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## JURISDICTION SUBGROUP

Wednesday, February 21, 2018 -- 13:00-14:30

[This meeting is now being recorded]

>> GREG SHATAN: Good morning, good afternoon, and good evening. Welcome to the Jurisdiction Subgroup call for the 21st of February 2018 at 13:00 UTC. We have the agenda in front of us, which we will review. First, we have or next we have the Administrative Minutes. After that the critical item of resolving the current open items in the report and attachments have been sent around for that. After that, we'll finish the second reading of the comment tool, starting with line 9.01 and see if anything there requires any further discussion or potentially action. After that, we will discuss the timeline and method for confirming consensus on the revised Subgroup report so it can be sent up to the Plenary meeting on the 28th of February. So that is the agenda. Of course, AOB and adjourning will follow that.

And that brings us to our administrative minute. I'll ask if there are any changes to statements of interest. Seeing none, I'll ask if there are any audio only participants.

>> STEVE DELBIANCO: Greg, this is Steve DelBianco, I'm audio only on 6206.

>> KAVOUSS ARASTEH: This is Kavouss. I'm on audio only.

>> GREG SHATAN: Thank you, Steve, thank you, Kavouss. It doesn't appear we have any phone number participants, everyone is named, so that is good.

So then we can move on to the meat of our meeting. And if I could ask staff to put up the list or rather the open items. It's more than a list, it has the details as well. When needed we can turn to the draft report itself to see these changes in context, but I think it's probably better to work from the list. So the first thing up is resolving the discussion around the term "best efforts" or "reasonable best efforts." We had two calls which had somewhat different results in the last two weeks, out of which came a potential compromise/solution of which there would be a footnote and we'll see if that works. And which of the two footnote approaches will gain traction or more traction in the group. So the first alternative which is up in your Adobe Connect room has the words "reasonable best efforts" in the text, which would be a change from the draft report circulated for comment, which had "best efforts." The footnote is proposed to read as follows: The term "reasonable best efforts" means that an entity, here ICANN, must use its best efforts, except for any efforts that would be unreasonable. For example, the entity can take into account its fiscal health and its fiduciary duties, and any other relevant facts and circumstances. In some jurisdictions, this limitation is inherent in the use and meaning of the term "best efforts" and the use of "reasonable" here does not imply any additional limitations. However, in other jurisdictions, this may not be the case, and thus it is necessary to explicitly state the limitation for the benefit of those in such jurisdictions.

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The second alternative uses the text "best efforts." The footnote reads: The term "best efforts" as used throughout, should be understood to be limited by "reasonableness" meaning that an entity, here, ICANN, must use its best efforts except for efforts that would be unreasonable. For example, the entity can take into account its fiscal health and its fiduciary duties, and any other relevant facts and circumstances. In some jurisdiction, this limitation is inherent in the use and meaning of the firm. However, in other jurisdictions, this may not be the case, and thinks it is necessary to explicit state the limitations for the benefit of those in such jurisdiction.

We will open it up for discussion. I believe the meaning is clear either way.

>> Greg, this is Steve DelBianco. The first alternative is preferred, the second is acceptable, but the first alternative is preferred.

>> GREG SHATAN: Thank you, Steve. I also see in the chat David McAuley also supports the first alternative. Any other opinions, views, discussion of this point?

>> KAVOUSS ARASTEH: Yes, Greg, Kavouss has another comment to make if you allow.

>> GREG SHATAN: Yes, please go ahead.

>> KAVOUSS ARASTEH: The use of the phrase "reasonable best effort" might get you in trouble if you think it means something less than best effort because it may not, the best [indiscernible] to is to use best effort to mean no stones left unturned. And "reasonable effort" to mean that some stones reasonably left unturned. So unless you include that in the footnote, it should not be interpreted less than best effort because clear meaning in all [indiscernible] because it may be interpreted less than best effort. If that is the case, we have a problem with that. Thank you.

>> GREG SHATAN: Thank you, Kavouss. I haven't seen written interpretations like that. I think that the footnote seems to explain, at least to me, that the footnote that all stones must be turned except those that would be unreasonable to turn over.

>> KAVOUSS ARASTEH: Yes, yes, sorry. Go to Google and type "reasonable best effort" and you have this for you. It is written. It is not from me. I have not invented that. This is written. Usually you refer to the Google, you say 156 version of that, this is one version. So it is written. So unless it is in the footnote it can in no way be interpreted less than best effort. I agree with the second alternative footnote provided that you mention this, however, it should not be interpreted that to me less than best effort. Thank you.

>> GREG SHATAN: Thank you, Kavouss. Let's see if there are any other objections. Not seeing any other hands or objection. Given that the preferences so far expressed are for the first alternative and we have one objection that may be to both alternatives, I would say that we have a preference overall and the weight is going towards the first alternative.

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Thiago, I have not seen your e mail a few minutes ago. It's 8:00 in the morning here and I came into the office directly to my desk to take care of this call. So I don't know if anybody has seen your e mail. But if you have something to if you wish to object or to add something to the discussion, now would be the time to do so.

>> KAVOUSS ARASTEH: Greg? Hello?

>> GREG SHATAN: Yes.

