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CCWG-JURISDICTION SUBGROUP MEETING

Wednesday, October 4, 2017 - 13:00 to 14:30

>> GREG SHATAN: Hi, this is Greg Shatan. We will be getting started in just a minute.

>> GREG SHATAN: Hi, this is Greg Shatan, again. Why don't we get started? Let's start the recording, please.

[This meeting is now being recorded]

>> GREG SHATAN: Good morning, good afternoon, good evening and welcome to CCWG Accountability Work Stream 2, Jurisdiction Subgroup, meeting number 49, I believe it is, not 48, October 4th at 13:00 UTC.

Let's briefly review our agenda. After the administrative minute we will complete our discussion of the OFAC recommendation and spend the bulk of our time on the applicable law and choice of venue recommendation, which some of you have been working on all week. Hopefully more of you have looked at it during the week since it's always available on Google Drive Docs. And time permitting, we will review our proposed issues list and our and what's left of our timeline. And after that, any other business, if there is any other business.

So with that, let's take care of the administration. First does anybody have a change to their statement of interest? Seeing none, let's move on. Do we have any audio only participants? I hear none as well. Has Kavouss Arasteh's dial out successfully been completed? Kavouss?

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Well, hopefully that dial out will be completed quite shortly. I see a note from David McAuley that he is the phone number 4154. It looks like he has been converted in the participants list.

We note apologies from Raphael Beauregard LaCrouix and I believe there were apologies from Jorge Villa, they were sent to me and we will fill in the list and make sure they are of record.

With that, let's move on to the discussion of the OFAC recommendation, if we could put that up, please, the proposed final version. Thank you.

Thank you, staff. So this is the OFAC recommendation that we have been looking at for some weeks now. We've had an extended discussion of the possibility of adding certain additional suggested suggestions to it and those were circulated one last time a couple days, a few days before this meeting and based on the activity on the list and in our prior meeting, it appears to me that these additional suggestions have not gained traction.

There were a couple of suggestions based on some of these proposals that were added to the final recommendation. The last sentence, which was seen last week in suggest mode and now has been accepted, and the addition of "at the earliest possible time" on the fourth fifth lines of the final recommendation.

So we have when I sent this around you will have seen a note that reflects a discussion we had on last week's call and it's my assumption that we will include this note when we send it up to the Plenary. So let me read that note out since I didn't prepare a PDF of it.

During the preparation of this recommendation, the Subgroup considered an e mail where Registrar declined to do business a potential reseller based on the Registrar's policy of not doing business with people with Iranian passports. The Subgroup also learned that this

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Registrar, which had been registering domains for a number of Iranian nationals refused to continue to do business with them. The Subgroup has concluded that to the extent these instances are related to OFAC, the concerns raised by these instances are adequately covered in the recommendation already, without any additional changes. This is not, in anyway, a comment on the validity of these particular concerns. The Subgroup will consider creating stress tests based on these scenarios.

Are there any questions or comments about this note?

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

>> KAVOUSS ARASTEH: Yes, good afternoon, good morning, good evening. No, Greg, I think I don't want to reopen the discussion, but please read the chat. I have mentioned what has happened at the call, at the end of the call, and I have also mentioned that the very general scenario that could be further developed and it could be further proceeded accordingly. I don't want to take it verbally, it is in the chat, you kindly may look at that or read it yourself and that is the idea. I think that I was alone at that meeting, there were no other people supporting the other people having sympathy, but you said it was sympathy for the resolution of the problem, but not the resolution of the issue. I do not want to re-discuss that, but this is my minimum requirement that I request you and distinguished colleagues to kindly look at the matter with, I will say, favorable consideration and to allow that [indiscernible] be provided. I am sure that our main architecture of the [indiscernible] in the Work Stream 1, Mr. Steve DelBianco could be so kind and could make the first draft as he has done it for 40 or so [indiscernible], has considerable experience, come tense and the background on this. And I thank you very much.

>> GREG SHATAN: Thank you, Kavouss. And thank you for your note in the chat. I just want to add something to the remarks in the chat, where it was said that media reports of actual companies is the wrong way to raise my concern, that's not actually what was said. We asked for the media reports to be sent to the group and I asked for that more than once and no media reports were ever sent to the group. So we have no way to rely on media reports that we don't have. If there are reports in the media, that can be sent and reviewed by the group. That would be a different situation, but that's not the situation that we have.

And then there were real there were examples given, but they both involved U.S. Registrars who do have to follow OFAC obligations, so we took into consideration what we could in terms of having reasonable evidence in front of us. So I'm all in favor of fact based inquiry, but we need the facts in front of us. I hope that's acceptable as a remark.

Kavouss?

>> KAVOUSS ARASTEH: May I comment, please? Do you allow me to comment further?

>> GREG SHATAN: Yes.

>> KAVOUSS ARASTEH: What I said in the chat is not my wording, it was wording by [indiscernible], but I changed the subject, instead of "I" that means he, I put in "was" and I put it in the passive voice, so it was said in the chat and it was sent to me in a message. So and on and forth. Whether it was what you said, but in fact it was such at the meeting as such, that does not have any importance. The importance is that you kindly said that, yes, it should be [indiscernible] without any relation to the OFAC and some other people also mentioned that, yes, we should consider to see to what extent we could cover that point. And Steve mentioned

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that, yes, a scenario for [indiscernible] and, in fact, the wording of the scenario is his wording, but not my wording. I just make it sort of modification to what he sent to me and what he said in the chat and put that, so take it as such. The importance is to have a [indiscernible] and to proceed with that and the scenario is just the first thing that he put in the chat and he sent it to me and I modified it slightly, linguistically to replace "I" with Steve, with "me" that means Kavouss to make it valid for the chat. But, in fact, it is not my wording, it is the wording of Steve.

