stream 2 remain the ICANN's jurisdiction on operation and policies mechanisms is primarily to the process for the settlement of disputes within ICANN involving the choice of jurisdiction and applicable laws and not necessarily the where ICANN is incorporated.

By the way, please interrupt me if any hands stay up for too long. I'm switching between screens. Any comments on this first paragraph and footnote?

Please do mute if you are fought speaking and especially if you are typing.

Next paragraph three such jurisdiction related choices have retain the attention of the members of the subgroup. Namely the absence of the choice of law provision registry and venue in registry agreements.

I'll pause briefly to see if there's any remarks.

I'll try the read a little slower.

Both the RA if someone could stop typing or put themselves on mute. Your choice.

Both the RA and the RAA are standard form contracts. Which do not give rise to negotiation between ICANN and contracted party. With some exceptions made when the contracted party is a intra governmental organization or governmental entity. The contents of the contracts are

now determined through an amendment procedure detailed in the agreement for example see article 7.6 of the RA.

I'll stop here. And ask, those more familiar with the process of the RA and RAA, is it accurate to say that it does not give rise to negotiation between ICANN and the contracted party? I know there's at least the option, I believe, for registry applicant to engage in negotiations. Rather than taking the agreement as is. I'm not sure how often that was exercised. It seems it wasn't very often if at all. But I want to make sure we state this accurately.

If nobody has a view on this, on the call, or the experience to talk about it, I'll highlight this to list just the make sure we state this accurately.

Especially since we are talking about the something that effects the contracted parties a lot. I really want the make sure that this particular that this recommendation is accurate.

Where it's talking about the past facts about which there can be accuracy.

Moving on. Through its discussion, the subgroup has identified three pre separate issues which appeared to influence ICANN's accountability these are listed below. 1, choice of law provision and registry agreement. ICANN's registry agreement doesn't contain the choice of law provision. The governing law for RA is the undetermined until a judge or arbitrator takes decisions on the matter in the context of the litigation. It should say ail make the change.

Irk can's registrar does not contain choice of law row vision. As in RA the governing law for RAA isn't determined until the judge takes the matter in context of litigation or arbitration.

Any comments? So far so good. If I don't see your hand, please let me know.

So we just read paragraphs 1 and 2 under the issues section.

We will move on to paragraph 3. Choice of venue provision in registry agreements.

Disputes arising in the context of ICANN's registry agreement are to be resolved under binding arbitration pursuant to ICC rules. Moreover, the RA contains a general which is of screen would you provision. The word general was inserted, I believe by Jorge. And unfortunately Jorge is unable to join us on this call because he's traveling. I know he would prefer to be with us but he can't be.

What does general add, I'm only aware of choice of venue provisions.

Of being, I don't know if there are different types of them.

Just confirm that we are implying something about the choice of venue provision without knowing what it is.

We will keep this the document if anyone has any comments on it, on the call, hopefully can have some comments on the list.

So this takes us to the paragraph or the section which is the really the rest of the document as it now stands. Entitled possible solutions.

At this point I would like the step back from the text. As there are I have two ways to look at this next section choice of law provision and registry agreements.

As originally drafted, it was essentially a list, a more detailed list of the possible option without really any discussion of the tendencies of the group to favor an option or how the options might possibly be viewed as an integrated whole in some fashion.

The suggestion made by Jorge which is in purple is that it appears to him or at least suggested that the text instead read, that a we have reached a common ground or and that common ground we'll get to that in a few minutes or in a minute. I want to make sure that even though Jorge is not on call that we give due consideration to his suggestion on how this would read as well as the possibility of leaving it for the moment as an open set of options. What is really more important than discussing the text here is where we stand to options which I've listed out in the agenda.

So let's briefly look at this and perhaps we will switch back to the agenda for a minute. Sorry staff, to make you play document juggling.

But if we do look at the agenda we can take a look at the over all list here of the possible options. And we can have a discussion of whether one of these options is gaining traction, as Thomas would say. And how may be some more detail about the options. So, based on what I have read and seen on the list, I believe there are essentially these 5 options, which probably some of them probably need more definition or more specific so we can understand what they are.

But the first one I think needs no additional explanation, it's the status quo. The current situation of no choice of law.

The second is the menu option, where there are a number of choices and there are a number of possibilities about how the menu could operate. I think the one version that I've seen on the list is basically may be 1 per region. So, 1 for Latin America and 1 more North America, one for Europe, etc. And that you can choose any of the above, the one for your region or one for another region, but that choice would be limited to the menu of a few suggestions that that would dictate the choice of law for the entire agreement.

Another way of looking at the menu possibilities is to have a much more comprehensive and flexible menu of options that could include the jurisdictions of every country in the world or just the option of choosing your home jurisdiction or one of the region options but not just choosing any jurisdiction you feel like.

Another question is whether the menu option may allow for the so called carve out options. In other words, to make part of the contract have one type of applicable law and the rest of the contract have a second. So we will need to define the menu option a little more specifically because they could cover a number of different iterations and we need to be clear in our recommendation what we are recommending perform.

The third option is what is being called the California option. Maybe it could also be called the fixed choice of law option. The California where California and the U.S. law would be expressly listed as the applicable law for the contract. The governing law of all registry agreements.