>> KAVOUSS ARASTEH: I suggested that you add the short words that I mentioned into the footnote. However, it should not be interpreted to mean less than best effort. You put about an ability which you put in either of the alternatives that they have no problem with that, but [indiscernible] this one, it should not be interpreted less than best effort. While you said it should be reasonable because of the feasibility, because of mean other things, I agree with the footnote, but I'm kindly requesting if you could add it to the footnote. However, it should not be interpreted to mean less than best effort.

>> GREG SHATAN: Kavouss, the first sentence of both footnotes says that the entity must use its best efforts except for any efforts that would be unreasonable. To say that they must use their best efforts without any sense of what's unreasonable would be to take the whole discussion of reasonableness out of this and would create a conflict between two parts of the same footnote.

>> KAVOUSS ARASTEH: So if you take alternative one, I would suggest that you modify the word is the second line, instead of "would" "could be unreasonable", but not would be unreasonable. If you take alternative one. I don't know which alternative at the end you take, but if you take alternative one, you could kindly change "would" to "could be" unreasonable. The same thing for alternative two, also the "would." So if you change that, I would go along with either of the two alternatives, depending on the majority views. Thank you.

>> GREG SHATAN: Thank you for the suggestion, Kavouss. My understanding in the English language is that "would" is a stronger direction than "could." So it would seem that what you are suggesting seems at odds with your position.

>> KAVOUSS ARASTEH: Yes, I associate reasonableness with "could" rather than "would." Both grammatically are correct. From the condition of the section of the sentence both is okay, you could say "would" or "could." I suggest "could" instead of "would" so if you would not object. Thank you.

>> GREG SHATAN: Well, "would" is the past tense of will, which is similar to must and "could" is the past tense of can, which is similar to may. I have thought that the stronger expression would be only those that would be unreasonable. Those that could be unreasonable leaves open even a greater amount of judgment as to what might be or may be reasonable.

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Thiago, I see your hand is up. Please go ahead. Or actually, I don't see your hand, but I've been told your hand was up.

>> THIAGO JARDIM: Yes, hello, everyone. My apologies for being late and jumping in in the middle of the discussion. I just saw the two alternatives and for what it is worth now, my opinion is that the second alternative would be desirable. And I would only caution against including examples. I believe the footnote could stop at the end of the first sentence. It is not necessary to give examples. You see, the examples would, again, limit the existing leeway in the interpreted process that is acceptable when we read the "best efforts" explanation alongside with the explanation that is provided in the sentence before the examples. Thank you.

>> GREG SHATAN: Thiago, a couple of questions for you. Do you not believe that the "any other relevant facts and circumstances" leaves enough leeway for anything that would fall under the heading of reasonable versus unreasonable?

>> THIAGO JARDIM: Can you restate your question in a different way so a non native speaker can perhaps understand it best? Thank you. I'm sorry.

>> GREG SHATAN: Yes. The sentence, "while there are examples at the ending" ends with "and any other relevant fact and circumstance" which seems to leave the door open for anything else. So the examples are purely by way of example, not by limitation. So I was wondering if that second part, after the examples, took care of your concern.

>> THIAGO JARDIM: I'm sorry [laughter]. I couldn't grasp it, again.

>> GREG SHATAN: If you look at the sentence, the sentence ends with "or "and any other relevant facts and circumstances." That means the entity can take into account any other relevant facts and circumstances, along with taking into account the given examples of fiscal health and fiduciary duty.

>> THIAGO JARDIM: Yes, I see, but still we would be you see, when I say that, I think that the footnote should end at the first sentence, I meant that it should end at the word "unreasonable." So we would already be stating quite clearly that the best effort obligations means all possible efforts except those that would not be reasonable or those that would be unreasonable. I don't see the need for adding examples there because, you see, you've chosen when you drafted that footnote to flush out fiscal health and fiduciary duties as examples. Obviously there are other circumstances and facts that may be taken into account. But you see, we are venturing into a choosing process that I think is unwelcome here.

>> GREG SHATAN: How is it a choosing process if it says that "any other relevant facts and circumstances can be taken into account?"

>> KAVOUSS ARASTEH: I would like to have the floor once you are comfortable.

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>> THIAGO JARDIM: Go ahead, Kavouss.

>> GREG SHATAN: I was just trying to understand.

>> KAVOUSS ARASTEH: Yeah, I could agree with the second alternative and I would agree to retain "would" but not being convinced of what you have said, but to be more conclusive on that, if you delete the examples, I don't want any examples because there might be other examples. I have difficulty with "relevant facts" so if you [indiscernible] which you have already and [indiscernible] I could [indiscernible] the second alternative would be the [indiscernible] of "would" but not changing to "could." Thank you.

>> GREG SHATAN: Thank you, Kavouss. I see a hand from David McAuley.

>> DAVID MCAULEY: Thanks, Greg. David McAuley speaking for the record. Like Tatiana, I find this a little bit confusing. I think you and Thiago may have been reading from different footnotes, but anyway I raised my hand to say while I support number one, "reasonable best efforts" I could support either term if we went on to include a sentence describing the term pretty much as the first sentence and footnote to alternative one says or, indeed, the first sentence in footnote to alternative two. Like Avri I don't think it would be bad to put examples, but I could live with the first sentence of either of those. I think it makes sense to add some description to what we mean. Thanks very much.