>> GREG SHATAN: Thank you, Kavouss. My misunderstanding. I do recall that Steve remarked in our last meeting that using individual examples with the names of individual companies is not the best way to give examples for purposes of policy, development, the facts can be disputed, others can feel singled out when others have the same issue and so forth. So you were, in fact, citing to we are not talking about the fact that we didn't see the media reports, but rather bringing back and reminding us of Steve's thought that a stress test framed as a hypothetical is a better way to draw attention to a scenario or situation than to use specific examples, isolated anecdotes as such. So I agree with you and I agree with Steve on that and I think that is, in fact, what we did in Work Stream 1 and should be the way forward here as well. So I appreciate that. And thank you, Kavouss, for helping me to understand and to remind me of the content of those remarks.

Let us know see if we have any questions, comments, or the like with regard to the OFAC recommendation in front of us.

Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, Greg, I'm sorry, I don't want to further comment on what you [indiscernible], I'm just questioning, not questioning, asking that what you also indicate as you

put in the note that the meeting agreed to proceed with the draft of [indiscernible] and perhaps I don't want to ask Steve because I don't want to bother him, but Steve was kindly invited to help as he has told at the meeting that he would help in order to prepare this. If you could kindly [indiscernible] in one way or the other in the recording of this meeting, it would be very much appreciated. Thank you.

>> GREG SHATAN: Thank you, Kavouss. The group has not discussed the stress test. We do not have time to develop a stress test before the draft goes up. I think that the stress test is something we would consider separately as a project, if possible. We'll have to figure out how that works in terms of the process. But I'd like to ask if there is anybody who is opposed to creating one or more stress tests on hypotheticals related to OFAC? Assuming there is a way to get stress tests into the final report. If there's anybody opposed, please give me a red X. I see no red X's, so I would say that the group is favorable toward creating a stress test, if that can be done in terms of process.

I will note as an aside that the bylaw that creates Work Stream 2 states that we should follow the same route as Work Stream 1 and that did involve stress tests. I'll also note that none of the reports so far have had stress tests, so perhaps a subsequent decision has been taken that stress tests will not be relied on to the extent they were in Work Stream 1, but that's above my pay grade as a mere Rapporteur of a Subgroup.

Let us Kavouss, is that a new hand? I'll assume that's an old hand, Kavouss.

Phil Corwin, please go ahead.

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>> Thank you, Greg. I typed a sentence into the chat, the next to the last sentence says the ultimate goal is enabling transaction between ICANN and residents of sanction countries to be [indiscernible] without minute friction. My question is what the word "friction" encompasses. Is that business organizations or other entities that are not human beings? Thank you.

>> GREG SHATAN: Thank you, Phil, that's a good question and I think a good catch. The intent certainly is to embrace business organizations and other entities, so I think we can change the word "resident" to "entities" without considering this anything other than a final document.

>> Okay, thanks for that clarification.

>> GREG SHATAN: Thank you.

So I would like to see if there's any opposition to considering this a final recommendation that can be sent up to the Plenary for consideration. If there is any opposition, please put a red X. If you are on audio, please indicate your concern on audio. I see no red X's, therefore, we can consider this a proposal approved by this meeting. And can be sent to the Plenary as indicated, we will do so with the note in e mail, that was in the e mail attached, and we will change the word "residents" to "entities" so it is clear we are not just dealing with natural persons.

I see a couple of questions in the chat. Just checking, Chris Wilson, do we have a sense of cost ICANN will incur when seeking OFAC licenses for a specific registry or Registrar? We do not, however, it has been ICANN's practice and custom to seek such a license each time that a registry or Registrar applicant has come to ICANN to contract to take on that role. And that they have not refused to do so. While we don't have a sense of the cost, I note that it is an online application process, which is not to say that it's as easy as signing up for a contest on the

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Internet, but that it is a relatively constrained process and is, at least in my opinion, kind of a minimum necessary for moving forward.

I see after that a note from Thiago Jardim. Greg, I need to consider this further before acquiescing to it.

>> I have a question.

>> GREG SHATAN: One second please. I see a note asking 5838 to identify themselves. They have not done so yet. If they could do so, please.

Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, yes, as you know, Greg, I am not as quick as many of you to replace "resident" by "entity" I have no major problem, but I request you to kindly maintain resident in round brackets, deleted with the [indiscernible] mark in order I [indiscernible] to see whether the placement of "resident" with "entity" will have impact. I did not comment on the whole recommendation because it was not prepared by me, but by others, but immediately at the meeting changing "resident" to "entity" I need to further clarify I have no major observation, but, please, I would not like to lose track of that for the time being if I found any problems or some other people found any problems. Is it possible, please?

>> GREG SHATAN: I see a suggestion from Thiago it should be specified that the entities are residing in the given location. Why don't I think that's a suggestion, we could say "residents or other entities residing in the given location" and thus retaining the word "residents" as well and make sure we have covered as broadly as possible the coverage that we have. So hopefully that will be acceptable.

