

CCWG-Accountability Work Stream 2
Jurisdiction Meeting #50
11 October 17 @ 19:00 UTC

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>> GREG SHATAN: Good morning, good afternoon, and good evening. Welcome to Jurisdiction Subgroup Meeting Number 50 at 19:00 UTC on October 11, 2017. Let us review our agenda, it's short, but significant. First we have our administrative minutes. Followed by that we will complete our discussion of the Choice of Law and Choice of Venue recommendation. Next we will finalize the draft Subgroup report. And then there's some time for AOB. And our next meeting will be at 13:00 UTC. The note at the bottom of the page is critical, the Subgroup report including the Choice of Law and Choice of Venue recommendation and of course the OFAC recommendation must be submitted for Plenary review by 23:59 UTC today. It may not need that meeting given our submission to the Plenary, so that meeting may be cancelled between now and then, but we'll see if there's any reason to have a meeting.

And Milton asks, we have finalized the OFAC recommendation? That is correct. It is inserted into the draft Subgroup report which is essentially final as well.

Why don't we turn to our administrative minute. First I'll see if there's any changes to statements of interest. Seeing none, I'll see if we have anybody who is only on the audio bridge. I hear no one saying that they are in the audio bridge only. And I see we have no phone number only participants at this time.

So why don't we turn to the Choice of Law and Choice of Venue recommendation and let's put that up on the screen. You're also welcome to look at it in the Google Doc if you prefer or in the Word or PDF version that is were circulated as well.

So here we have it and you should is have scroll control. As noted in the transmittal e-mail by which this was sent to the group, the assumption is that each of the suggested changes will be made final unless there is opposition to those changes made, sufficient to change the document. Any other issues with the document can also be raised at this time, but you would need to have significant support to change that.

The comments are in the margins so that you can see them because some of them were made to the document recently and I wouldn't want to -- there to be any transparency issues so that you wouldn't see them in the document.

Erich, I see your hand is up. Please go ahead. Erich, we are not hearing you yet. I see Erich's hand is down.

Why don't we go through the remaining suggested changes that are open in the document. I left these open because they seemed to me to be ones that should be specifically called out for review. But stop me if I go past any point at which you would like to discuss any language in this recommendation.

First the suggestion is to delete the very beginning words in keeping with its stated mandate and the accompanying footnote which briefly attempted to summarize the group's mandate. This has been suggested for deletion and I would like to see if there's anyone opposed to that deletion. Since I see no opposition, that deletion will be made final.

Next we have an insertion in the paragraph above issues in the middle of the page, new text was suggested a couple of days ago and then revised so it now reads, it should be noted that in formulating these recommendations, the Subgroup did not consult with ICANN's contracting -- contracted parties or seek outside legal advice. I would like to see if there's any objection to this insertion. Seeing none, I will make this insertion final.

So the first page will get cleaned up and finalized.

The second page has many comments on the side, but only remaining change. The last paragraph on page 2, based on some comments over the course of the day, I changed the sentence to read, the Subgroup has not determined what the menu items should be as this is beyond the reach of the Subgroup. So I have inserted "as this is beyond the reach of the Subgroup." Are there any objections to this insertion? Hearing none, I'll make that insertion final.

Moving on to the next page, there are some suggested changes in [indiscernible], the insertion of "possible advantage" and the deletion of the example "EG personal data protection" which we just inserted today, although it was not marked as a suggested change. I think somebody went in in edit mode. In any case, I would like to see if there are any objections to these two changes.

Of course, when I'm asking for objections, if anyone wants to discuss the change, that is also open. If you need to decide whether you object or not. Hearing no objection, I'll consider those changes accepted.

The next change is in the paragraph beginning "a second disadvantage" and here I've suggested the insertion of "a significantly different RA" so it will read "a second disadvantage which is related to the first is that some registries could ultimately find themselves with a significantly different RA governing their relationship with ICANN, by virtue of mandatory [indiscernible] brought about by a different governing law." The reason for this change was just to make it clear would not be an entire different RA, but there would be changes if it were being read into the contract. Any objections to this insertion? Hearing none, we'll take that insertion as accepted and move on to the next page.