>> GREG SHATAN: Thank you, David. Are there any opinions about the second sentence, pro or con, from anyone else?

Thiago, your hand is up. Please go ahead.

>> THIAGO JARDIM: Thank you, Greg. This is Thiago speaking for the record. You see, another element that adds to my opposition against including the "for example" sentence and what comes after that, there's an argument that the standard of best efforts made vary according to the jurisdiction that is being in which both efforts are being undertaken. But the problem is, you see, we are recommending ICANN to seek and try to obtain general licenses. Those general licenses are a product of U.S. jurisdiction, so the efforts that, the best efforts, if you will, that ICANN will have to undertake to get those general licenses, which is a creation of U.S. law, will be regulated by U.S. laws. So I think this is not really accurate to say that the explanation of what "best efforts" means, but this may change according to the jurisdiction that is in place. I don't think this is accurate. It's not an accurate reflection of the question which is the [indiscernible] within the context of the U.S. jurisdiction. So I would, again, say it would be simpler to simply strike out everything that comes after "unreasonable" at the very end of the first sentence and I'm referring here to the second alternative. Thank you.

>> GREG SHATAN: Thank you, Thiago. I'm a little confused because I thought I took away from last week's call that the concern about putting "reasonable" before best efforts was in some jurisdiction, perhaps your own, reasonableness is already understood to be part of best efforts, while in other jurisdiction such

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as the U.S., reasonableness is not understood to be part of any best efforts. But perhaps the simplest solution is the best and rather than trying to wordsmith either version, try to see which go for something, the second alternative with only the first sentence. Let's see if there are any objections to that version of the alternative. Second alternative, first sentence only.

>> KAVOUSS ARASTEH: I fully support that. I fully support that.

>> GREG SHATAN: Thank you, Kavouss. I hear support from Kavouss. If anyone has any objection, please, hands up or red X. As long as you can live with it, even if you don't prefer it. We will take the second alternative with the first sentence. I feel like an auctioneer here, sold to the second alternative with only the first sentence. Time to move on. That solution has been resolved, at least on this call.

So let's move on to number two. Here we have "applicant is otherwise qualified" appears several times, talking about whether the applicant is whether it's an applicant of the Registry or Registrar, we say whether they are otherwise qualified to be a Registry or Registrar. So there are a couple of different alternatives. Based on the February 7th call, we changed, tentatively, the "qualified" to "acceptable." After listening to the second call of the 14th and going back to the transcript, it seemed there would be perhaps more support, at least for those on the second call, for saying "applicant would otherwise become accredited" and we're talking about Registrars. Or saying "applicant would otherwise be approved" when it comes to Registries, which lack the advantage, in my mind at least, of more specificity, basically means that they would succeed other than this the need to get the specific license.

The third alternative of course, is status quo and retain "applicant is otherwise qualified."

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

>> CHERYL LANGDON ORR: Thank you. Cheryl Langdon Orr for the record. Just raising the awareness in the subsequent procedures for [indiscernible], the terminology of qualify sorry, not qualify, of sorry, it is a ridiculous hour here the terminology for being approved or able is something that is being hotly discussed, so this is one of those alternatives that you need to look at very carefully. So "acceptable" is probably a slice of it, I guess, in my judgment, based on what I've heard from others and wider community input in a different context. The context of "accredited" "accredited" is a terminology that has had several concerns being raised in, again, that other context, so I would suggest we might want to move away from using the term "accredited." So not showing a particularly clear preference from that point of view, but raising awareness that "accredited" in particular has had severe pushback in the context, in and of itself.

>> KAVOUSS ARASTEH: Greg, I have a suggestion, also.

>> GREG SHATAN: Thanks, Cheryl. Kavouss, please go ahead.

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>> KAVOUSS ARASTEH: Yes, in my view the term "acceptable" is a vague term because I say acceptable and I usually say acceptable [indiscernible] in the hand of one party, so to some extent I agree with the argument launched by Cheryl that in the subsequent procedure we are discussing the issue of qualified and so on and so forth, but if the qualified does not have agreement of the people, I am well in favor of the second alternative to say "otherwise become accredited." The reason for that is "qualified" is an event which will happen before [indiscernible]. So in my view, it covers both. You accredited if it is [indiscernible] implicitly. So I am in favor of the second alternative. Thank you.

>> GREG SHATAN: Kavouss, just to clarify, are you in favor of the third alternative, in fact, which is to retain the status quo, "applicant is otherwise qualified."

>> KAVOUSS ARASTEH: No, I'm in favor of the second alternative.

>> GREG SHATAN: Okay, that is changing it to "applicant would otherwise be accredited" or "applicant would otherwise be approved."

>> KAVOUSS ARASTEH: Yes, thank you.

>> GREG SHATAN: Thank you, Kavouss. Any other comments on this? We seem to not have any clear path forward at this point, which by default would mean that the status quo, the third alternative, "applicant is otherwise qualified" would remain in the document. So I guess the question is, does anybody object to the third alternative in this case? Even if it's not proved preferred, rather.