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Let's see, I think I saw a hand up from Bernie Turcotte. Bernie, please go ahead.

>> BERNARD TURCOTTE: Thank you, Greg. Can you hear me?

>> GREG SHATAN: We hear you well. Please go ahead.

>> BERNARD TURCOTTE: Thank you. Just a timing reminder here, folks. The meeting, there's a Plenary next week on the 11th and that's already pretty much full up and then the last Plenary before Abergavenny is Wednesday October 18th. Per our procedures, for the Plenary on October 18th, the documents have to be in October 11th, which is basically one week from today. And that has to be a final draft report so it can hopefully go through two readings without a hiccup and then can go to public consultation. And you will remember the Co Chairs have been very specific since the month of May, if a full report is not handed in for that 18 October Plenary by the 11th, it cannot be included in the final recommendations because it will not have time to go through the full process. So I would encourage you to think strategically here if we're going to produce a very short draft report, given we have limited recommendations, that we do have to meet those timelines. Thank you.

>> GREG SHATAN: Thank you, Bernie. Important points. I think we need to take one let me ask you a follow up question then and maybe we have, I think, two options, neither of them ideal. One is to submit the OFAC recommendation now for next week's Plenary and then submit the remaining what seems to be the only remaining recommendation we'll complete, which is the choice of law and venue recommendation for the following week. Or, we could submit them as a package for the following week, after having considered that recommendation in today's meeting and next week's meeting of this group and create a basic wrapper around it so that it's framed as our report. So I would just like your thoughts, Bernie, on whether we

should submit this piece meal. And as you know, the upcoming meeting already seems to be full or filling up. Or submit as much as submit what becomes our report in one piece for the following week. Bernie, please go ahead.

>> BERNARD TURCOTTE: Thank you, Greg. It's really the group's decision, but at this point, next week's meeting was mostly to complete carry over material from the 28th of September meeting, where modifications were requested to staff accountability Ombudsman complete the reading of the HR. So I think that's going to be quite full. My recommendation to you, as I say it's the group's decision, I would reach as many conclusions as I can for recommendations and I would submit them as a package. Also, given you're not going to get as the Americans say, too many kicks at the can on this one, I would keep it as lean and clean as possible.

A final note, I will remind everyone as per Sam Eisner's comment on the choice of law thing is that really only ICANN and the GNSO can initiate changes to the registry and Registrar contracts and so I would not get into too many details on that recommendation. And if there is support for a general approach, probably that would be best given the timing considerations and the approval process for those changes as built into the bylaws. Thank you.

>> GREG SHATAN: Thank you, Bernie. And I think that provides a good segue after taking, Kavouss, to move on to the next recommendation to which you refer.

I see we have Kavouss. Please go ahead.

>> KAVOUSS ARASTEH: Yes, while I tend to agree to great extent to what Bernie said, but, but, I think it is not a direct relation between the choice of law and venue and OFAC and I think that may take more time, even as a team we may not finish that one, so I suggest that we submit. I

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am not happy with OFAC, but I can't do more than I can do. I think we should submit OFAC to the 11th of October meeting and so on and so forth. I don't see any problem because this [indiscernible] procedures was agreed overall the in Work Stream 2. I don't think we should have a package, otherwise you would put all of the recommendations of the entire Work Stream 2 together and send it as a package. I don't see any direct relation with the choice of law and venue. It's entirely different issues that came during the discussion, deliberations, and so on, so I suggest that if everybody agrees, just if and only if everybody agrees, you proceed with the text provided by Thiago instead of replacing resident or providing by entity, put the way Thiago mentioned and send a clean recommendation with the note you have prepared for the 11th of October. I'm sure that will go to immediate [indiscernible] because I don't see much discussion could happen because what has been discussed has already been discussed during this [indiscernible] meeting we had. So I'm in favor of dissociating this from the choice of law and venue, if possible. Thank you.

>> GREG SHATAN: Thank you, Kavouss. I'll note that all of the other subgroups have submitted final reports or draft reports with all of their recommendations in one package. So we would be following the process of Work Stream 2 by submitting one report up to the Plenary, rather than submitting pieces. And I think there is, obviously, a relationship between the two since they both relate to the question of ICANN's jurisdiction and its relationship to enhancing ICANN's accountability. That is, after all, what this group was constituted to deal with. However, let's get a sense of the group. As Kavouss notes, it is a group decision.

If you want to submit the OFAC recommendation alone for next week's Plenary, please put a rabbit up in the chat. And if you wish to submit a complete report for the Plenary of the 18th, which needs to be due on the 11th, to submit a complete report, please give me a turtle.

Abstentions will be counted as turtles.

Thiago, please go ahead.

>> THIAGO JARDIM: Thank you, Greg. Hello, everyone, this is Thiago speaking for the record. Before I think we undertake a before we try to see what's the position of the Subgroup on this matter, could you just clarify about the requirement? You mentioned other subgroups are submitting a whole report for the Plenary and then you suggested that we should be doing like they are doing, these other groups, is there any mandatory requirement that requires us to follow the course proposed by Bernie instead of following Kavouss's suggestion? I would be tempted to agree with Kavouss. And I think it would be good and in line with the method that we have been following, the Subgroup, to submit just the OFAC recommendation at this point since we somewhat agreed to submit proposals [indiscernible] issues as they appeared unless we were able to agree on specific issues, meaning that issue that is were not discussed and covered and remain outstanding would eventually be discussed, if time allowed. So I think it would be [indiscernible] that approach to submit all the finalized recommendations that we have at this point and then try to move forward and discuss more and more issues. So I don't think it would can a good idea to wait to have a package and submit the whole package. Thank you.

