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JURISDICTION SUBGROUP MEETING #57

Monday, February 28, 2018 -- 13:00-14:30

[This meeting is now being recorded]

>> GREG SHATAN: Good morning, good afternoon, and good evening. Welcome to the CCWG Accountability Work Stream 2 Jurisdiction Subgroup call for February 28, 2012 sorry, 2018 at 13:00 UTC. We have the agenda in front of us, so let's review it. First, after the review of the agenda, of course will come our Administrative Minute and then really the bulk of the call, which will be to resolve the remaining open items in the report, which are more specifically noted in the chart that was also sent around. Then we'll cover the steps needed to submit the Subgroup report on or before the 2nd of March, which is the deadline. We'll go to AOB. And then we'll adjourn.

Any comments on the agenda before we move to the next item? Seeing none, we'll move to the next item which is our Administrative Minute. So first I'll ask if there are any changes to statements of interest. So I see no changes to statement of interest. I'll ask if there is anybody on audio only.

>> KAVOUSS ARASTEH: Hello Greg.

>> GREG SHATAN: Yes. Kavouss.

>> KAVOUSS ARASTEH: This is Kavouss on audio bridge for the time being.

>> GREG SHATAN: Thank you very much.

[Audio echoing with Kavouss]

>> GREG SHATAN: That is all and Kavouss is showing up in the Adobe Connect because he got a dial out. Sorry about the echo. I should have muted while Kavouss was speaking. I'm on a tablet and that's what happens. So I will try to get on the phone link before too long into the call, but that will take a little time.

So let me see if there is anyone there are no phone number only participants, everyone has been named, so that's good.

Why then don't we move on to the next item in the call, I think in this case, which is to resolve the remaining open items in the report. I think it's probably best to work from the chart for that purpose. So if we could if staff could put up the chart in the Adobe Connect room that would be very helpful.

>> BRENDA BREWER: Is this the chart you want, Greg?

>> GREG SHATAN: Yes, thank you very much.

Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

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>> BRENDA BREWER: You're welcome.

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

>> GREG SHATAN: Thank you. I'm just trying to get on to the phone line here. Okay, I'm now on the phone, so hopefully my sound will be a little bit better.

Let us start with the first of the items, the first proposed change where we have revised some of the text referring to sanctions other than OFAC sanctions. And as you can see, the explanation here is, having reviewed what was in the draft immediately after the call, which was we were drafting on the fly to some extent, the thought was that it really didn't take into account the multiple different kinds of sanctions that could be, some could be very different from OFAC sanction, and also the multiple different types of relief there could be, some of which could be much more difficult even than getting a specific license under OFAC. So the change is that there is now a footnote on page 3 of the document and we can look at the document as well if people would like that. The footnote is quoted here. It says, "In the future is ICANN is similar in scope with similar methods of relieve for entities not specifically sanctions, the spirit of these recommendations should guide ICANN's approach." This footnote is on the first sentence on the section which is called Recommendations Related to OFAC Sanctions and Related Sanction Issues, which says that the Subgroup considered issues relating it should say relating to Government sanctions, particularly U.S. Government sanctions. And on the particularly is where the footnote is hung.

I'd like to see if there are any comments or objections to this change. I'm seeing none. I see a comment from Thiago. If ICANN is subject to similar sanctions it would be more appropriate to say, "If ICANN activities are affected by similar sanctions." I would agree with that since it's not really ICANN that is subject to the sanctions and rather the particular Registry or Registrar. Is there any object to that change? If not, I will make that change in the document. Thank you, Thiago.

Okay, so now that says "in the future if ICANN's activities are affected by other similar sanctions, e.g. similar in scope, type effect, et cetera, et cetera, the rest of the sentence is unchanged. I just kept the word "other" in there as it changed. So I think that takes care of Item 1, which is good. We can move on to Item 2.

Here in Item 2, we have a change in our recommendation from the report that was put out for public comment. Instead of just providing the idea that there are options for choosing from the menu, including having the contracting party choose or have it be subject to negotiations, we would actually be making a recommendation that the Registry or Registrar negotiating, that should choose from among the options in the menu. The choice would not be negotiated with ICANN. This was in the prior draft presented in the as the other alternative which was to continue with the way it was put in the draft that went out for public comment. And so having reviewed, Finn pointed out it was his recollect that the results of the last call where this was discussed was, in fact, there was broad support for changing the recommendation, so I went back and reviewed the transcript of those calls and agreed with Finn and changed this so that now

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our revised draft report reflects the sentence that is now inserted which says, the Subgroup recommends that the Registry choose from among the options on the menu, i.e. the choice would not be negotiated with ICANN. And since we are working our way through the executive summary, this change and the prior change will ultimately need to be reflected in the body of the document itself, which of course is what is being summarized here. But that make sure we are taking care of the editing, that everything is parallel so that there isn't something that is only in the summary and not in the report, which would be rather odd. Of course, there can be things in the report that aren't in the summary, that's a different point entirely.