Cheryl says she thinks "approved" is better, in your opinion. Cheryl, are you suggesting approved for both Registries and Registrar?

>> CHERYL LANGDON ORR: Greg, Cheryl here. I'm suspicious that might be a safer opinion a safer terminology, but I'm also not going to die in a ditch over it because, you know, public opinion will win out once we get through this.

>> GREG SHATAN: Thank you, Cheryl. I guess the question is here, in a sense we have a fourth alternative, which is to use "approved" in all cases rather than "qualified" or "acceptable." So given our status quo is "qualified" if you have a preference for "acceptable" among the three alternatives, or considering now the second alternative is modified to "approved" in all cases, if you prefer the first, which is a "acceptable," please give me a green check. I see Cheryl

>> KAVOUSS ARASTEH: I am against. I am against the first alternative.

>> GREG SHATAN: Okay, Kavouss objects to the first alternative. Are there any other objections to the first alternative? If so, give me a red X. I see none, so we have one preference and one objection on the first alternative. The second alternative which is to use the word "approved" instead of "qualified" if you prefer this alternative, please put up a green check. I see Cheryl also prefers this one, so your preferences

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are equally split, that's very generous. Does anyone else prefer the second alternative as modified to be "approved" in all places?

>> KAVOUSS ARASTEH: I'm in favor. Sorry, I don't have the computer access. I am in favor of the second alternative.

>> GREG SHATAN: Thank you, Kavouss. So we have two in favor. Do we have any objections to the second one as modified, using the word "approved" in all cases? I count that as no objections and I see Cheryl's indicated she shifts her takes away her preference on the first one and puts it solidly on the second. Thiago also prefers the second as modified. And no objections.

The third alternative, no change, "applicant is otherwise qualified" who prefers this formulation? Does anybody I see David McAuley prefers the "qualified" formulation. And, also, Jeff Neuman. Is there anybody who objections to the third alternative?

>> KAVOUSS ARASTEH: I am neutral.

>> GREG SHATAN: Thank you, Kavouss. So Phil I see also puts up a green check for the third alternative. I suggest on this we take it to the list. There is a slight preference for the status quo, but and given the overall weight of retaining the status quo, that speaks to keeping the status quo, but given that we have a relatively few people on this call, though it is certainly enough to make a decision, but given there is no clear decision coming out of this group, that we put up a choice only between "qualified" and "approved" to the list for a final sense of consensus on that point. Any other comments on the second open item?

>> STEVE DELBIANCO: Greg, it's Steve DelBianco. Apologies to everyone, I may have been the one that started changing the language. I will remind everyone that the reason I suggested we needed a nuance is parties who wish to become qualified as a new gTLD Registry or private proxy for a Registry are parties that often need to enter into application, negotiation, and discussions with ICANN. And I had the understanding that even that level of engagement could potentially be prevented by sanctions and, therefore, we needed ICANN to make it possible for people to be able to enter into applications and negotiations in order to determine if they could be approved or qualified. You just don't know if someone is qualified before you have done financial analysis and all of the qualifications that we do for new gTLD registrants. This is just my way of saying there probably was a legitimate reason to consider our language carefully here so ICANN would be obliged to apply for relief at a point where you have no idea whether they would otherwise qualify. Thank you.

>> GREG SHATAN: Thank you, Steve. Just to clarify, what would be your preferred construction?

>> STEVE DELBIANCO: I am honestly not an attorney, so I'm not qualified to understand what would be the best way to address my concern. I guess I would be first interested to know if anyone else in our group thinks my concern is valid. Thank you.



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>> GREG SHATAN: Thank you, Steve. I guess this goes to the point or to the question of where in the process the license must be secured. Must it be secured for an accredited Registrar, potential Registrar to even submit the application? Or is it only when they are ready to be accredited? I just don't know the answer to that, nor do I know the answer in terms of a Registry. I would assume that a Registry or a potential Registry operator can submit the application, pay their \$185,000 or whatever it is the next time around, without needing to get an OFAC license to do that, but perhaps not because there is the exchange of money.

>> STEVE DELBIANCO: Precisely. Precisely my point.

>> GREG SHATAN: Yes. Jeff also acknowledges that. So it seems like it does come a little further up the railroad track. So I think your point is well taken. I do, also, think as Jeff notes that none of these alternatives fully take into account your comment. David McAuley says, my old suggestion of viable candidate would address these concerns. David McAuley says, I should add "probably." I was thinking "likely" the same thing. Thiago suggests, somewhat tongue in cheek, that we add a footnote. I think this requires a little more work to try to find a word that appropriately expresses that ICANN should get the license at the point where it needs to interact with the applicant and needs to move things further along. If anyone else has suggestions, that would be welcome. I can try to start something on the list, put out a list on this particular point. I think Thiago asks, what did Sam Eisner say on the previous point? That is a good question. I don't have the transcript up in front of me, but it would be wise to check the prior transcript, which I will do. So let's look at that. We only have one call left and it's actually on the very day of the Plenary, which means we really need to resolve these questions before our next call. So we need to take care of this on the list or live with the status quo. That would be, I think, where we go on this. So any suggestions, please send them to the list or put them in the chat if you come up with them while on this call.

So let's, I think, take Steve's concern into account, which I think is correct and we will look to the list as quickly as possible to solve this particular thing.