>> [Indiscernible] speaking. Sorry for interrupting.

>> GREG SHATAN: Go ahead.

>> Just wanted to briefly let you know I have joined the call and I am on audio only. If you go to the [indiscernible] I am very much in favor of submitting individual recommendations to the

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Plenary so that they have time to digest the recommendations from the subteam. I will go back on mute now. I should also add I will only be able to stay on this call for roughly half an hour.

>> GREG SHATAN: Thank you, Thomas. So given that remark from our Co Chair, which would encourage us to submit the OFAC recommendation for next week, subject to clarifying the term "residents" in one place, we can go ahead and do that. And then submit everything else we want considered by the Plenary on the 11th, that is basically in one week's time. After that, the work of this group in producing recommendations to be made part of the final report of the CCWG Work Stream 2 will be over. So in response to Thiago, there really is no additional time for discussing other recommendations, even if we submit the OFAC recommendation today, tomorrow, whenever I think the due date is, 23:59 today for next week's Plenary, by one week from today, we'll need to submit all remaining materials to the group. And so we have the recommendation that will be in front of us momentarily and a basic wrapper of a final report and that would be about it, unless we are somehow rapidly able to consider and submit any further issues and recommendations from our issues list.

So, again, let me see if there are rabbits or turtles. Rabbits to submit OFAC only. Turtles to submit the whole package in a week. Abstentions will not be counted as rabbits or turtles, but as abstentions.

In the absence of any remarks to the contrary and given the remarks of both Kavouss and Thomas and Thiago's rabbit, I will indicate that we will submit the OFAC recommendation on its own for the upcoming Plenary, where there will hopefully be time to discuss it. Or at the very least, it will give the Plenary individuals more time to digest it and to discuss it on the list and,

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thus, allowing for maximum time to review as opposed to the minimum time by submitting it just at the deadline.

So, I see in this case that we will submit this.

I see a remark from Thiago Jardim, fair enough, important issues will be left out and we may not be in a position to support the final product. I assume "we" is Brazil. And we will have to dissociate ourselves from it in order to show the jurisdictional problem remains uninvolved.

There are a number of jurisdictional problems, I'm not sure which one you would say enhances ICANN's accountability, but that is a subject where there is endless discussion and, unfortunately, our group is not endless.

So with that, I will solve that one issue of the word "resident" submit this up to the Plenary, and see what the comments are.

And now let us work on the recommendation in front of us to move it through. So if we could put the choice of law recommendation up, staff, that would be helpful.

And that wraps up our discussion of the OFAC recommendation.

Here is the applicable law and choice of venue recommendation. This was seen last week in the group with a lot of things in suggest mode. There's been considerable discussion over the last week on the call and a number of changes made as well. What I did for this meeting was to put into accept mode, in other words, not in color, everything that seemed to be the end result of the discussions so far. And then I added some additional suggestions, which are in suggest

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mode, to clarify the remarks in here and to also just edit for clarity and style. There's also one set of suggested stuff in the choice of venue section that may need to be further resolved.

So hopefully you have been reading along with this as it's been created. I don't think we need to do a full verbatim reading unless someone wants to put us through that, we only have 45 minutes left on this call, but I will see if there's any if there are any objections or concerns with the background section, the six paragraphs, noting this will be submitted a week from today, there's still more time to wordsmith this document. And most importantly, to resolve our key recommendation regarding choice of law in registry agreements, as well as the choice of venue, which I don't mean to say is less important, it's perhaps just less involved.

So the background section really just provides largely an introduction. And I think notably and following on Bernie's remarks about how the RA and RAA are, in fact, unchanged, I'll see I will read the ultimate paragraph.

Rather, this recommendation should be understood as suggesting possible changes to the aforementioned contracts. Changes which as stated above would increase ICANN's accountability.

So that, in general terms, is the framing of this recommendation and we'll need to make sure that it's expressed that way throughout. So there may be some editorial revisions.

The issues section just states briefly each of the three issues and describes them briefly.

Are there any remarks on any of these three issues paragraphs?

I had one question myself on the third issue, choice of venue provisions and registry agreements. There was a suggestion made by Jorge in the second sentence to add the word "general." I'm not sure what a general choice of venue is especially since we don't at any point distinguish between the types of venue provisions in our report. So I'm concerned that adding that would actually confuse.

Unfortunately, Jorge is not on the call, but I will direct him to this and see if he can answer.

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

>> KAVOUSS ARASTEH: Yes. My question, perhaps it goes to Jorge who is not in the call, but I don't know whether he meant by a general choice if you use the term or word "general" in a different way saying that the RA generally contains a choice of venue. Because I don't know what does it mean, general choice. Choice is choice. Particular choice, general choice, I don't know, maybe he has a more comprehensive view than me, but I don't know what really he meant by general as an adjective or preword for choice. Perhaps he wanted to say that the RA general contain a choice of venue. Just for clarification. If you have another view, please kindly clarify whether the term "general" is the correct term before choice or we put it in a different context, different way.