Without any option of at all no option of no choice of law or perhaps, again, we can be flexible in talk about this you could have an option of choosing California law or no law but those are your only two choices.

Next is the carve out option. The idea here is that probably it may make sense in this view to have a one choice of law for all pro installations would benefit from certainty and consistency of approach and then have more the menu option for the remaining parts of the agreement that may have more to do with local law compliance and or local business issues of the registry.

So, that's that option.

Then the final option that I've name because it wasn't named on the list, the bee spoke option much bespoke. Where the options is the registry agreement has the jurisdiction law of the sorry that's Christmas here.

It's the registry agreement has the registry choice of law as it's choice of law.

So those are the options.

As Jorge has noted there's a good amount of discussion about the menu options. And some amount of traction given to it.

But, you know it's not clear to me where exactly we stand on it. I think it stands we now need to discuss this further and hopefully arrive at a common ground or a broad area of broad support.

For one of these options.

And that is a key part of how our task today and on the list. So that we more important in the sense than the text. Because the text will be dictated by our choices ultimately. We have hands from Kavouss followed by Tijani were.

>> KAVOUSS ARASTEH: Hello to everybody. May you please kindly a little bit explore this bespoke options. What you said is exactly what is written here. It's possible once again to describe the 5th one thank you very much.

>> GREG SHATAN: Thank you Kavouss. It's probably better said on the agenda than I managed to say it. While I was distracted. The governing law of the registry is the governing law of the document. So if you have a Dutch registry for instance, Dutch law will be the governing law of the document. If you have a south African registry the south African law is the governing law of the document. So on. There's also an option perhaps of one men two item menu which is to choose your own governing law or California law.

That's the bespoke option. Thank you for that question Kavouss. Tijani go ahead.

>> TIJANI BEN JEMAA: Thank you very much Greg. I want to ask about the first option, the status quo. You wrote here no choice of law. Means that now when you have a registry for example a contract risk agreement against ICANN under registry with there is a problem what is the law applied for the conflict?

Is jurisdiction applied for the or what is the law applies for the conflict.

>> GREG SHATAN: So I can probably speak to that, there's a lengthy discussion in one of our earlier documents and anyone that would like to come in on this as well. What point what you get to if you are in litigation or arbitration, then the law of the venue has a will have a conflict of laws provision in it. And provisions of laws statutes provide the make for choosing which law applies to a given contract. There's a it's a bit complicated and there's a good discussion of it in one of our earlier documents. But so I don't go into the details but the basics are

there's a road map for the judge or arbitrator to apply that will then result in a choice of law decision being made by the Court almost always may be always. This is based on briefs from the parties and either the parties may agree on a choice of law for the Court if it's one of the Court's choices or they may contest a choice of law and a choice will be made based on the briefing and arguments of the parties as well as on the statutes.

If it's a matter of interpreting a contract just between the parties, or without any kind of litigation or arbitration context, then in a sense it's an open discussion of the discussion I think would still go back to a conflict of laws analysis. But instead of the Court doing it, the parties having the discussion would discuss among themselves what they thought was the appropriate choice of law for the contracts.

So it's while it may be indeterminate once it's actually discussed there's really unlimited number of options based on the facts of surrounding the contract. And the parties.

I hope that helps Tijani.

>> TIJANI BEN JEMAA: Thank you.

>> GREG SHATAN: So what I'd like to do is open the floor, hopefully to discussion of these different options. To see if we have some traction or tendency or for that matter any concerns or options or for that matter any questions or the like for any of these choices.

Kavouss I see your hand is up again. Please go ahead.

>> KAVOUSS ARASTEH: Yes, I think for the time being you just describe the scope of each of these options and I believe that this stage we are not going to opt for one or the other unless

you advise to the contrary. This is the stage we want to understand the 5 options which probably explain and literally in the text unless you want to go further and reach a choice. This is not an issue thank you.

>> GREG SHATAN: Thank you Kavouss. We have had some time to consider these options. They have been discussed in one way or another on the list for a number of weeks if not a number of months. So, I'm hopeful that we have some basis for discussion of the options. I'm sure its premature to make a decision on this call unless there was some sort of overwhelming majority view. But I hope we can still have a discussion about it if anyone has any opinion. I'll leave the mic open to others.

>> THOMAS RICKERT: Greg this is Thomas can I get in the queue please.

>> GREG SHATAN: You are in the queue.

>> THOMAS RICKERT: This is me in capacity I'm been implicating a conflict that caused a menu item for many years. IE offering at least one jurisdiction per world region and I think this concept has that beauty of giving many of the contracted parties a legal concept in their contract which they are used to or where at least they are used to the legal tradition. And the region that I'm coming from, IE Europe, I think that this concept would work quite nicely. Because what I've been facing with several clients but this one in discussions with other contracted parties that they struggle with U.S. faced contracts only. And there are actually some clauses that would potentially be the declared void by courts in Europe and some of these provisions leave the contracted party with the bulk of the risk going along with the contract. Even if ICANN is doing something wrong.