Cheryl suggests "seeking to be approved." That may well do it. We can put that out on the list.

Why don't we go to the third item now, which is on the second page? You should have scroll control. So the first item, again, is one that shows up sorry, this third open item also shows up several places in the report, but it comes down to two alternatives. Currently our report mentions that if a menu approach is taken either the selection from the menu could be done entirely by the contracted party or about to be contracted party without any intervention from ICANN, although I assume ICANN will have may have something to say about the menu, the creation of the menu, but once the menu is in place, it would be up to the contracted party to choose the Choice of Law.

Or it could be so this would remove any mention of negotiation. So currently the document, apologies if I'm being unclear, currently the document offers two possibilities, it does not exclude other possibilities,

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and makes no expresses no preference, makes no recommendation. So that is really the second alternative, again, the status quo.

The first alternative is to revise the menu proposal to recommend that the party contracting with ICANN have the choice of jurisdictions from the menu, and remove any references to making that a potentially negotiated point with ICANN. Understand, of course, that given there is a separate process for amending these base agreements, anything we say here is advisory, unlike the recommendations where if approved by ICANN, ICANN is then bound to take them forward. So in this open item number three, I'd like to see if there is support for the first alternative, which was advanced on one of the prior calls, which is to recommend the contracting party make the choice.

Who prefers the first alternative?

>> KAVOUSS ARASTEH: Greg?

>> GREG SHATAN: Yes, Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, I prefer the first alternative because when you said in the second alternative to negotiate, in fact, there is no choice as such if the negotiation does not have any outcome, so that choice really [indiscernible], so for that reason I prefer the first alternative. Thank you.

>> GREG SHATAN: Thank, Kavouss. Just to be clear, the second alternative says it could be the choice of the contracting party or it could be negotiated, we leave that for subsequent for somebody else to decide.

>> KAVOUSS ARASTEH: [Indiscernible] somebody else? Who is the somebody else?

>> GREG SHATAN: That would be in the process that exists for the amendment of the base Registry agreements, which and if there are any Contracted Party Reps who want to clarify on this basically is a process largely between the contracted parties and ICANN as to how the base agreements will be modified or amended in the future. And that is where that decision would be made, indeed, because of the existence of the process we cannot make a recommendation here that would be binding, if it were approved by ICANN.

Thiago, you have had your hand up patiently. Please go ahead. Thiago, we're not hearing you.

>> THIAGO JARDIM: Sorry. This is Thiago speaking for the record. Thank you. Can you hear me?

>> GREG SHATAN: We can hear you now, Thiago.

>> THIAGO JARDIM: Thank you. So I was saying that I'm wondering whether the options that will be available for the contracting parties to choose from in the menu, these options will have to be negotiated

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already, right? ICANN will have, if we implement this recommendation, it will have to go through some negotiating process. So I would, on this understanding, favor option first alternative because ICANN would already have something to say in the as it determines what will be the options available for the contracting party to choose from. And [indiscernible] the contracting parties will have the ability to choose, it will not be necessary to negotiation, for ICANN to have the ability to negotiate what these items are. I'm not sure what the options are, but it seems to me it could happen, so I would favor first alternative.

>> GREG SHATAN: Thank you, Thiago. That does make sense. I think sitting where we are, it seems likely that it will or it seems that it must be negotiated as part of that amendment of the base Registry and Registrar agreement process that I mentioned before, but the nature of the negotiations and the nature of the vetting of each item on the license on the list is unknown, of course. But, yes, it will the list presumably will be the subject of its own process to create.

I see support from Thiago from number one based on what he just said. Finn Petersen also supports number one. I would ask, given where I think I see some greater weight here, if there are any objections to the first alternative. If you object to the first alternative, please put up a red X or make yourself known in the chat or by voice.

Given the lack of any objections to the first alternative, I will take it that everyone can live with the first alternative. And there are seems to be more preference for the first alternative. So I think the first alternative has it, subject to we will need to put this all out on the list for the 120 people who aren't on this call, but the list will go out with just with the first alternative as the preference, which will mean accepting the markup that's in the document and moving on. So I would say that on the third item then the weight of this group is the first alternative and that will be the way that the document will appear when it goes out. There will be a note, of course, of this discussion and tentative decision.

So that moves us to the fourth item. The summary of the work of the Subgroup before, during, and after the comment period. This is on page 11 of the PDF, assuming the PDF format is the same for everyone. This has been in the document for over two weeks in suggest mode. I have not seen any objections or edits. Perhaps we can put this up on the up in the Adobe Connect, if we could bring that PDF up so we can take a look at that language. Give it one last errand, so to speak. If you could all turn to page 11 in the draft. It somehow just disappeared in my tablet. There it is. Okay.

Hopefully you have this language up in front of you. It seems to be right there for me. So the question is whether there are any objections to this language? It basically picks up with the report that we submitted to the Plenary leaves off in terms of describing the next steps. I'm seeing no objections. I see that Finn Petersen II has stepped away. Thiago says, hold on. Page 11 question mark. Yes, Thiago, the bottom half of page 11 there's basically three paragraphs of new text which describe what went on after

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our last report was finished or the last draft was finished and, therefore, ended its tale of where things were.