>> GREG SHATAN: Thank you, Kavouss. To be honest, it's a mystery to me. My speculation is that it is referring, without going the whole way, to a general choice of law provision that covers the entirety of the document, or rather a choice of venue provision, or rather a specific choice of venue provision that would relate only to certain provisions of the agreement or which would require specific, multiple specific venue provisions. So that, for instance, anything related to payment was dealt with in court, but anything else was done through arbitration, or

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something like that. In other words, more of a what we have been calling the carved out approach. That's the only thing I could think it means, but we don't suggest anything specific like that about venue, so it seems to me it confuses the issue to put it there.

I see Thiago has some remarks in the chat which I'll read out and see what other people think about this.

Thiago says, I would ask the deletion of the first six words of the first paragraph of the document, including its footnote. There is no need to restate the document that is referred to in footnote one, which is the Work Stream 1 report. Nor is it necessary for the purpose of this recommendation for any of us to venture into an interpretation about the mandates of the Subgroup in relation to matters that go beyond the recommendation at hand. Further, if the Subgroup submits this recommendation, it stands to reason that this is within the mandate of the Subgroup.

I see a response from David McAuley, I agree to delete the first six words. Do not see this effort as aimed at ICANN's overall accountability.

David, just to clarify, would you also remove the footnote? I assume the answer is yes, but just want to see if that's the case.

In any case, I see David says, yes.

I see a hand from Kavouss. Kavouss, please go ahead.

>> KAVOUSS ARASTEH: No, that is an old hand, sorry. That is an old hand. I'm sorry.

>> GREG SHATAN: No problem.

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Does anybody else have any opinions, suggestions in response to Thiago's suggestion to delete the first six words and the footnote?

I'll ask once again if the person with phone number 5838 could identify themselves orally or in the chat, please. We don't like to have mystery guests.

I see no hands on this point. What I suggest we do then is in the Google Doc, I don't know, Thiago, if you have access to the Google Doc, if you could strike that out as a suggestion. Or if you don't have access, I'm happy to do so, enter the Google Doc and enter the suggestion and then put that out to the list when we put out the next version shortly after this call. Thiago, I'll be happy to make that suggested change.

Okay, so I think that takes us with that one suggested change and the discussion of "general" which I'm going to suggest that we strike out, but make sure that Jorge gets an opportunity to respond on that in the next draft. So I think that actually brings us now to the possible solutions section. And we have the choice of law provision in registry agreements.

The conversation has further ah, David McAuley, your hand is up, please go ahead.

>> DAVID MCAULEY: Greg, thanks, David McAuley for the transcript.

I wanted to make a general comment in this area, but it sounds to me like you were going to make a preface to this, so I'm happy to wait until you're done.

>> GREG SHATAN: Certainly. What I said was while this conversation is still open and resolution hasn't been finalized that it does appear to be a reasonably strong base of support coalescing for recommending consideration of the menu approach. Again, this would be framed as a

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suggestion and not something that ICANN must adopt if the Board approves it, but a suggestion. And that said, the menu report, the menu recommendation can be very high level or have some suggestions, but I think that trying to cement at this point what exactly the menu would be would both be going into implementation and also provide another opportunity for endless debate when we have an end coming very shortly.

With that as an opening remark on this section, I'll turn back to David McAuley. Please go ahead.

>> DAVID MCAULEY: Thanks, Greg. David McAuley here again for the transcript. I appreciate what's been said on the list and what you just said, but I'm here arguing in favor of the status quo position and it would be my hope that's what we do. With respect to the menu option, it's my belief that it's more complicated than it appears at first and that we need to, as I said on list, we need to check with those practitioner, those contract practitioner that actually live with this language day to day, ICANN legal, registries and Registrars.

I understand what you said, Greg, that we won't get into the implementation if we make a suggestion about the menu option as to what options there should be, but there will be options that are chosen if this is ever implemented. Recognizing this is just a suggestion, a suggestion from this Subgroup carries some weight and so I think it should not be made lightly.

If we did not make a suggestion in the menu option, then we would basically be at the [indiscernible] option, subjecting ICANN possibly to 190 different interpretations or so.

So my concern is that with the menu option, ICANN won't have the ability to negotiate. Right now there could be different laws governing because the governing law clause doesn't state

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what it is, but it's up to the negotiating parties and if ICANN has a particular concern, it can manage to that concern in its negotiation.

I would also mention that we have to recognize that registries, whatever boundaries we choose for the menu option, registries may have their location in area one and deal with Registrars in multiple areas. Registrars might be located in area two and deal with registries in multiple areas. The complications in the contract are sort of mind boggling. And so I think this couldn't be adopted even as a suggestion without asking for serious input. And as Bernie noted, unfortunately, we're out of time. And so I would suggest that we stick with the status quo as a consequence of that. That's basically my concern. And I did check with my colleagues, as I mentioned, and that's the way I feel.

I do think this has not been discussed for months. It has been on the list as a proposal since August and there have been some discussions, but I think it was just in last week's call that we really sort of crystallized it into the five option that is we're on the table. And so I think this is a timely discussion and, unfortunately, I think that the only available option is the status quo. Thank you.

>> GREG SHATAN: Thank you, David.

So one second here as I have some technical difficulties.