So I think that you know having a menu option is something that would probably be fair. If but let me also acknowledge it's not a perfect solution because it doesn't equally say that all contracted parties. Thanks so much.

>> GREG SHATAN: Thank you Thomas that's very helpful. I see again hands from Kavouss and Tijani. I think that's the proper order. Kavouss please go ahead.

>> KAVOUSS ARASTEH: Yes I have no difficulty with what Thomas mentioned but in some area, this one regional option would create some difficulty. Look at the Asia Pacific or about 78 to 79 country asks states easy. And the spaces of the situation that in these countries are not as simple as the North America or as search as in I would say Western Europe. So I don't think that we could say it's worked for every area. It may be work for Europe or maybe work for North America. I don't know about Latin America. But Asian Pacific it's very, very difficult.

Very complex.

Thank you.

>> GREG SHATAN: Thank you Kavouss that's a good point. That's exactly why we are having this discussion, to see what issues there might be. And where we want to go with this menu and the different possible options.

Thank you Kavouss. Tijani please go ahead.

>> TIJANI BEN JEMAA: Thank you very much. Kavouss spoke my mind. If you see the island Pacific region, the law of China is absolutely different from the law of Australia. And absolutely

different from the law of the gulf of the gulf. So that when jurisdiction or one law Parisian will certainly not solve the problem.

So, perhaps we can use the menu option but not by one by region. We have to find other distribution.

But, what about the 5th option, which is bespoke. I think it would be best because it would be the law of the registry and in this case, nobody would complain. They will have their own law applied because what they are saying now, why we are using the American law or Californian law, when it is not always conform and it cannot be in conformity with our jurisdiction, our law.

So I think that option 5 is perhaps the best to solve all of those problems. Thank you.

>> GREG SHATAN: Thank you Tijani. I think I see in the chat unfortunately David McAuley is only able to participate by chat. And has said a couple of things. I'll read them out I think they are germane to your comment Tijani.

I'm not prepared to choose yet said David McAuley. The recent discussion about this on list seemed bit unsettled and the list just now strikes me as crisp. Now with this list of options I want to check with colleagues prior to stating a preference.

David, goes on to say one problem with bespoke ICANN may have to track 190 to 200 law and come up with very different interpretations.

With the ICANN consistency dealing with one country's law for what is intended to be a common contract and where the provisions are not intended to be highly negotiated, has a certain appeal. I could see also why each individual strig would like to have the law of their

own Korea ply. But of course there's two parties to every contract. And we need to take both into account. And the issues raised by the different e various different options.

So, Kavouss is that a new hand?

>> KAVOUSS ARASTEH: Yes new things. I could say that perhaps apart from the safest school in California, perhaps a combination of any of the three may work. For instance, the regional menu regional if it works for example Europe and other areas the problem those that have difficulty may take the 5th options combined with any other options according to the circumstances of the situation. That may help.

Thank you.

>> GREG SHATAN: Thank you Kavouss. So I think it seems like we have some options for ways to look at this. For instance, and we could combine these options.

For instance, have an option that allowed for the choice of the 3 first items you could choose or negotiate to choose with ICANN. No choice of law, California law, or one of the menu options. And recognizing that certain regions having the menu be a choice be one for that entire region may raise issues. At the same time the question becomes when do you where do you draw the line? I'm sure that Vietnamese law is different from Thai law and so on and so forth.

You know at least to some extent. So, then we are in a sense we are back to the bespoke option which could allow a choice of no choice of law or California as well as the personal, the law of the registry.

There's also related question about whether this is the choice of the registry or is this a negotiation between the registry and ICANN. And should any of these be negotiated? Perhaps they could be a simple choice of no law or California law or the regional law and any possibility of a negotiation for the law of this specific question. I throw that out as a suggestion.

So is there anything else on this particular option?

Or list of options. I know there's been a fair amount of discussion of the menu option. It may be too early to tell if there's a tendency of the group the think one way. But let us at least think about trying to get to the point where we are thinking one way.

We can common ground this as Jorge put it. Tijani I see your hand is up again. Please go ahead.

>> GREG SHATAN: Tijani I'm not hearing you yet.

Tijani, I'm not hearing you yet.

Perhaps we are having some connectivity connect issues for Tijani.

So it's probably best to continue this discussion of the options on the menu or on the list. Unless anyone else would like to weigh in. I see a number of remarks in the chat as well.

That should be noted as this goes forward.

I'm not sure if we don't have a decision on this, may not make sense to go back to the recommendation.

Because a lot of the recommend age will change until we have a decision. Why don't we go back for a few minutes to the recommendation? We will just take a look at it.

We have also questioned if you will down at the bottom, D, which is how should this recommendation be framed?

Because we are not talking about we are talking about a contract that traditionally or the method of developing it has not been has been for it to be developed by ICANN with over time what appears to me to be greater and greater participation by the contracted parties in the process. And then ultimately a public comment on the on the draft documents and then there's the amendment process as was remarked by Raphael in the document.

But since this is a the question is what how can we can we just tell ICANN to change the contract? I don't believe that the amendment process would allow that.

I don't know that the CCWG can override the amendment process. I think we need to look carefully at the amendment process. I would really appreciate hearing from registries and registrars on this because I don't believe it's that simple as just telling ICANN to make the contract one way and the contract then becomes the way we tell them to.