I'll give a minute for people to read this over. I'll finish my almond crescent.

I see a question from Thiago, what about France's request to have her comment added to the report? There was a discussion, I think three meetings ago, that the comments themselves will not be reflected in the report, just any changes to the report that would be made due to discussions that were started by the comments. And this is the standard practice across all the subgroups. And as far as I can recall, all the working groups and Cross Communities that I have dealt with. So there will be a reference here to the comments and where they can be found and so that is the way they are available to those who wish to look at them. As well, I think, a link to the comment tool that we're working with as well.

So any objections to the language that's here? I'll wait a few seconds more to see if there are any objections or comments or discussions. I will now record a lack of objection to the language on page 11 and so that will be accepted and go into the document as it will be presented to the Subgroup for the last time close to the last time. Again, you know, noting that this language was inserted after the public comment period so that people will at least know to look at it, but given the lack of objection, it will be shown as an accepted change.

That brings us next to reviewing the proposed language added to the OFAC general license recommendation. And for this, why don't we stay with the PDF of the report? And turn to page 19 in that report for this language. Hopefully you have this up in front of you. And so this language is based on a comment submitted, I think, by the NCSG and after discussion over the last couple of meetings, the following language has been proposed as an addition to the end of the general license recommendation. And it reads as follows: The utmost importance of these recommendations for ICANN to carry out its mission and to facilitate the global access to DNS should be considered when implementing them. Taking into account this importance, the implementation phase should start no later than six months after approval by the ICANN Board.

Any questions or comments on this?

>> KAVOUSS ARASTEH: Greg?

>> GREG SHATAN: Yes, I have a hand from I had a hand from Thiago, but it seems to have come down. Kavouss?

>> KAVOUSS ARASTEH: Yes, I have no problem with this text which was presented by [indiscernible] from NCSG and entered by Farzaneh. The only comment I have is the six months, I stand to be corrected where the six comes from. I have no objection for that, but I just want to know if it's rising or [indiscernible] code of action that would not be possible to do in less than six months or would require more than six months.

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Other than, I have no objection, and, in fact, I support the idea, but just the clarification of six months. Thank you.

>> GREG SHATAN: Thank you, Kavouss.

Thiago, I just wanted to see if you had if your hand was up on this point here on page 19. Thiago says, should we not include in this new addition to page 11 the suggestion of taking this session on immunities further on in a different setting. It is descriptive of what happened following the report's adoption by the Plenary, and echoes points raised in the comments like those in France? My hand was up to call your attention to the points I raised in the chat, regarding page 11 additions. I hope I'm forgiven for inviting us to come a step back.

Let's see if we have any other suggestions, approval, objection, or otherwise of that. Also, please consider whether if we cite what one comment says about discussing immunity elsewhere, also we cite other comments that had other views on immunity and whether it should be discussed.

We do say early on or at the very end of the entire document, on page 26, after noting that as an example there were discusses of limited, partial, relative or tailored immunity for ICANN that did not come to conclusion. As these [Reading] beyond the CCWG and the Subgroup suggests that a further or multi stakeholder be [indiscernible] that potentially was the resolution of these concerns. I think that does cover that fence here. And since it's not really the work of the group post public comment, but rather an opinion, I would suggest that it is covered on page 26 to 27. And let's also recall that the Abu Dhabi transcript will also be included in the overall package as well.

In terms of describing what happened, I don't think anything happened within the group after the public comment on this point. In other words, we did not come to any decisions or any change. We are recommending moving forward into other decisions.

So is there anybody else who suggests that the text on page 11 should be changed?

Actually, Thiago, it did not happen after the submission to the Plenary. It happened before it. It's part of the existing text on which we're commenting, so there was no change in our group based on that comment.

I don't see anybody else on this point, so let us go back to page 19 and the language suggested or brought to us by Farzaneh and Tatiana for our consideration.

I see a note from

>> KAVOUSS ARASTEH: I would ask for clarification on the six months.

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>> GREG SHATAN: Okay. Thank you, that's a good point. I see Farzaneh has her hand up. We'll hear from her and if she has a comment on that or otherwise, we'll come back to that point. Farzaneh, please go ahead.

>> FARZANEH BADII: Thank you, Greg. So [indiscernible] asked in the beginning of the public comment for a timeline of when things should start for implementation and since I think that would be a hefty task and kind of hard for this group to come up with, we decided to come up with a period of just state a period of time that it should take, no later than that the recommendations they should start look into implementing their accommodation. One year is too late, three months is too short, so we went with six months. There's no I mean, I think six months is quite reasonable. It's not too short. It's not too long. And that's why it's there. And, also, because we didn't want to burden the group to come up with a very detailed timeline, that would have been too burdensome and not possible.

>> KAVOUSS ARASTEH: Greg? Hello? Do you hear me?

>> GREG SHATAN: Yes, Kavouss, please go ahead.

>> KAVOUSS ARASTEH: I have no problem, I just asked for clarification and the clarification given was convincing. I have no problem with this text to be added. Thank you.

>> Greg, if you are speaking, we can't hear you.