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

>> KAVOUSS ARASTEH: Yes, Greg, unfortunately, I [laughter] cannot agree with David. If the process, it's [indiscernible] seems to be complex, it doesn't mean that people should agree with something that they have expressed dissatisfaction for [indiscernible]. I think there is

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room to improve that. Finally it may go to a PDP or other process, but I think the idea seems to be [indiscernible] and I don't agree with David that it goes to 192 or 193 of the countries or [indiscernible] of the countries, I don't think that. It might have more than one, but I think a group of countries may get together to have one [indiscernible] which is applicable for this investigation and [indiscernible] go to one country law and some other sub region may go to another, so I don't think that we end up with 192 or more. You may end up more than one, but facilitate the issue and [indiscernible] out. I do not support eliminations of this menu which seems to be an interesting idea no matter who has put that on the table, Raphael or other people. I think we have to further discuss that. If we don't have time, we go into a little more in detail of that, on that idea, on the context and the options, it is interesting and needs to be further pursued. And by this occasion, I apologize, Thomas, I misunderstand you or misread his message. That I expressed my disagreement with David and I hope you would not be unfriends with me because I have not agreed with his proposal. Thank you.

>> GREG SHATAN: Thank you, Kavouss and I see Wale agreeing with your remarks.

Just to briefly respond and, of course, we must disagree without being disagreeable and it's not personal. Only whole different opinions, hopefully we come to consensus or something like it. Regardless, it may not be anyone's opinion that ends up as consensus.

Just briefly I would say that while I agree that input from registries, Registrars and others will be useful, I think the best way that we could do that is through public comment on the report. And perhaps as we did in Work Stream 1, we specifically highlight the desire for comment on this suggestion. But, of course, we hope that people comment on everything, so that may not be necessary.

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And secondly, of course this will need further review and study and that's all we're suggesting. We're not suggesting that an implementation plan be the next step, but this is a good opportunity to put this thought into the stream since, unfortunately, there is no PDP process that would be assembled to amend registry or Registrar agreements and this issue is in front of us now. And I think it has been reasonably well flushed out. And I think that with the appropriate language, which I hope I have done some work toward reaching in this section, it would make it clear that the 190 country option is not the favored option or at least that it raises concerns. Of course, I would also note that while that is a potential option or potential outcome, for better or worse, we do not have registries or Registrars from anywhere close to 190 countries and maybe not even 90 countries. But that's just an aside.

Overall, I would like to get a sense of the room as to whether we take David's suggestion and just strip this down to the status quo or perhaps just leave these as options without making any recommendation toward any approach or we continue along as we are with the menu approach being the common ground.

I see Wale has had to leave, but he has already noted his position.

So if you support David's suggestion to have no recommendation, then please give me a green check. I see two green checks and one from David, not a surprise. Thank you, David.

Now if you do not support this, please give me a red X. If you do not support limiting to the status quo option, give me a red X. I'll count Kavouss and Wale, who has had to leave, as red X's. I see additional red X's, three more red X's. I think the X's have it. And clearly based on Jorge's work in the group, I would count Jorge as a red X as well since he has contributed much

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to this section. I wouldn't want to ignore his contribution or his position. So I think the X's have it.

And I think in that fashion we have also confirmed that the menu approach will be the recommended approach recommended discussion, not a recommendation to be adopted as an activity or required action of ICANN.

Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes. If you allow me just a little bit of sharing with you my experience. It is about 22 years that I'm dealing with a similar subject that a problem has been identified and solutions were sought. And the reply to that, the first reply by some people is no change. Leave the status quo. However, the advantage of that, everything will be simpler, but now a big disadvantage that the requirement and objective under which the problem was identified is not met, but it is a big disadvantage. I don't think we can just simply ignore that. It is a major disadvantage that we [indiscernible] of this situation. And we don't know yet, so I don't think that we should abandon this good idea that might have some shortcomings, maybe some corrections, maybe some refinement, but I suggest we continue to further develop that. And one option would be no change. That would be on the table. [Indiscernible] recommendation and we go with that [indiscernible] and this is what we can do. But we could not eliminate that from the very beginning, we should maintain no change and we should go to the other options. Thank you.

>> GREG SHATAN: Thank you, Kavouss.

Please take your red X's down. I think we've made a

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>> KAVOUSS ARASTEH: No, no, no, my red is up. No, my red is up.

>> GREG SHATAN: I'm not talking to you, Kavouss, I'm talking to the people who have actually, you still have your red X up. We have finished. The X's prevailed. So let's move on the menu approach section here. This is the one that needs specific attention in this meeting given the press of time. The rest of this should be reviewed on the list.

So what we have here, and I will read a little verbatim, it has emerged from the Subgroup's discussion that aside from the status quo, and actually I would suggest removing "aside from the status quo" because I think that's confusing, there is a common ground whereby increased freedom of choice for the parties to the agreement could help registries in tailoring their agreement to their specific needs and obligations. This would, overall, result in a menu approach, whereby the laws governing the registry agreement is or are chosen at the moment of its conclusion. Such choice would be made according to a menu of possible governing laws.

There are a couple of open issues I see with this paragraph. One of them goes back to David's remarks, whether this is a choice that is made only by the registry or whether it is a negotiated option, negotiated between ICANN and the registry or whether there are some we suggest that there be criteria for the choice if it's not on the menu. One would hope that if ICANN approves a menu, they would be happy to accept anything on it, but we can't necessarily assume that at this point. So that is kind of a next level question that perhaps we don't resolve, but that we the question of, David, we are discussing the question of whether the menu is a choice made solely by the registry or whether it is a negotiated option or whether we would have some criteria by which a choice would be made by the registry.