The next page has no changes noted. We'll move on to page 5. Page 5 there's one change noted at the very end of the status quo discussion that says "another disadvantage was noted in the introduction to this section, that the governing law is undetermined which creates ambiguity in interpreting the contract." I felt it was important to add this disadvantage since this is in many ways the predicate for this entire recommendation existing in the first place. Any objections to this addition? Hearing none, we'll take this as accepted.

Also, there is the deletion of a footnote, number five here, which was citing to a specific e-mail by Thomas Rickert. Since we have not generally identified any suggestions or insertions with a particular participant in the Subgroup or at a particular point at which they were inserted, this seemed to be out of character with our process and so I've deleted it. Any objections to that deletion? Hearing none, we'll take that as accepted and move on to the next page.

Page 6, on which there are no changes.

And page 7, where there are no changes. This is part of the end recommendations. Sorry for the somewhat odd spacing on this page. That will be fixed.

I see a note in the chat from Finn Petersen. Please change "however, there are several disadvantages of the menu approach" to "however, there are some disadvantages of the menu approach." Finn, can you tell me what page that is on so I can go back to that? Let's go back to page 2. Oh, page 3, yes. Thank you.

Since we list three disadvantages, one can disagree as to how many is several. I'd like to see if there are any comments on this change. Any objections to making this change? I see support from Milton Mueller. I think the change is not inaccurate, it may be more accurate than saying "several" so I see no reason. And let's take that change, so this will now read "however, there are some disadvantages of the menu approach."

Thank you for the suggestion, Finn, I think that is a better statement. And Raphael agrees. So we will take that as a change, as well as accepting all of the other changes that are in the document, and removing the marginal comments. So just want to make sure there are no objections to the document as it will stand with those changes.

David McAuley, please go ahead.

>> DAVID MCAULEY: Thank you, Greg. David McAuley for the record. First, thanks to you for all the work on this with not much time to do it.

Two, the person who were on the last call and heard my comments, I'm a strong proponent of the status quo, but I'm going to abstain when we get to moving this forward. My feelings are on the record and well-known. As I read the final draft overall report, I think that the language that deals with this area, that is that it's a suggestion and it bears study by ICANN, the GNSO and contracted parties was fair language. I just wanted to say that, my comments still stand, but I'm going to abstain and not stand in the way of this.

And thank you for the tremendous amount of work you've put on this thing. Thank you. Bye-bye.

>> GREG SHATAN: Thank you, David.

Any other comments? That's a fair position to take.

So just to confirm with the change suggested by Finn and the acceptance of the changes already marked in the document, we can state that this recommendation final, has the support of the group. Cheryl, thank you for the check mark in that -- in the chat. Thank you all for your work on this and for moving toward consensus even when consensus was not ideal, as it rarely is.

Let us now turn to the -- Thiago, I see missed the question. We went through the Choice of Law and Choice of Venue draft recommendation and the decision of the group was to approve it with the changes in the document accepted and with one change suggested by Finn Petersen made in addition on page 3 where it says "however, there are several disadvantages of the menu approach" that will instead read "however, there are some disadvantages of the menu approach." So that is approved.

Let us now move on to the draft report itself. This is coming on-screen. Let's just briefly go through on a page by page basis, although there is only one change based on some comments on the chat and by Raphael Beauregard-Lacroix in the document. So moving past, on page 1 we have the executive summary, so we'll see if there are any changes. This document has been stable for quite some time, so I'm expecting there will not be any last minute changes, but the floor is open.

Any comments or changes on page 2? Hearing none, we can move on to page 3. This is where this is one change based on Raphael's comments in the margin, I suggest the change from this list, the Subgroup prioritized in the time remaining rather than the Subgroup agreed to prioritizing. I do believe we agreed to it, it certainly was not objected to the point where we didn't go ahead, but nonetheless, we wanted to solven the language a little bit in response to Raphael's comments, which hopefully you can read. I'll read it to you, it says, "It was more something that was done quote/unquote on its own since these are the issues actively transformed into draft recommendations. Other things were untouched and so nothing happened to some extent, without the need for an agreement."