Is there any objection from changing the recommendation from the draft report so it is a recommendation that it is the contracting party's choice? I'm seeing no objection on this point and, therefore, I think we can take it that we have we can move on to that.

So let's move on then to Note 3 in the document. Note 3 was simply a note that the section describing the work of the group after the draft was submitted to the Abu Dhabi Plenary has now been accepted into the document, it was in suggest mode the previous time around and didn't want to completely lose sight of the idea that we were now accepting this into it. So I wanted to make sure we essentially confirm this section understanding we have Items 4 and Items 4.1 which will change or may change this section further.

So unless there are we will move now to that portion of the document. I'm assuming there are no changes to this section other than what's discussed in item 4. And then we have a discussion we need to have about item 4.1.

Item 4, we added a sentence following the mention of the Abu Dhabi Plenary that as a result of these discussions, further discussions of jurisdiction related concerns was added to the draft report, suggesting a path forward for these concerns beyond the CCWG Accountability through a further other multi-stakeholder process.

So I would like to see if there are any comments on this addition, any objections to this addition, or any support for this addition. I think it seems fairly innocuous, I think. We'll see if there are any objections or any if anybody wishes to make any comments on it.

Okay, I'm not seeing anyone raising objections to this sentence. So I think we can take it that the sentence in item oh, I see a hand from Thiago. Thiago, please go ahead.

>> THIAGO JARDIM: Hello, everyone. This is Thiago speaking. Can you hear me?

>> GREG SHATAN: Yes.

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>> THIAGO JARDIM: So I've just commented on the chat what I think would be a useful suggestion for this paragraph. I agree that the sentence should be added as you suggested, Greg, but I believe it should be reorganized. It should not appear where it is currently appearing. My suggestion has been explained in more detail in the chat. The main concept is that if we keep the new addition where it currently is, it would give the impression that the draft report was approved by the Plenary already, including the addition, which was not the case. The admission by the Subgroup and eventually by the Plenary, the "further discussions of jurisdiction related concerns" are needed came after the Plenary held its meeting. So to cut it short, I think my proposed paragraph as it appears in the chat would solve this problem. Thank you.

>> GREG SHATAN: Let's all take a minute to read what's in the chat here. Okay, I guess the issue as I see it is that what was sent out for public comment ultimately was, I believe, approved by the Plenary. We'd have to go back and look at, maybe not the Plenary as it was constituted in Abu Dhabi, but for the report as a whole to be sent out for public comment as it was, it was approved by the Plenary.

Thiago?

>> THIAGO JARDIM: Yes, thank you, Greg. This is Thiago speaking, again. You see the main point is the reference to the new added text should come after [indiscernible] was referenced in the report. Because when Brazil dissented and said why it was against the adoption of the report, the report had not included at that time the new text, so that's why I think we should reorganize the sentence and explain that and in reference to the new added text after we mention the Brazil sentence. Thank you.

>> GREG SHATAN: I see your point now. Okay. I see this primarily as a reordering. This may need a little more work to just make sure it notes that the well, maybe just one more short sentence that says that this, that the report as amended was then approved by the Plenary and sent out for consensus sent out for public comment, rather.

Any so I would suggest adding something like that, that would, I think, close the loop, as it were. So I think that makes sense in terms of, you know, describing the process and since this is the intent of the section is to describe the process, we might as well be accurate and get it right, so that, I think, takes care of that.

Any objections to Thiago's revision with my addition of a sentence stating that the report amended was approved by the Plenary and sent out for public comment? I'm seeing no objection. So that will be repaired and it's my intention to get this out on the list as a stable, final draft just for people to check that this call has been reflected appropriately as soon as possible after this call, but consistent with my other obligation.

In any case, let us move on then to item 4.1. I believe you all should have scroll control. Item 4.1 is a suggest which I believe as it currently stands, it did evolve somewhat over time as it was in the group,

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that comments by other countries in support of the "further jurisdiction related discussions, in particular immunities, should be specifically referenced." And also reference similarly the contrary voices of those that did not support.

And, also, suggested that perhaps there should be a further discussion or perhaps analysis that the contrary voices are not really contrary to Brazil's dissent, suggesting this should be made explicit in the report.