So we need to consider how our recreation is going to look whatever our recommendation is going to be unless of course we recommend the status quo. In which case, nothing has to be done.

Any thoughts or questions on these? Bernie I see your hand is up.

>> Thank you Greg, can you hear me?

>> GREG SHATAN: Yes I hear you now.

>> BERNARD TURCOTTE: Thank you I'll try to channel Sam who is at a long week at a board retreat and unfortunately I don't think made it to call. I think you presented it well, that this group cannot really make a recommendation to change the RA and the RAA. It just wouldn't work under the bylaws the way they are written. There's no way this group can say ICANN change this. If it's written this way, ICANN will probably be put in the position to note being any public comments that it has to reject this kind of recommendation. I think the best the group can do, given the realities of the processes for changing the RA and the RAA, is provide their suggestions for what they think work the best and then ICANN and the registry parties have to consider that. Yes, I see Steve saying we can recommend revisions to the RA

[the host has left the meeting to speak to meeting support]

>> BERNARD TURCOTTE: We cannot make this unilaterally. So if that is the case, then maybe the recommendation we are making could be more general. I'm just offering this up as a possible way in the context of considering the time we have left to get recommendations to the plenary. Thank you.

>> GREG SHATAN: Thank you Bernie. Any other questions on this? Or I see Steve is in the chat. I don't know Steve Steven has now agreed with Bernie. So I don't need to look for a different don't need the look for a different view.

Raphael yell agrees. David McAuley agrees. Agreed with Bernie.

Any disagreement or other views on this point?

I'm not seeing any. So why don't we we should proceed along those lines when we frame whatever our recommendation is.

And not over step.

So anything else on this particular point of framing?

Hearing none, let's look briefly at the second page.

What we have now you know is a bit of a combination of different drafts. From the initial draft plus Raphael's additional contributions plus Jorge's additional contributions a few comments from me as well.

So we have discussion of the different options. Some of them more discussion of advantages or of others and really not too much discussion of disadvantages. We have had some discussion of that on the list. It would be good for people to contribute to this document. Ideally in Google.

Or, if not by marking up the Word document in your Word processing tool of choice and sending it back to the list or each just describing it to the list but please describe it as specifically as possible so the change can be made by anybody reading it. With a minimum of interpretation.

It's become very difficult to take highly conceptual suggestions and make them into changes with the approval of the person originally making the suggestion.

In other words, a little less work for me if the suggestion is totally flushed out.

As I said before, I don't think it makes sense to read this here. I'll just remarking over all that we have these options here. And the suggestion that there is a common ground that hopefully we can reach a common ground. I don't know what it will be yet.

Let's turn briefly to page 3. Again just the look over what we have here.

The choice of law provisions for RAA is very sketchy. If I just filled in a sentence there so there would be some. I don't know if it's the same as the RA suggestion. So registrars would be very helpful in those that observe registrars would be very helpful if it makes sense to have a different discussions there or just kind if a me to discussion on that point. Raphael, I see your hand is up please go ahead.

Rob yes everyone, can you hear me?

>> GREG SHATAN: Yes I hear you well. Really just a clarification about the RAA and this recommendation I put it there the original document one of the place holders than anything. As I said in the initial proposal for my idea was exclude the RAA from this and make it as narrow as possible because I think the narrower it is the easier it is for us to work the final recommendation. However if anyone feels like jumping in and adding RA to this, to the problem. One thing I noted as difference between the RA and RAA a major difference was that the RA is trying now it's to go into arbitration if there's a dispute. And this has rather big impact on the choice of law that is to be decided by the arbitrators while the RAA is mostly or can be settled in court. And when there's a court settlement, the choice of law can it still under mine the RAA but the fact it's settled in court has a different influence which is a different one from when it's settled to arbitration. That's why I wanted to make a difference. Now I put it there as a place holder but again maybe it's something that we can remove there the whole recommendation and put there to be settled. Thank you.

>> GREG SHATAN: Thank you Raphael. Let me ask you a follow up question. When it might be peck year where you have two documents, neither of which have a choice of law this them and

to suggest adding a choice of law provision to one and not the other. What's your thought on that?

>> RAPHAEL BEAUREGARD LACROIX: You're asking what if we asked we add approve the RA without improving the RAA.

>> GREG SHATAN: Correct that makes sense.

>> RAPHAEL BEAUREGARD LACROIX: I mean I don't know. I guess in the words it would improve both, but it's also a matter of bandwidth. That's why I put that as more of a place holder. Yeah, I'm sure that would be great to do both but it's more may be the reality can we do both or do we have the maybe do both. As of now I'm not sure the deadline we have may be October but if we can achieve votes maybe that would be the best of course.

>> GREG SHATAN: Thank you Raphael. I suppose one option might be to have the detailed discussion of this and recommendation which is going to be a suggestion or consideration rather than an order. Or something that will that happen because it is a proved much maybe we suggest that the same thing could be procedure with regard to the registrar accreditation agreement. But that it's less pressing given the option of litigation.