We can always review this.

Thiago, thanks for your comment. Nobody has yet endorsed the report. That's what we are doing today.

Any comments or objections to this change on page 3? Hearing none, we'll take that change as accepted. We'll move on to page 4.

This is the OFAC recommendation, which really has already -- actually, I'm sorry, this is the summary of the OFAC recommendation so this has basically been seen already and it is a trimmed down remembertion of the OFAC recommendation. So unless there are any comments on this, we can move on to the summary of the Choice of Law summary. Summary of the

recommendation which starts in the middle of the page, toward the top of page 5. So I'll stop here on page 5 and see if there are any concerns.

I'll move on to page 6 and see if there are any concerns. Hearing none, we'll move on to page 7. This is the beginning of the background section. This has also been out for quite a long time with no changes. Nonetheless, we'll stop here as we are in the process of final approval and see if there are any concerns with anything on this page. Hearing none, we'll move on to page 8.

This is just a quote from Annex 12, so no need, I think, to spend much time there.

Here we have page 9, any concerns with this page? Hearing none, let's move on to the next page, 10.

This is largely the questionnaire and description of that and also the links to the questions for ICANN legal. I don't expect there's anything controversial here, so let's move on to page 11.

Page 11 briefly touches on the ICANN legal question and answer and also on the review of litigation, and finally on the master list of proposed issues. Any concerns with this page? Seeing none -- let's see, Erich is typing. And Milton is as well.

Just to move on, the next pages are the full OFAC recommendation, which as noted, has already been approved. Erich notes that agreed to prioritizing needs to be changed, I think, to conform to the recommendation itself. That's a good point. I'll make a final check that there's any language where the summary needs to catch up with to the full recommendation. And this Subgroup agreed to prioritizing will be changed to the Subgroup prioritized, as we discussed.

As we discussed earlier on page 2, I believe, based on the suggestion by Raphael and some discussion on the list, I've suggested that where it said "the Subgroup agreed to prioritizing" it should instead say "the Subgroup prioritized." So now it says "the Subgroup prioritized" Thiago.

So I think that takes us to the end of this draft report. And I would like to see if there's any disagreement that this draft report is approved and ready to be sent with the changes noted in both places of "prioritized" rather than "agreed to prioritizing," whether there's any disagreement. Thiago, the language is will be reflected as well on the page we were just looking at.

So I would like to ask if there's any disagreement that this document is approved and with the Choice of Law added to it and ready to go to the Plenary. If there's any disagreement, please give me -- I see a red check -- red cross, rather, from Thiago. Is there any other disagreements? If you agree, might as well give me a green check, or give the group a green check since we have the red X, we might as well see the green checks. We have several green checks. And it looks like several abstentions perhaps, but we'll view that as lack of disagreement as stated in the charter. So in this case, the report is agreed, the ayes have it and the report is approved and will be finalized and put into a package, a single document, and sent to the Plenary. Also, the transmittal e-mail will include the paragraph that was sent earlier with the OFAC recommendation alone so that we preserve that record of that paragraph.

Thiago, are you suggesting that the report should not be approved and we should send nothing to the Plenary? I think the horse has left the barn. If it's not consensus, then we're not sending it.

We have either full consensus or no consensus. If we don't have full consensus, we will not have a document. And we can only have those on the call participate in the call. In any case, the decision is made, this is approved, dispense can be taken per the charter. It has been cleared this would be approved on this call or not. In any case, this needs to be submitted in roughly four hours and needs to be finalized by me in that time and I also have a job. So I agree that we have consensus. And if anybody believes that the document should be withdrawn from the Plenary, they can make that suggestion on the Plenary list, otherwise, we'll have nothing to submit.