I will note in the meeting of February 7th we were visited by Co Chair Thomas Rickert on behalf of the Co Chairs who noted that it is not the practice of the CCWG or any of the subgroups to actually discuss the substance of comments in the reports, but for any changes to be reflected in the report that are caused by the comments. And the comments themselves are, of course, made available as an annex or link from the report so they can, of course, speak for themselves. So we don't really have any text proposed for 4.1. I'd like to see if there is any support for this beyond Thiago, at least I assume Thiago still supports this as it was his point, but it was perhaps as things have moved on, that may change, I don't know. So I'll take a hand from Thiago. Please go ahead.

>> THIAGO JARDIM: Thank you. Thank you, Greg. This is Thiago speaking for the record. Just a clarification request and more of a sort of procedural question. You explained that the Subgroup will not comment on substance of the comments received, which I understand might be the practice of the subgroups, but my question is: How do we make sure and show to the public that we took into account their comments? I understand that several comments were taken on board and they came to be reflected in the they will be reflected in the revised version of these reports, but what about the comments that were not taken on board? How do we make sure we have addressed them? Thank you.

>> GREG SHATAN: Thank you, Thiago. I guess there's two parts of that. I'll turn to Bernie to explain in a little more detail what is being done to our comment tool which will have a new column in it. But primarily the comments are taken into account, but in any case the comments don't change the report and that is just the way the process works. So there really is, other than saying, all comments have been dually taken into account, there's really no acknowledgement that any particular comment was or wasn't taken made a change. Indeed, we don't note where a particular comment has caused a change to be made. So, Bernie, if you could just explain briefly what the comment tool, what you call the matrix of comments, how that is changing?

>> BERNARD TURCOTTE: Thank you, Greg. As people will have noticed, we publish these for the three other subgroups that had public comment hearings and these were sent to the Plenary, which will be held later today. So what you've got here is the comment matrix, a very quick and simple summary responding to that comment and if there has been a change. And we tried to identify the general area if a change has been made. So what we will be doing is preparing one of those comment matrixes with those added columns for this group once the work is done here. Thank you.

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>> GREG SHATAN: Thank you, Bernie.

Thiago asks: Is this the column in which each comment appears either in red or green? Those colors have been removed. Those colors were just our internal aid memoir so we could rapidly match up where the comments would support, which, of course, would not change the report by definition or was something other that might change the definition. So it is now a black and white report.

Steve DelBianco, please go ahead.

>> STEVE DELBIANCO: Thank you, Greg. I fully agree that the comment matrix is the appropriate place to cross reference whether and how a comment was reflected in the report and to that end where the report includes a row for a comment from the French Government, I would just ask Bernie and you, Greg, to confirm in that row of the matrix that the comment is reflected into the mission of the report where we indicated the need for further work. Thank you.

>> GREG SHATAN: Thank you, Steve. That seems an appropriate suggestion.

Any other comments on that or other generally? I see Thiago, your hand is up.

>> THIAGO JARDIM: Thank you, Greg. This is Thiago speaking for the record. I don't think it would be appropriate to add Steve's suggestion to qualify French Government comments. In particular because the addition or the recognition that further discussions where jurisdiction related concerns are needed had already been included in the report prior to the French Government submitting it to comment. Thank you. So it was not a response to it was not an action taken into account, whatever the French Government said. Thank you.

>> GREG SHATAN: Thank you, Thiago. Actually, I think that is correct. What we did add was a section in the summary about the process, so that's what was just added rather than the section on further discussions, which as Thiago correctly notes was added after the Plenary, but before the public comment. So all we really added this time was a process description. So I think, Steve, you are probably mixing the two together. Everything we try to keep in our head and sometimes things that sit next to each other appear to make sense, but then we realize they don't. So thank you, Thiago. I think Steve it looks like Steve has essentially withdrawn that suggestion.

So any further comment or question on 4.1 and whether there should be any change to the document considered based on the discussion we have just had? I see Thiago is typing. He says, that's why I suggested a specific reference to France and others should come there in the report. Thank you, Thiago.

Does anybody else wish to comment on this suggestion? Suggest anything that should be done to the report in connection with 4.1? Specifically, is there any other support for adding a discussion of specific reference to the substance or positions of any comments and perhaps how those comments relate to

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either the majority report or the dissent submitted by Brazil? I see from David he supports no change. Anybody else wish to weigh in? Steve DelBianco says, I do not see a need for a change. Would anybody else like to weigh in? If we could have the participants speak to this.

Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes. I think the way expressed by Thiago, I think I tend to support his position. Thank you.