>> GREG SHATAN: Sorry, I was speaking to myself. Avri had the point that or maybe Tatiana, you got [indiscernible] after dying in the ditch, if possible. So Avri noted that the "them" is sort of a dangling referent in the first sentence. So without changing the meaning of the first sentence, it might be possible to rearrange it a bit so that the language is a bit more flows a little bit better. I thought about editing this before it was put out to the list, but I decided to let it go as is. But it might be better to flip it around a bit. Such as that ICANN should consider the well, the utmost importance of the recommendation well, I won't do it on the fly, but I'll try something else.

Thiago said he would like his suggestion to be taken up and decided by the wider group. I will note that on the list as well. So that is fully aired out. Any other comments on the grammar? If it's only grammar editing, that's fine. But if it's watering down what is already watered down, I would be against it. So Tatiana says fire to water. Yes, there's no intention to dilute it. As an aside I am reading a book on the [indiscernible] flood. So I think at this point we are subject to purely grammatical changes. As a monolinguist I will try to use the small skill I have in that regard.

So let's move on to the last point here, which is to review and approve the stress tests.

I have 15 minutes left on the call. Are we ending at 9:20? That should be 15 minutes.

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The stress tests on the last couple of pages of the document, so if you could look to those. You hopefully have seen them before. They have been circulated for a little while yet and have not seen any comments, objections, or the like to these. So if anybody has anything to say about these, on I believe it was our last call or maybe the one before, Steve DelBianco talked us through these. And these are in the vein of stress tests from the first Work Stream. I would note only that the Work Stream that the stress tests are limited to stress testing the OFAC, O F A C, OFAC issues, not on the Choice of Law issues, but that's not objectionable.

>> More generally the sanctions in general, which OFAC is the most particular example.

>> GREG SHATAN: Yes. Changes have been made in the document to reflect that while we focus on OFAC, we are not limiting ourselves to OFAC.

David McAuley, your hand is up.

>> DAVID MCAULEY: Thanks, Greg. David McAuley here. I did have one suggestion with regard to stress test number one and it's an aside that talks about the proposed accountability measures.

The second part says this [Reading] should allow Registrars to accept domain requests from citizens of any country. And I would just suggest, and I'll go ahead and type something in the chat, but I think we should say this clarification should encourage Registrars to specifically ascertain the law applicable to them under the circumstances and accept domain registration requests from citizens of any country or if needed seek ICANN's assistance in securing an appropriate license. I think that would be a more accurate statement. Anyway, that's my comment. Thank you.

>> GREG SHATAN: Thank you, David. That's a good point because actually there may be Registrars who are under a legal obligation not to take any registrant from any country. And the point here being that it's just that the RAA itself does not create any bar. So if you read this on its face, it makes it sound like once informed by ICANN that the RA does not create a bar to accepting a registrant from anywhere, they are then clear to do so. But it's subject to their legal obligations from elsewhere.

>> STEVE DELBIANCO: Greg, it's Steve. I may have unartfully phrased the result of the stress test. So if it was too optimistic at expressing the positive effects of the stress test, then I will happily defer to David and you in wording it in a way that is legally accurate. Thank you.

>> GREG SHATAN: Thank you, Steve. I think just with a subject, too, you know, obligations under, you know, applicable law or limitations due to applicable law should be sufficient. I think that would be a friendly amendment. And Steve, if that sounds unobjectionable to you.

>> STEVE DELBIANCO: Friendly amendment. Thank you.

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>> GREG SHATAN: Thank you, Steve, we'll take that as a friendly amendment. Any other comments on the stress tests? I'm seeing no others, certainly no objection to adding the stress test, as far as I can see.

So we have about 11 minutes left, I don't want to neglect the last few comments. We also do need to talk about the timeline. So I think just a minute on the timeline. This needs to be submitted to the Plenary for next week, on the 28th.

Bernie, how far in advance of that meeting does this need to be out to the larger list?

>> BERNARD TURCOTTE: Well, typically that would be today if you want it on the 28th, but the absolute drop dead date we have to publish is two months, so if you don't submit something by March 2, it will not be considered in the final report.

>> GREG SHATAN: That is the draft date in which the open items should be resolved and a general sense of consensus should be taken. Clearly we need to make decisions on the list because our next our next meeting is the 28th as well. So there's one more Plenary for which this could be submitted for publication, I take it. So let's see where we get to. It would be nice, certainly, at the latest to have this completely wrapped up by our next and hopefully last call on the 28th, which would then give a chance to whip it up into finalized form, correct any typos and the like, and get it off before 2 March.

So let us turn now to 9.01 for the second reading of these comments. This says 9.01 comes from the Business Constituency notes that sanctions are often applied by non U.S. Governments, such as the EU CFSP. Recommendations should be generalized enough so that ICANN [Reading] by any sanction, not just OFAC and those changes have already been made in the document. So I think this has been taken care of. Any comment on this point before we move on to the next?

Seeing none, the next is 10.01, also from the BC, on scope of work. It says, we, therefore, do not agree with the noted majority review that the draft report falls short of the objectives and visions for Work Stream 2. [Reading] by not tangling the issue of ICANN [Reading] in the BC's view the draft report meets the objectives for the WS2 project. So this is support for this as is. I think we actually agreed to change this from red to green green to red, so I will do that in the last few here and read those that are only green or white.