That might be one way to leave the door open to further exploration without having to kind of flesh out a whole discussion of the RAA as well. Obviously if there's if anyone has a taste for the full discussion of the RAA, and wants to draft it, they can get traction in this group, you're invited to do so. But off the top of my head that might be an elegant solution so it doesn't look like we ignored the RAA since it has a similar symptom as the RA. Obviously it's not a decision yet, it's a brainstorm at best. Maybe a brain drizzle.

But that's one way to work quickly and a bit elegantly on that open question.

Seeing no massive objections I'll take that as at least activity for suggestion. Last but not least on this we have no recommendation section much we have come to no conclusion which is not surprising. But we do need to start fleshing that out. So at least for the RA we have a number of options we need to whittle those down into a recommendation.

I guess I should just mention for interest choice of venue provision registry agreement there's also a discussion there that you should all read. Which also suggests the maliciously named venue menu which could again follow a number of the thoughts about venue less important in the sense the ICC arbitration rules shall predominate wherever you are. But there is the law of the underlying jurisdiction does have effect on the arbitration.

So if we could read that fully, it would be helpful and particularly try to pay attention to the options and approach a common ground.

I think with that unless there's anything further on this recreation we should turn to OFAC recommendations since we reached 57 minutes into the call. So ivory circulated what we have looked at last time. It has not really changed so there's nothing so you should all be familiar with it. But I sent it around one last time.

So that is being put up in the window even as we speak.

Just so you know what you're looking at when you look at it. By in large the document is fairly stable or settled. What we have to discuss on this call are a number of suggestions made by Kavouss for further changes to the document. As well there are a couple of small changes that

I made in response to Kavouss' changes, my changes are highlighted in yellow so they can be distinguished from the track changes which are the suggestions from Kavouss.

So we should probably turn to the first of those changes. One second here. It's not so easy to see the changes because they are underlined in a very dark color.

We will get there. Footnote 5 on page 3 that footnote is withdrawn I apologize for not getting it out of this draft beforehand.

Let us now turn to the first change.

In the document.

Which is in the issues and recommendations list on page 1 this is just a clue you all to actually the bottom of page 2. What is going on here in this document?

Sorry there appears to be technical difficulties with this document. Bear with me for a moment.

Staff, when I open the document in my PDF viewer, I see changes that are not showing up in the PDF in the window.

For instance, after OFAC registrars there should be insert policy of not doing business with and it goes on from there.

>> BRENDA BREWER: I just Greg this is Brenda I just got your new document. So let me upload the one you just sent.

>> GREG SHATAN: Okay good. Thank you. That explains.

>> BRENDA BREWER: You're welcome. I just got it like less than 80 seconds ago.

>> GREG SHATAN: I understand.

>> BRENDA BREWER: Thank you.

>> GREG SHATAN: ICANN mail seems to be slower than regular mail. Hopefully that's a sign of exceptional security provisions being take own by ICANN. We can at least hope that's the case.

Apologize again for the technical difficulties here.

Please stand by.

>> BRENDA BREWER: How does this one look Greg?

>> GREG SHATAN: Let me see.

Much better. This is the right document. This should be the document in all of your inboxes and matches the last document I circulated with the changes from Kavouss.

So again, the first change is at the bottom of page 2 it's just a heading since this is just a list of issues and recommendations. This is a new suggested issue.

The first significant change comes up on page 5.

Middle of this page there's several reports in the media. I open up the there's expressions of opposition on the list but I think we need to give this an airing here in the call as well. So I ask for anybody to speak up on this particular insertion.

Or should say suggested insertion.

>> BERNARD TURCOTTE: Greg if you're speaking we are not hearing you. There's no hands up currently.

>> GREG SHATAN: Thank you. Sorry I was speaking to the mute button. We were having a great conversation.

As Bernie says there's no hands. I'm not seeing any support for adding this to the list. We can I wanted to note that the registrars that I mentioned in the second paragraph here are both U.S. registrars. So given there's been a good deal of Steve DelBianco your hand is up. Steve go ahead.

>> STEVE DELBIANCO: Greg, a lot of us were making the transition to the second 30 minutes. So for instance I had to go cancel something so I could stay on another 30. I would ask forgiveness for the others. Greg can I ask you to articulate one more time the rationale for retaining the provisions. I think it would elicit more reaction from those on the call if you understand the benefits you had in mind when you put the benefits in there. Thank you.

>> GREG SHATAN: Thank you I think u I think we need to add that asset of Kavouss. So Kavouss, if you want to talk about this section it would be very helpful. Kavouss please go ahead.

>> BERNARD TURCOTTE: Kavouss if you are speaking we are not hearing you.

>> GREG SHATAN: We are still not hearing Kavouss unfortunately.

>> KAVOUSS ARASTEH: Yes I said do you hear me please?

>> GREG SHATAN: Yes now we hear you.

>> KAVOUSS ARASTEH: I asked you, can you please kindly indicate what is the changes that you refer to. I don't see any draft changes in this document. The blue part or which color which page please.

>> GREG SHATAN: We are on page 5 in the milling of the page. Blue the blue.

>> KAVOUSS ARASTEH: Page 5.

Page 3, 4 and 5. Yes.