>> GREG SHATAN: Thank you, Kavouss. I don't see any consensus anyway, any sense this is getting traction. Plus, of course, we would have to draft something and have it be part of the document that's submitted in 48 hours or so. Or 50 hours or so.

So it's my sense here that Steve adds Steve DelBianco adds just in the chat, just to be clear, do we have proposed text to add, do we? No, we don't have text. What addition? That France supports the recommendation? No, it was a mention that France well, yes, France supported the idea of further jurisdiction related discussion and I think there was a mention that there should be further mention of immunity here and there are comments that come in counter point to those comments that would also need to be mentioned. And finally, there is a suggest that these counter point comments are not, in fact, contrary to Brazil's dissent and that they should be mentioned as well. Although, I would think we would need to check with the authors of those comments to see whether they agreed with any of those. So essentially we would need to, I guess, summarize all comments as related to the idea of further discussions or further work, so that would be, I guess, what would need to happen in we were to take this path.

Kavouss, is that a new hand?

>> KAVOUSS ARASTEH: Yes, it's a new hand. I am asking that, imagine the particular country or entity making comments, is it possible that we conclude that we have not considered that at all? Or we could say that we have considered, mentioning what the comment is, but without expressing that whether it is a support, whether it is a position, or whether it's a consensus. Totally ignoring the comment that means we think that you have not properly treated the essence of the public comments, that we need to take some comments into account, some other comments into the not account. I'm not asking for the majority or the minority of the comment, but comment of a country or entity is a comment, that should be reflected to some extent in order to that the report reflect the reality and the actual situations, not always taking oh, everything was 100% agreed, we don't make any changes. The comment has been made. Why the totally avoid [indiscernible] I'm sorry, why we totally refrain not to mention that at all? Thank you.

>> GREG SHATAN: Thank you, Kavouss. We do mention in page 11 in the discussion of the process that these comments were dually considered and discussed by the Subgroup. We don't go into and of

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course, we have the comment tool which reflects the result, if any, of that consideration, whether it made a change in the report. But, again, we don't reflect whether there was support from particular comments for a particular section of the report as well.

I see comments in the chat. Raphael Beauregard Lacroix says, summarizing all comments is not really a realistic thing to do considering the deadlines. Do other subgroups do that? Essentially the answer is no as a matter of policy or procedure within the CCWG that the substance or at least the position or result of comments in any way is not mentioned in the body of the report, but rather taken care of by providing access to the comments and then the comment tool summarizing how the comments were dealt with or considered.

Kavouss, is that a new hand?

>> KAVOUSS ARASTEH: Yes. I'm sorry to come back to that. The comment made by, I hope that people would not [laughter] would not attack me. A comment made by a Government, Russia or France or Brazil, is a comment of that country. It is in the standard legal process is a declaration of that country. Whether people agree or not agree, that is another issue. But at least you have to reflect that. That comment was made. What Thiago proposes is that the comment was made, but there was no agreement to include that, that is another issue. But totally not reflecting, I don't think people can go back and look at the 30 pages or 20 pages of the public comment and so on and so forth, some of them we have to reflect without saying we agree or disagree or we have not been able to agree, no [indiscernible] is mentioned. The issue, the following issue, one or two lines, was raised, no consensus was reached, and that's all. That is sufficient for the review. And that is respectful to the countries, encouraging the countries to make public comments. But if we do that, they are representing a very particular group of people, so on and so forth.

>> GREG SHATAN: Kavouss, I want to clarify

>> KAVOUSS ARASTEH: Thank you.

>> GREG SHATAN: Kavouss, to clarify, are you suggesting that we should treat Government comments differently than other comments?

>> KAVOUSS ARASTEH: Not at all. Not at all. I said if the comment is made, you reflect the comment and say it was agreed included. If it was not agreed, [indiscernible]. I am not suggesting to make any distinction or priority or inferiority between any of them, one single person or hundreds of persons, but I think totally ignoring the comment may not be seen as we treating everybody equal. That is what I'm saying. Please kindly do not interpret me different. I never ask to give priority to the Government. No, not at all.

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>> GREG SHATAN: Thank you for the clarification. It would seem though that the interpretation is all comments are dually considered even if they don't make a change to the report or that all comments are ignored except for those where a change to the report was made. So we would need to mention all comments, or particularly all comments that did not change the report. And I guess so the question, I guess, is how we would do this and whether there's a reason to do it only for this section of the report or throughout? And again, considering once again this is not the practice of the Working Group.

I see a comment from Farzaneh in the chat. But further discussions about the jurisdiction could include immunity or not other stakeholder groups also supported the further discussions about jurisdiction to happen. Yes, I think the comments, we would have to go back to the comment tool to see which comments supported having further jurisdictional discussions of some sort and whether they comments actually objected to having the further discussions. I'm not sure what the utility of this is.