The next one is the Government of Russia. The full text is in the official comment but the excerpt here says, we support the inclusion of annexes with the dissenting opinion of Brazil and the opposed issues list which was supported by stakeholders during ICANN 60 and provide rich food for further work. At the same time we would like to express our major concerns which have early presented during broad discussion of ICANN jurisdiction issues including public session at ICANN 60. We believe that report falls short of the objectives envisioned for Work Stream 2. And the recommendation only partly mitigates the risk [Reading] which makes the adoption of the report unacceptable. This is the position of several Governments reflected in GAC Communique.

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I don't think this suggests any change to the document, unless we were to decide that our report should not be accepted, or not be adopted at all. If there's anybody who would support that and scrap our work, now would be the time to say so. I don't think we had support for that in our prior discussion.

So with no other points on that, i2Coalition wishes to respectfully disagree with the comments of Brazil and other dissenters and says clearly IANA transition was predicated on the fact that ICANN is and will remain a California nonprofit. Noting of course that the dissenting statement continues to be part of overall package.

ISPCP, 10.04, understands that the United States will remain the jurisdiction home of ICANN and we see this as preferable to the alternative of either moving jurisdiction, for which there is no public will or becoming an NGO. I think that's part of the immunity language which may require ICANN to be a public entity. ICANN only works if it has accountable, including legal accountable and this runs counter to the role of NGO. Therefore, this was the proper and just conclusion. And also respectfully disagree with comments of Brazil.

John Poole sympathizes with Brazil and elsewhere who now recognize they were misled and lied to, which I can only say, don't take it personally. You can watch this video of the former ICANN CEO lying to the French Senate. ICANN has lied to me and a lot of people; it is part of the ICANN corporate and organizational culture. Recognize and acknowledge it, don't take it personally.

I don't think any change to our document was suggested based on this comment, but if there is somebody who believes there should be change, let me know, let the group know.

The last comment was just on the stress test which was already covered. So that is already covered. So that takes us to the end. I see Thiago has a comment in the chat, which I'll read out. A quick observation on the comments that are portrayed as opposed to Brazil's dissent. The opinion of Brazil is about misconstrued by the [Reading] under U.S. laws or ICANN physically located in the U.S. and the comments by i2Coalition and by ISPCP, which are not portrayed as disagreements with Brazil, are not real disagreements. In fact, their opposition to ICANN's changing its jurisdiction of incorporation is not incompatible with the fact that ICANN, while remaining a U.S. incorporated entity, could still seek to obtain immunities. Hence the comment may not be necessary be taken as disagreeing with Brazil. But I ask my observations above to be taken into account when categorizing those comments as owe opposed to Brazil's dissent. They misconstrue Brazil's sent. You know your comments are both on record and in chat as read by me into the transcript. So that at least puts them on the record to some extent. I guess all of these things will be worked out in the multi stakeholder meeting that we are all looking forward to discuss more jurisdiction issues.

So we are now down to the last minutes. And we have our marching orders, so to speak, in front of us. I will try to get a document on the list that reflects the outcome of this call and the report that shows

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where changes have been made as a result of this call and also where there are changes that need to be commented on as a result of this call.

>> KAVOUSS ARASTEH: Greg?

>> GREG SHATAN: Yes, Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, sorry, maybe you have taken an item. I think at the end of the report, the one part is talking about consideration of further action. I think we have discussed it. Is it still there or is it not there? The part about the page that we discussed I think at the end of the first examination after comments from Jorge and others, there was a paragraph or two paragraphs added to further consideration of the issue if all of these things would not resolve in a practical solution. So where is that paragraph? Thank you.

>> GREG SHATAN: I believe what you are referring to is the section, further discussions of jurisdiction [indiscernible].

>> KAVOUSS ARASTEH: Yes.

>> GREG SHATAN: That is still on the document, immediately before the stress tests.

>> KAVOUSS ARASTEH: Okay, thank you. Sorry. Thank you very much.

>> GREG SHATAN: No problem. So given that we have now reached the end of this call and I think our next the next action is for me to get stuff out on the list reflecting the outcomes of this call, including those items which are more or less open, and including Thiago asking about his suggestion with regard to immunity, adding further language on immunity in page 11 be considered. That will go out to the list as quickly as possible. I encourage all of you to respond, especially those who have been on this call, but it's even more important for those not on the call to weigh in. You on the call have been through most or all of the prior calls of the last few weeks, it's important for you to say something on the list, whatever your position is, just to bring in those who might not have read the transcript, listened to the recording, et cetera, et cetera, to try to encourage discussion so that we can feel that we have the broadest possible response from those in the group so we can send it up to the Plenary with that sense in mind.

So with this, the next call will be our last call on which we can deal with this document. If by some miracle we fully close it before the next call, so the last call will have to be the call where all solutions are finalized. Hopefully the work on the list will make it fairly clear what those outcomes are. So the next call is exactly a week from now. That is 13:00 UTC on the 28th of February. And until then, I will adjourn this call and everyone should keep an eye on the list. The recording may now be stopped. I hope you all have a wonderful rest of your day, however long that may be. Goodbye, all!

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[Meeting concluded]