>> GREG SHATAN: So Steve's question is what is the benefit or reason for inserting this into the recreation that we have here.

>> KAVOUSS ARASTEH: Yeah first of all these do not come from me. This is what is in the documents I see several two or three weeks. The portion that has changes was not this. This two examples was given by someone else and that is that was in the documents. Two or three weeks ago. It was 13th of September, 16th of September. So on. Is in not the part that I have added.

>> GREG SHATAN: Sorry Kavouss that's not accurate. This is this was inserted based on your changes submitted just before last week's call. It was not in the document before then.

You submitted it as a single block of text at then of the general license recommendation much since it did not relate to the general license I tried my best to put it where it seemed to make sense in the document but this is your suggestion.

>> KAVOUSS ARASTEH: Could you please show the document that I send you that has this portion?

For this is example of to examine this to example is not mine. If my example was another one. With this did but not this one. These two were not my example. This is not my example. It was in document before. I have not proposed that.

>> GREG SHATAN: Well if there's no support for this. The and it's not your proposal I think we should take it out.

I'm not sure how it got in the document if it didn't come from your suggestions. I have to go back to the list and look for the first time this came up.

But.

>> KAVOUSS ARASTEH: Excuse me. Are you talking of my recent suggestion? Or talking of suggestion of several weeks ago? Which one you are talking.

>> GREG SHATAN: Your recent suggestion that came in just before the last call.

The call in last week.

>> KAVOUSS ARASTEH: The last week, my suggestion was the case that I reported to you registrar has denied to get into the discussion of negotiation with the registrant recently in a particular or specific country. That was what I had about it. This was already the document and it was already agreed. I don't know why it is coming in the blue form or in division mark. It was in the initial document several weeks. The item was not these two. It was the third report of the media.

[indiscernible] not these two. These two is not something I propose last week. Last week was another case that I have added to these two that you have not [indiscernible] I have no problem with these two.

>> GREG SHATAN: Yes well I've gone back and looked at the history of this. And this was in the you proposed a single paragraph at the end of the general license recommendation. These were two sentences in that paragraph. And I moved them into the section from that paragraph. That was the first time they appeared in document.

I request you show the document that you are have from the 13th of September not this one. In the 13th of September you have these two text. My proposal was after the 18th of September not before that. This was proposed before, whether it was me or someone else it was before. The text proposed was not this one. Please go back, this is just confusing, this is situation.

>> GREG SHATAN: Meanwhile Greg, a hand up.

>> GREG SHATAN: Steve please go ahead.

>> STEVE DELBIANCO: Steve thank you Kavouss with answering the what I had out there. With that in mind remind us all with the way we developed and tested our recommendations in work stream one. 1 we did so with stress test. With stress test are hypothetical and plausible scenarios that force us to think through whether we really came up with the right recommendation. In doing the stress test we deliberately avoided actual examples of things that have happened or are happening. Because actual examples under mine you're recommendations. Let me explain why. When you put an actual example reported from the media or an actual example from your experience, everyone reading the example stops to say

well pay wait a minute that doesn't apply here or that example has some special circumstances but make it not generally applicable.

In other words, people focus on the example and whether it's an accurate representation and we all lose sight of whether we are actually solving the problem with our recommendation or whether we need to at the time our recommendation with plausible scenarios. But the use of actual companies and actual names in these reports is complete distraction and undermines the credibility of that report and undermines the ability to focus people in what the recommendations are. That was a very successful approach in work stream 1 where we came up with 40 stress tests to show our recommendations would hold up in the kind of scenarios that we received much I strongly suggest that we omit examples like this that are very contentious to whether they even apply and whether the media reports are even remotely accurate behind the registrars many I hope that's helpful, thank you Greg.

>> GREG SHATAN: Thank you Steve. I mentioned that none of us perhaps with the exception of who put this here has seen those media reports so really couldn't in good faith cite to them and this section here is a non U.S. registrars and the two examples are both U.S. registrars. So they would seem to be in opposite as well. In had the meantime, I found and will send to the list the document I was referring to Kavouss. You sent it to me September 18th. You said dear Greg I have sent you an edited file as attached and sent 3 times this needs to be discussed and regards Kavouss. It was sent to the list with a host of CCs.

And it has the single paragraph at the end of the general license recommendation and it contains these two sentences which I said I moved to this section since they were not part of the general license discussion as far as I could tell.

So I can send that to the list but if everybody has it on the list already, it was sent September 18th, 2:26 p.m. my time. Which would be 18:26 p.m. in UTC.

So we have any further comments on this? Kavouss sips your hand.

>> KAVOUSS ARASTEH: Yes I have further comment. Greg, the situation is a part mix up here. What I sent you on 18th of September after you send the document saying this is what was discussed, I added the third example. In the recommendation 'reference is made to the non U.S. based non U.S. are national registrar and the text here is a preamble of those which currently exist in the recommendation.

So the gentleman spoke before me he said that it is undermining the recommendation if we give any example. My question is that without ream bell how can you have recommendation. You have recommendation based on preamble and preamble is examples. When you add the third example that I have provided is another issue. I have provided example of this. But these two was already by someone else. Very, very old one I would say two weeks, three weeks ago. So the question is, is not the to the question is the discussion of giving an example of the media under mine the recommendation. That's the issue we have to discuss. In my view does not. It enforces the recommendation.