Thiago notes there is text here in the chat that I'll read out, that he has suggested. As follows: The late recognition that further discussions of jurisdiction related concerns are needed particular on jurisdictional found echo in several comments received, in particular by Governments.

>> DAVID MCAULEY: Thanks, Greg. David McAuley speaking. I wanted to further explain why I was one supporting no change here. It's a combination of time, we have to have a final report by Friday. Complexity, what we are talking about doing. I agree with Kavouss, a comment by a Government is important, but I also think in the context in which we work, comments by all people are important, so if we summarize one comment, we need to summarize all comments, at least on the topic, if not overall. And that's a very large undertaking. I agree with what we did on Note 4, but on 4.1, I'm just not in agreement. And with respect to what Thiago kindly put in the chat, I would even argue over that wording. For instance, I don't know that the word "recognition" would be right. You know, a late recognition by who? By the whole group? That further talks are needed? I'm not sure that's a correct statement. I think it's a suggestion that we are talking about. And what we're going to deliver to the Board is a report that says, here's what we've agreed. We should have language on sanctions. We should have language on governing law. We didn't agree on immunity, but some and leading with the Government of Brazil suggest further discussions. I mean, it's all there and the comments are there and the Board works this way with these kinds of public comments/topics. I think basically we're done and I would argue against a change under 4.1, but I respect Kavouss and Thiago and what they are saying, I just don't agree. Thanks very much.

>> GREG SHATAN: Thank you, David. Any other comments people want to make orally? I do note a comment in the chat from Farzaneh. I also don't support change. I agree with David. We have recommended further discussions about jurisdiction. I think that is sufficient. I see a hand from Kavouss. Please go ahead.

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>> KAVOUSS ARASTEH: Yes, sorry. Thank you very much, David. I also respect you. [Indiscernible]. I would suggest that putting one general paragraph that comments were received in general, therefore, after discussion there was no consensus and at least the Board they know formally that the comment [indiscernible] they know informally [indiscernible] but they would not be able to include those comments because there was no consensus, but comments are comments. Without saying in particular or not in particular. Having one sentence referring to these comments that receive on the various part or this part in particular or this part and we are not able to reach a consensus on that. That is what I am asking you to consider kindly. I'm sorry, this time pressure is not very comfortable for us. We want to say this is time pressure, this is not our problem that we have time pressure. It's the system's time pressure, not us.

>> GREG SHATAN: Thank you, Kavouss. I will note, again, that the report currently says, these comments were dually considered and discussed by the Subgroup, where this led to a change to the Subgroup's consensus, the draft report was then changed to reflect the new consensus. So I'm not sure if your suggestion would perhaps be another sentence that says these comments did not lead to a change in the Subgroup's consensus, the draft report did not change. I'm not sure that needs to be said.

>> KAVOUSS ARASTEH: Yes. Yes.

>> GREG SHATAN: Thiago, I see your hand is up.

>> THIAGO JARDIM: Thank you, Greg. Thiago for the record. I am [indiscernible] with the comments raised by Kavouss and also with David where he explained or felt there would be a need to somehow say that France's comments were taken into account. Having said that, and I am thinking also that what Farzaneh has said, perhaps a new paragraph could be added at the end of the whole reorganized sentence that I suggested explaining that the comments by different stakeholders or the need for further discussions were considered by the Subgroup to be already dealt with by the section that had been added prior to the public comment period. So basically restating what David himself acknowledged, that the and Farzaneh as well, that the section in which the section in the report in which there's this suggestion for further discussion, this very section, even though it was included in the report prior to the comments, to the public comments, this section is at the basis of why the Subgroup didn't explore in more detail the comments by France and others. Thank you.

>> GREG SHATAN: Thank you, Thiago. We need to try to find a way forward on this. I'm not seeing anything gelling. Perhaps one possibility is, as I remarked to Kavouss, a general third sentence that perhaps takes into account your point, Thiago, which is that where the Subgroup found that the comment supported the report, you know, no further change was made. And we can make a reference to that or we could, if we want, make a reference perhaps somewhat else graciously that where the Subgroup disagreed with the comments or they did not cause a change to the consensus, that no changes were made to the report. I think there are kind of two separate points which to some extent some might

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believe are self evident. One, that comments that supported the report or were already reflected in the report did not cause further changes. And the same is also true of reports that did not or comments that did not change the consensus of the group. So if we could I will try to put together a couple of sentences there, which I would add to the bottom of page 11 where we're discussing the handling of comments. And that perhaps, you know, could take care of this and also, you know, give a little bit more recognition, if you will, to those who took the time and effort to make comments, but don't see an explicit recognition in the shift in the report or otherwise that their comments were taken into account and that might help to ease the impression, which would be unfortunate, that anybody's comments were ignored. That would be my suggestion for a way to kind of bring the different ideas on this point together.