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Now that can be left to implementation or at least to the further exploration of this. And perhaps the best thing to do is to note this as an issue that would need to be resolved rather than recommend a unilateral decision especially given the contracts are typically not unilateral and noting that some believe ICANN's contracts often end up being unilateral in ICANN's favor once the base registry, once the base agreement is determined. But that's getting into the weeds.

So that's one issue. And my suggestion would be to raise that as an issue and not try to resolve it, but make sure it's clear that's an issue and we haven't come down on one side or the other of that option.

Second is the remark here that the law governing laws governing the registry agreement will be chosen at the moment of the agreement's conclusion. I'm not sure why we need that level of detail, but if we get there, it would seem to me, as someone who negotiates a lot of agreements, that one would want to decide the law of the agreement early in the negotiation rather than at the end because that would influence any remaining negotiations and how the agreement will be read overall.

So my suggestion would be to remove that detail rather than get into that because it is really an implementation detail.

If there are objections to anything I'm saying, please let me know. These are not final decisions, but these are going to be edits to go into the next version of this document. So those are my thoughts on revising the first paragraph. There may be some minor wordsmithing changes here as well, but those are kind of the substantive points.

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Moving on, this is some new suggested language from me, but, again, it's only a suggestion at this point. I'll read verbatim again.

This menu needs to be defined. It may be best to leave it to ICANN, working with the gTLD registries, to define the registry option. The Subgroup discussed a number of possibilities:

The menu could be composed of one country from each ICANN Geographic Region. The menu could be composed of a small number of countries from each region. The menu could also include the stat us quo, i.e. no choice of law. The menu could also include the Registrar's Jurisdiction of Incorporation as a choice. The menu could also include the countries in which ICANN has physical locations. Conceivably, the menu could include every country in the world.

The Subgroup has not determined what the menu items should be. However, the Subgroup believes that a balance needs to be struck between the freedom to choose or at least negotiate for a particular choice of law and negative consequences from unchecked proliferation of laws to which the standard based registry agreement is subject. The proper balance is likely struck by having a relatively limited number of choices on the menu.

I'll stop there and see if there are any questions, objections, or the like on this point. I see none, obviously this document will remain open as we move along. But I've tried to strike a reasonable tone here.

David McAuley, please go ahead.

>> DAVID MCAULEY: Greg, thanks. David McAuley again for the transcript. And while I support the status quo, in as much as we're going to move forward, I would have some comments on this. The way I understand the menu option is there would be the five ICANN regions and

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presumably within those regions there would be a governing law chosen. And you're right, I think it would be implementation as to who gets to choice, that kind of thing. But this list of options ending conceivably the menu could include every country in the world, that goes beyond the menu option as I understood it when it was first proposed. And I'm sorry, I hadn't read this prior to the call. So I'm just worried that the way we're presenting the menu option, it sounds almost like it could go all the way up to the Bespoke option. So it just seems a little bit broad and I think that the complications that I was referring to earlier are thus even more complicated if we present this way. Thank you.

>> GREG SHATAN: Thank you, David. In preparing this list, I went back and reviewed the conversation on our list for the last few weeks and, I agree, the initial discussion of the menu option, the first time it was crystallized, I believe it was by Becky Burr as suggesting the regional option, but the discussion did move on and I felt it was important to document the suggestions with that were discussed within the group, while at the same time indicating some level of value judgment among the suggestions in the full paragraph following the menu.

What I would suggest both for David and everyone else is that they go to the Google Doc and put in suggested editorial changes on this point, but consistent with the common ground approach of a menu option. And if you are not able to access Google Doc, please send along a word processor document such as a Word document with suggested changes. Or if that's not available to you, just send an e mail with your suggested changes and we'll take it from there.

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

>> KAVOUSS ARASTEH: Yes, Greg. For this one, I tend to agree with David. If you butt the last bullet, conceivably the menu could include every country in the world, you already mix up the

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Bespoke option with this menu option. I suggest that you delete the last option and for the reason that it is implicitly included in the other option which is the Bespoke, that means all countries of the world could have their own law for that, which has the disadvantage that David mentioned for that. So I think if you agree and other people agree, you delete the last option you have added because you have mentioned the concept of this last bullet in the Bespoke options. Thank you.

>> GREG SHATAN: Thank you, Kavouss.

A thought then that perhaps we should eliminate the last bullet because it does seem to create a capacity for it's an edge case and it creates the capacity for pushback on the menu option overall and it's not an option that was specifically supported as part of the menu option. It is slightly different from the Bespoke option in that the Bespoke option, and perhaps that's not the best name for it, maybe it's the home country option is a better name for it, that the option is that the Registrar registry rather can choose or will get its own countries jurisdiction as the governing law, but not that it could choose any. Under the menu approach, if we had every country listed, a U.S. registry South African law if it so choose. But I think it makes sense to remove this option. Obviously it can be suggested down the line in some other form, but there's no reason to draw attention to it when it at least overlaps with the Bespoke option and is not really in the spirit of the menu option, which I think the spirit was a limited menu and not an unlimited menu. So I will take that as a suggestion and delete or indicate a suggested deletion of the final bullet. Thank you, David and Kavouss. And it's good to see that so quickly after being on different sides of an issue, you are on the same side of an issue. That is the multi stakeholder way.

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We have only ten minutes left in the call. I suggest people read the advantages and disadvantages section and see if they agree. Obviously we need to be fair in both the things we agree with and the things we don't agree with in bringing out the advantages and disadvantages.