Saying that the recommendation is not based on theory, recommendation based on practice. Recommendation based on report. So I cannot agree with the gentleman saying that giving examples would undermine the recommendations.

If you want to provide recommendations without examples, I have no problem. Just in the recommendation you the explain the case of registrar non U.S. based registrar or non U.S.

national who have already taken out the domain name of the resistant if you want to go without any introductory part introduction. That's another issue.

Thank you.

>> GREG SHATAN: Thank you okay it seems there's no support for retaining the blue language in the middle of 5 so we will take it out of the draft and let's move on to the next change.

Next I think is what Kavouss is talking about which was submitted more recently, most recently is this resell owe matter. Where here's a registrar indicated that they have chosen not to do business with resellers who carry Iranian passports.

Their indication is this is a business decision. I would like to see if there's any support for putting this into the document.

As I've said, I've seen some opposition to this before.

Kavouss please go ahead.

>> KAVOUSS ARASTEH: Yes I think in the meeting that I see most of the people are not favoring the real situation that prevent Iranian reseller to have access to this because of the matter of the policy of the registrar. I don't know how you could say that, that there's no support. It was a case, what do you expect from some of the distinguished colleagues that they don't want any reference of this, they are happy with the situation. The more pressure to some national the better for some other people. Why do you expect any. So this is a case and we want to include that.

Thank you.

>> GREG SHATAN: Thank you Kavouss. I think we need to keep in mind this is a recommendation relating to OFAC and the effect ICANN jurisdiction and the specifically the effect of OFAC and every other point talks to issues that are raised by OFAC or where OFAC is expressly involved. Here we have no connection to OFAC. I don't think anybody is saying this is not an issue. Just that this is not an issue that fits into this recommendation because this recommendation relates to OFAC.

I see a suggestion, Kavouss I don't know if that's a new hand please go ahead.

>> KAVOUSS ARASTEH: You said that this doesn't have any relation with OFAC but presumably the action by your registrar was as result of having any doubt or fear or something that maybe it will be subject to the OFAC regulation. If he wanted to be, I would say extremely two distances of that. Why you do the same thing. So we kept all of the discussions in. So if there was not OFAC what is what was the reason the registrar having already domain name given to the people they would know that. And they have now a case of 10,000 domain name has been withdrawn or taken out. Because of the decision of registrar.

And presumably because of the OFAC. In directly but not directly. If it is not OFAC under what provisions registrar have taken this action. Does registrar have the total authority to say that I don't want to negotiate with anybody because I have decided registrar as an agreement. And they have to allow the people to use this domain name.

10,000 has been taken from one area totally in the last few months. So why, if it is not OFAC, what is it?

Indirectly it's OFAC. So if knots mention it is not. The text I propose to you in the recommendation that the group did not find any relation of this with OFAC however they found that there should be a way to address the matter.

This is a preamble in the recommendation I have not asked anything about OFAC. I said that the group did not find any relation that OFAC applied to this. If therefore the group recommended that ICANN examine the matter and find a way, whether there is any provisions in the registrar agreement to deny negotiations with any requester or any reason. Or if they are silent we have to add that one so they do not do that.

If you look in this the text I send to you I did not put anything in the recommendation about that. I said that the group did not find any relation between this and OFAC. That is more than sufficient if you say in the recommendation part. That there's no relation.

>> GREG SHATAN: Since this is the OFAC recommendation it seems this doesn't belong here. If we found no relationship to OFAC.

I see that Thomas has made a suggestion in the chat. Says "why don't we make a reference to the examples on this call include that those are covered in general nature in the recommendation already. And that the group has analyzed the cases to establish that the concerns have been adequately covered."

Thomas I don't know if you can hear me, but is your suggestion that this reference be made in the record of this call? Or that it go into the document?

I think you may be so Thomas said in the call in the transcript.

Okay so I think that we certainly can note that we have looked at the case that's cited here which is reseller declining to do business with a single potential reseller. Then there's what is related to us just on this call and also I think on our list in the last couple of days that reseller was also serving as a registrar to a number of Resello to a number of Iranian nationals then refused to do business with them. Which is not in our document at all but which is of course what Kavouss has just shared with us.

Was also the note from Thomas that what has been shared by Farzaneh on the list which is part of our document here does deal with the excessive application of OFAC which is the portion of the document that relates to mistaken political of OFAC by registrars who believe that merely because they have an RAA with ICANN that somehow brings them into a compliance problem with OFAC.

So I would suggest is we do make a specific note that in the transcript and in this record that we have examined the issues raised by Kavouss and we understand the value of these concerns. That these concerns have been adequately covered in general. In the document without the additional suggested changes being added. And that we will suffice to note that these have been considered and that we believe that the underlying issues a relating to OFAC or mistaken presumption of OFAC are dealt with in the document.

>> KAVOUSS ARASTEH: Greg allow me to speak.

>> GREG SHATAN: Yes please.