So if there are I see a hand from Thiago. Please go ahead.

>> THIAGO JARDIM: Sorry, it was an old hand.

>> GREG SHATAN: Okay. I see support from Farzaneh and David and also I believe Kavouss was commenting on this as well. I think that may be a middle ground here. So I will draft a couple of sentences, one or two sentences along that line. And, again, get this out on to the list as soon as possible so that we can make sure that we do have a report to submit on Friday. And, of course, everyone should see what the words themselves are, but it seems like there's support in content for that approach. So I think we can take that as the result of 4.1.

And we'll move on to number 5. So here in number 5, there's text that he proposed to be added at the end of the recommendations on sanctions, which I believe is intended to refer to all of the OFAC sanction related recommendations and which was submitted by NCSG, specifically our participants Farzaneh Badii and Tatiana Tropina. And I did some editing for clarity so this now reads, when implementing each of the recommendations in this section, their utmost importance to ICANN in carrying out its mission and facilitating global access to DNS should be considered. Taking into account this importance, the implementation phase should start as soon as possible, but in no event later than six months after the approval by the ICANN Board. So that is slightly edited text so it reference to all of the recommendations and not just the last of the OFAC recommendations.

Are there any comments on this? Any issues with this text? Support? Objection? Discussion? Et cetera? There was, you know, it seems in our last call there was generally support for the paragraph in concept, some recognition that the text needed a little straightening out, which I've now attempted to do.

Thiago, is that a new hand? Thiago's hand is down. But we do have Kavouss. Kavouss, please go ahead.

>> KAVOUSS ARASTEH: Yes, I think you are right [indiscernible] any need for further development, I don't think so. You can improve the text ten times, but I think the idea is clear, so I suggest that if there is no other [indiscernible] we take it as proposed and change last time. Thank you.

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>> GREG SHATAN: Thank you, Kavouss. And I see from Farzaneh, one of the drafters of the original paragraph, no issues, reads better now. So I think that this text as edited slightly or re organized slightly by myself, but I stand on the shoulders of giants in Farzaneh and Tatiana is approved or rather, there's no objection to it going in. It seems we have reached a conclusion here on item 5, which can bring us to Item 6.

Which, again, is a general note that the stress test which had been in suggest mode in the prior draft circulated to the Subgroup have now been accepted into the report as final text, subject to one revision that's reflected in item 7. So unless there are objections to including the stress tests, which I don't think will be, we can move to item 7.

A friendly amendment was made on last week's call which did not make it into my initial edit of the report after the call, but which was then called to my attention and is now in the report as it was circulated for this call yesterday. That clarifies that any Registrars ability to accept domain registrations request from citizens of any country is still subject to limitations and obligations due to applicable law and Registry restrictions. So the point being that taking away from the incorrect idea that nearly entering into a Registrar Accreditation Agreement with ICANN caused the need to particularly enforce OFAC sanctions, even if you take that away, there could be other reasons why a particular Registrar couldn't take a registration request from a particular country. So this was acknowledged by Steve as a friendly amendment to stress test number 1 and was accepted as such by him. And so now we just need to see if there's any comment on this change, either in substance or language.

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

>> KAVOUSS ARASTEH: Yes, I'm very sorry. Is it possible you read the amendment? What amendment has been made? Or there has been made? Just if possible.

>> GREG SHATAN: Yes, I'll read it a little bit more comprehensively. This is in stress test number 1. In stress test number 1 the test is that a Registrar or Registry declines to accept the domain registration because they believe they are subject to sanctions that apply to the ICANN Corporation, e.g. United States OFAC sanctions. Proposed accountability measures: One proposed measure is to have ICANN clarify to registrars that the mere existence of their Registration Accreditation Agreement (RAA) with ICANN does not require the registrar to comply with sanctions that apply to the ICANN Corporation. This clarification, if credible and legally substantiated, should allow registrars to accept domain registration requests from citizens of any country, subject to limitations and obligations due to applicable law and registry restrictions.

So the "subject to" is the new language.

>> KAVOUSS ARASTEH: Thank you.

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>> GREG SHATAN: We don't want to give the idea that because ICANN gave us one advice that all Registrars can take registrations from any country regardless of any law or Registry restrictions. It's kind of like the patient who asks the doctor if he will be able to play violin after the surgery is over and the doctor says yes and the patient says, that's great, I was never able to play the violin before.