As noted in the -- in my response, this is a consensus document, it reflects a consensus decision, it is not a record of all of the issues that may have been discussed. So that is the job of this document is to make recommendations and to provide a platform for those recommendations.

So we have followed the path and process that has been laid out and we have now taken care of approving the Subgroup report, which I will send up.

So that brings us to AOB. Please take down your checks and crosses. Let's see if we have any other business. I see no other business, so with that, I will take into account the changes suggested on the -- in this call and the approval of the changes in the document and I thank you all for your steadfast participation in this Subgroup and in the call list over the last 50 meetings. And I thank you for participating in the result. I would like to make a particular thank you to Raphael Beauregard-Lacroix who brought the second recommendation into a concrete place where I had not yet had the changes to do it. That was a valuable and a great example of self-starting as well. Appreciate all of the long discussions. This is, of course, not the end, I believe, of the discussion of these issues in the ICANN universe, but it does bring the process of our report to the Plenary for consideration, at least, to an end, subject to, of course, discussion at the Plenary over the next two readings.

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

>> THIAGO JARDIM: Thank you, Greg. Hi, everybody, this is Thiago speaking for the record. I would just like a clarification. I understand that, therefore, according to your explanation of what just happened there is consensus, but at the same time it means that there's no full consensus obviously because there was opposition, at least from me. There might be opposition from others as well. In this case, considering that there was no group consensus, we are within our right to submit a dissenting opinion, so to speak, to be attached to the report which will be sent to the Plenary. I'd like to seek some guidance in relation to that deadline as far as to attach the dissenting view to the report. Could you please give us some answer in this respect? Thank you.

>> GREG SHATAN: Well, the report is being submitted to the Plenary at 23:59 UTC today, so if it were to be part of the report as submitted, it would need to be submitted to the list at least slightly before that time since we don't want to make a late submission. Today is the final deadline for any reports to be considered, read twice, and then added to the CCWG's report, as has been explained in the Plenary by Bernie who can explain more about the overall timeline if necessary.

>> THIAGO JARDIM: If I could [indiscernible] question, is there any -- this is Thiago for the record -- is there any particular reason that requires us to submit our dissenting view before the end of today? I ask this question because if you consider that the report might have been approved just today, it would be, I think, fair enough to leave more time for those dissenters to elaborate on their views based on the decision that was just taken so they could submit it and have it attached to the report showing their disagreement. Thank you.

>> GREG SHATAN: I see a hand up from Bernie. Bernie, please go ahead.

>> BERNARD TURCOTTE: Can you hear me?

>> GREG SHATAN: Yes, Bernie, we hear you.

>> BERNARD TURCOTTE: Can you hear me, Greg? All right, thank you. I think we have been clear in the red text on the screen and it has been very clear from Greg and the Co-Chairs have been very clear in every Plenary since May that the deadline for submitting anything that is going to be considered for the final report to be in by 23:59 today.

Now this being said, in the spirit of collaboration and given we do have consensus for this document and the discussions that have taken place, I believe that the Co-Chairs would not object if the parties that wish to submit a dissenting opinion would do so by the end of the weekend, so 23:59 UTC Sunday. Would that be reasonable, Thiago?

>> GREG SHATAN: I see from the chat that Thiago has read Bernie's intervention and finds it agreeable. David notes since there seems certainty of a minority report or dissenting opinion, it seems that such report should state that such a report will be forthcoming. I think that's better left for the transmittal e-mail and that will be dually noted in the transmittal e-mail, along with the paragraph relating to the OFAC recommendation that was sent along separately with the OFAC recommendation. So that will be dually noted so that the Plenary will know to expect something from the minority report, whatever you want to call, the charter, I think, has a specific names, but we have called it different things at different points. There's a minority viewpoint in the charter.

So with that, I think we are done and we can adjourn this meeting. I think we will consider the next meeting cancelled on the 18th. I didn't think there's any need for it. So I want to thank you all, again, for your participation and for everything that you have contributed to the work of this group. I will now call this meeting adjourned. We can stop the recording. And you can have back