>> KAVOUSS ARASTEH: What I said that you confirmed that this was a miss application or misinterpretation of the OFAC. By the registrar. Why not we at least mention that somewhere in the report?

If you believe everybody believes yeah that this I have given you a compilation of all views that OFAC does not apply to this case, so why not you mention that group consider or concluded or whatever that there's no relation with the OFAC in this case and it may have arisen from the misinterpretation or miss application of the registrar of the OFAC from this case. Why not we can explain that. I don't want anything more than that.

>> GREG SHATAN: I think Kavouss the problem is no one I guess you do believe that this might relate to a misinterpretation of OFAC but there's no evidence and no belief by anyone else that they could say that Resello's decision had anything do with OFAC. So there seems to be no support for putting that in the document. On top of that there's Steve's point that mentioning specific examples is very troublesome and particularly one here where at best we are making a presumption cut out any evidence in front of us. If we were to put this into the document. That's why the suggestion is we have dealt with it generally without mentioning any examples and we should leave it at that.

>> KAVOUSS ARASTEH: Greg if there's any fear of any of you that you don't want to make reference to any one that you don't wish to mention that's another case. And I don't think that's why we may start exclusion that not mentioning this what happened do we think there's some objection against the group that if the name is there?

>> GREG SHATAN: No I think there's just no support for adding this Kavouss. I don't think there's any concerns about adding it other than there's no basis to add it to this

recommendation much because there's no connection to OFAC which is the subject of this recommendation.

What we can do, I had hoped to submit this for the next plenary for what is the what is the deadline for the next plenary?

>> BERNARD TURCOTTE: The deadline for the next plenary, the next guaranteed plenary, the deadline is 11 October text must be in. Text that is not in by 11 October, can possibly not make it through two readings, cannot be accepted for public consideration and therefore knows recommendations cannot be in the final report.

>> GREG SHATAN: So aside from there's no plenary next week then? Or are we

>> BERNARD TURCOTTE: We have two plenaries that are optional. And we will make the decision on those after the call, the second half of the plenary call tomorrow.

>> GREG SHATAN: Okay. Well, if we do have those plenaries and we could get this one into reading and that one that would be good. Otherwise clearly the October 11th is basically the last chance for any of our recommendations to be made here. I'll suggest the following: While it would be good to get this suggestion in front of the group, we can take a final decision as on whether any of this should be in here. And get it out. But if there's no guarantee plenaries until the 11th we can take a little more time to come to a final decision on this. But we cannot spend too much time to this because we have other recommendations to consider.

>> KAVOUSS ARASTEH: Yes I understood we want to have added notes to the recommendation to the plenary. Do that. But also take this off modern chat.

>> GREG SHATAN: I did not suggest that. But thanks Kavouss.

The.

>> KAVOUSS ARASTEH: You did not suggest put it in the edited notes what are you putting in the note? That point. Did I miss understood you.

>> GREG SHATAN: I never said that.

>> KAVOUSS ARASTEH: What you want to do please.

>> GREG SHATAN: What I would like to do is remove all of the rather not take any of the suggested text that is in track changes in this document and send that to the plenary as a recommendation of that group.

Kavouss I think you're the only one that believes the recommendation should contain any of these text.

So, if you would like the maintain that, you can have a minority report. And submit this as a minority report to the group. We can take another day or two and try to come to a final decision on this or you can withdraw your request to put these in. But right now we have one person supporting putting these in. And that to my mind means there's consensus that they should not go in. So, I'm giving you every chance I can but at this point there's no support to put any of this in. So I can't see any reason it should go in.

>> KAVOUSS ARASTEH: This proposal had support before but we are not on the call unfortunately. Support for this.

>> GREG SHATAN: I've seen support for trying to come to some sort of bilateral or compromise but no support for actually the recommendation but just trying to find a compromise but no compromise was suggested by anyone else and no support for the actual recommendation was actually mentioned by someone else.

>> KAVOUSS ARASTEH: Please look for a compromise and find a compromise.

>> GREG SHATAN: I see no reason for compromise where there's con silence this doesn't belong in the document. We have noted that we have looked at these, we have noted that in the transcript of this call. But there doesn't seem to be any support for submitting the document with the inclusion of any of this text.

So ...

>> Are you on the phone? Most of the call is in Spanish.

>> GREG SHATAN: You seem to be in a different call.

>> GREG SHATAN: Thomas I see Thomas saying why can't we proceed as I suggested. I made the note in the transcript as I tried to state as clearly as possible. And that we will remove the text or not have this text in the document itself.

I will send that suggestion to the list so those that are not on the list can take that.

Anybody feels like they have they want to send that portion of the transcript to the plenary we can consider doing that.

But, there just doesn't seem to be support. For this being part of our recommendation.

As Bernie notes we are now at 4 minutes past the hour.

So, that is how we will proceed. I will send this out to the list. As soon as I see the raw transcript we will excerpt the portion and take it out to the list. For consideration and basically ratification of the decision that these would not appear in the text.

So, with that, I think we adjourn the call. And I thank you all for your participation and I look forward to our next call and to hopefully robust activity on the list. And in our second recommendation document. Which we have discussed today.

So thank you all, the call is adjourned and we can stop this recording. Thank you.