Our small solution to a problem does not create greater capabilities than otherwise exist. Farzaneh comments, playing violin is always allowed. We will ask Farzaneh to serenade us perhaps in Puerto Rico on the violin.

Is there any objection or discussion to this amendment as written?

Farzaneh, please go ahead.

>> FARZANEH BADI: Thank you, Greg. Farzaneh Badi speaking. So when we say subject to limitations and obligations due to applicable law and Registry restrictions, what sort of restrictions are we talking about? Are these restrictions that the Registrar comes up with on their own or are they applying some sort of regulation or complying with regulation? If we could clarify that.

>> GREG SHATAN: The Registry restriction reference to, and perhaps this could be linked in a little bit, maybe it's a little bit short, these are restrictions put in place by a specific any specific Registry, particularly say the GEO's. I cannot as citizen of New York and United States, and also Canada, but that's another discussion, I cannot go to .Berlin, no matter how much I want it, I'm restricted from getting a .Berlin because it is restricted. And conversely, most of the calls on this call except for me cannot get a .NYC registration because it's only for those in New York City. So that's the Registry restrictions. And the applicable law just means all the laws that actually do apply to any particular Registrar. Whatever they may be in the country where they are operating.

Does that make sense, Farzaneh?

>> FARZANEH BADI: Yes, it does. Sorry, I see Kavouss's hand is up. I understand, I just have a concern that, are we saying that the Registries, well, I guess they can, so they can come up with policies on their own and restrict domain name registration of a certain citizen? Or does this policy have to go have to be in accordance with ICANN policy?

>> GREG SHATAN: Well, this is getting a little bit into the weeds. I guess the question is, to what extent does ICANN policy prohibit Registries from making restrictions, however there are various types to whom a Registry in that particular Registry. And, you know, some of those clearly came up with the applications. Some of them may be related to other concepts. I think ICANN does not take too heavy of touch, I think, in terms of business practices of Registries and Registrars beyond, you know, certain things that relate to its mission. I don't want to get off into a tangent here, but I think the point is that Registries have various restrictions as to who can register in them. And some of those are geographic restrictions as the ones I

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mentioned, others are related to profession or type of business, you know, .bank, .law, so there are all sorts of what might be called restricted gTLDs and that's all that is being referred to here.

Kavouss, your hand is up. Please go ahead.

>> KAVOUSS ARASTEH: Yes, Greg. With this amendment, which has three parts, subject to applicable law. I have no problem with that. Or subject to the ICANN policies. Not a problem with that. But the problem is with the restrictions, you allow that [indiscernible] creating self demanded restrictions and not getting to the discussions or negotiations with any [indiscernible]. This is exactly the source of this test point, stress test. We went to [indiscernible] sorry, there is no OFAC restriction, there is no ICANN policy, but our internal decision was not to negotiate with you. That is dangerous. We don't want to have such an open arrangement that we will be at the mercy of any Registrar or Registry without recourse to applicable law, without recourse to the ICANN policy, just saying, sorry, this is my personal or internal decision, a management decision. We have been told by the Registrar that this is a decision by our financial department. What's that? So we don't want this friendly amendment. So please kindly delete the Registry section and I have no probably with subject to ICANN law, subject to applicable law, [indiscernible] something which takes into account the very original basis of this stress test. So I cannot agree with this amendment. Thank you.

>> GREG SHATAN: Thank you, Kavouss.

I think, of course, Registries can engage in all sorts of restrictions as long as it doesn't violate their contract with ICANN and their policies that are, you know, consensus policies that are made part of those agreements. Perhaps what we could say is Registry restriction that are valid under, you know, pursuant to ICANN policy. I suppose, you know, a Registry could not put in place a restriction that would be a breach of consensus or contrary to consensus policy.

Farzaneh says, yes, I have the same concerns as Kavouss, but Registries come up with their own policies. So I don't know how to solve this. Can we just delete Registry restrictions? It is implied anyway.