The remainder here is really a listing of the other things considered. And then we need to take the common ground approach and essentially reiterate it in the recommendation section at the end, which now that we have a path forward, I can take a crack at essentially reiterating it there.

We need to move to the discussion of how we're going to introduce our draft report [audio feedback echoing]

Kavouss, I see your hand is up, but if you could be brief, we need to discuss our overall path forward. Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, Greg, again my experience. We have had in other [indiscernible] ICANN the issue of any options to have advantages and disadvantages. We found out or ended up that some people they like a particular option, they put many advantages to that. Some other people that dislike the option, they put many disadvantages of that. So advantage and disadvantage perhaps should be in some informative way rather than formative. It should be just [indiscernible] views were expressed about advantage and disadvantage [indiscernible] it is not meaning that the opinion of the group was this. We could put it as a view expressed by the proponent of advantage and disadvantage and put it in the status of informative rather than formative one. Because I have experience that [indiscernible] put many advantages and [indiscernible] by someone else and put many disadvantages. And finally the people selecting

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they don't take into account advantage and disadvantage because that may not end up to anything. The views may be entirely different. So I [indiscernible] your suggestion, don't delete them, maintain them by giving them some sort of either annex or reference as informative and under the title views expressed about the advantage and disadvantage of any of these options which are summarized below or attached, but not as something that the group should [indiscernible] that. Because we may have some difficulty with any wording of advantage and disadvantage. This is just by way of suggestion because of the time. But if you want to continue with that, I have no problem personally. Thank you.

>> GREG SHATAN: Thank you, Kavouss. Is there any other support for Kavouss's suggestion on revising all of the advantages and disadvantages? This will be open for discussion, of course, on the list, but we do need to complete this in one week's time, as well as completing an entire completing the wrapper, if you will.

So we do need to discuss how we will get to a final to a draft report. The suggestion is that we will have a basic report wrap around this, the recommendation we have.

I think, Bernie, if I could ask you, you've had some thoughts, I think, about how to get basically a generic report wrapping around a recommendation which we would put on the list and agree to at the next meeting. It would not be a [indiscernible] report going on at length, but enough to get us into report mode. And we would have to do that without two full readings, but we would have time on the list, plus a reading at next week's call to finish it up. So that would be my suggestion is that we would get a basic report around this, the recommendations, and submit that in one week's time, noting that we will submit the OFAC recommendation to the Plenary list today. I believe it's today as the deadline for that.

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So that will be the plan. Bernie, does that is that consistent with what you think will work from a logistical point of view? Bernie, please go ahead.

>> BERNARD TURCOTTE: Thank you, Greg. Well, it's really up to the Subgroup, but I'll just reiterate, that report of the draft recommendations has to be in 23:59 11 October if it's going to be read the October 18th Plenary. Now I'm sure if the group is okay with it, we can try and cobble something together which I think should not be overly worrisome for anyone, just stating where we started, what we went through, and where we ended up, very shortly. And then the core of the document would be the recommendations as agreed. But I think that's the best we're going to be able to do given the timing.

And, also, something to consider here is that given the global timing perspective, we do want to it's probably advantageous to have a shorter report as the Plenary will certainly have a lot of things to look at. Thank you.

>> GREG SHATAN: Thank you, Bernie. I'll note that our next Subgroup meeting is on the 11th at 19:00 UTC, so only a few hours before the deadline. So whatever we approve at that point will pretty much just get cleaned up and put to the list at that time.

So we only have a couple of minutes left. I would like to see if there are any further remarks on this point.

Kavouss, I see your hand is up. Please go ahead. Kavouss, we are not hearing you. Oh, Kavouss's hand is down. Okay, that was probably an old hand.

So I see some David's remark, some full report but not some fulsome report. Yes, it will at least look like a report, but not stray off into a lot of discussion that would mirror the

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discussions we've had for the last 48 meetings and which we know would be difficult to get closure on in a week, much less 48 meetings' worth as we've experienced.

So we hope that we can get that report out to the list as soon as possible and people can review it and comment on it.

So with this last minute, just to briefly go over the plan for the next week, the plan is that the OFAC recommendation, subject to cleaning up the one ambiguous word "resident" will be submitted to the Plenary list, along with the paragraph in the in the e mail will be the paragraph that is the e mail containing our agenda today.

Secondly, we will continue and focus on cleaning up and moving on in the choice of law recommendation. In front of us, two specific changes will be reflected. Initially as suggestions and then adopted if no objections show up. The first is to remove the six words at the beginning, plus the footnote. Second is to remove the final bullet in the menu. So those will be reflected.

I will also reflect the editorial changes discussed in my remarks regarding the menu section. That will be on the list and we will then return to it at our call next week for essentially a second reading and approval, at which time and third, at some point in the next few days, the report itself, or the wraparound of the report to go with the recommendations will be put on the list and will need your attention. That will be approved on the meeting on the 11th and that will be submitted as our report for consideration for Plenary of the 18th.

We're at 10:32, so I would ask if there are any remarks to put them to the list.

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Finally, we'll wish all the Canadians on this call a Happy Thanksgiving as Canadian Thanksgivings was or is on Monday, whose turkeys would be frozen on Thanksgiving if it was at the same time as Americas.

And with that, I ask that the recording be turned off and wish you all a good morning, good evening, and good night. Thank you.