I think that we're talking about the Registry's ability. How the Registry chooses to restrict that ability itself perhaps is implicit as I think Farzaneh states. And that the real point here, primary point is that even if Registries and Registrars understand that OFAC sanctions do not affect them merely because they are party to a contract with ICANN, that there may still be other laws that affect them. So perhaps it would be, again, trying to find the middle ground here, appropriate to end the sentence after "applicable law" so we're not kind of getting into the questions of Registry restrictions, which really are not part of our discussion, otherwise except for as Kavouss notes, the unfortunate issue that Registries have put in place restrictions that, in part, may have been inspired by incorrect understanding of application of OFAC and the effect of their contract with ICANN. So perhaps rather than opening up a bunch of possible interpretations of what we mean by "Registry restrictions" and how it relates to valid versus invalid Registry restrictions and yada, yada, yada, we should just end the sentence with "applicable law." Any

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objection to the amendment? I'm seeing no objection to amending the amendment so it ends at applicable law. We would leave out Registry restrictions, which would get us down a rabbit hole, or leave impressions that would be unfortunate in a stress test and recommendation that's intended to get rid of potential misimpressions. We shouldn't add to the fire that we're trying to put out. So I think that was section 7, the friendly amendment is taken, but further amended to "subject to limitations and obligations due to applicable law, period."

I believe that takes us through the chart. I think we have managed, I believe, to resolve each of these points, in concept at least. I recognize that there will need to be a double check in reading the draft that comes out after this meeting to make sure that things are properly captured. More eyes on the document, the better. Since the last review captured a couple of changes that weren't quite made correctly, I hope there wouldn't be any in this, but I do ask everyone review that.

Thiago, your hand is up. We do have more on the agenda, by the way. Thiago's hand is down.

Let's go back to the agenda so we can get to the remaining items and see what they are. Of course, the agenda is also in the notes pod so we can see from there. The next thing is steps needed to submit revised Subgroup report on the 2nd of March. The 2nd of March being absolutely the last point at which a Subgroup can submit a report so that it can be considered by the Plenary and made part of our Working Group's final report, which then, you know, gets all bundled up and moves through the process. So essentially we have, it's now about, I guess 13:00 or 14:00 hours UTC. I'm still drinking my coffee, so I'm not doing my conversions perfectly. I think this needs to be submitted, Bernie can tell us, but certainly no later than 13:00 UTC on Friday night. So that gives us, you know, roughly 58 hours, one would say, in which to do this. I have a couple of real life things that need to get done, but I do intend to get this out by about lunch time, New York time, on the list and hope that everyone will review it quickly and either confirm either by silence or by saying so that the call has been captured correctly, or if they believe it's not correct or that there's some further refinement that should be made to make it so. And then we will just confirm, have the group confirm that the that this report as it stands or as it will stand, after that, reflects the consensus, not full consensus, but consensus of the group that will move forward.

Kavouss, your hand is up.

>> KAVOUSS ARASTEH: Yes, Greg. If you allow me, I have two points. It's not back to the report, just two smaller statements. The first statement is although I may make the same thing [indiscernible] but I would wish to mention that you have treated this very complex, controversial subject with all care, with patience, with competence, and with a lot of effort, many, many drafts you have prepared and listened to the people, sometimes they have some emotional statement, but it was properly handled. So you deserve sincere appreciation. You were in a difficult position. It was not easy. You have many, many restrictions, limitations, and environmental conditions that you did not have a free hand to do whatever you wish, you have to listen to everybody, you have to come up with something that makes everybody

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almost, I would say, equally unhappy, if they are not happy, equally unhappy. This is the first one [indiscernible] and you really deserve a sincere congratulations and a great [indiscernible] or whatever or physical applause and applause by the colleagues participating in the meeting. This is point number one.

Point two I would like to make that I have done it earlier in some other U.N. organizations, whenever we have [indiscernible] when you submit it to the Plenary you mention that this is the result of, you put whatever various hours and days and months and so on and so forth, but at the end you add this is the delicate values of the view of all of the participants and that the Plenary treat that with the same balance of delicacy and try to maintain that we would not reopen anything because that would be totally counterproductive. Once open a book, open a paragraph, you open another paragraph and that is consequence. So you put a sentence to the delicate balance you have reached during the discussion of this.

These are the two things. We can live with that. It is not 100%, so I use your sentence, at least we tried our best not to make good enemy of perfection. Thank you.

>> GREG SHATAN: Thank you, Kavouss. I really appreciate your words. They mean a lot to me. It's been a long haul through this group and it has been delicate and has been taxing. I really appreciate your views. I see them shared by others and I'm humbled. You know, helped so many people with so many important contributions, so which many did not agree with each other, but I think we came through this in a way that we were able to establish a balance. We could perhaps have done even more, but, again, as Kavouss mentions, we can't let the perfect be the enemy of the good. And I will take Kavouss's suggestion up that when we submit this to the Plenary we will note that this is the result of many long hours of effort and most importantly represents a delicate balance between many different views and the development of a common position or at least a consensus position and needs to be taken into account as being the result of a delicate balancing.

So thank you very much, Kavouss. You probably said it better than I. I'll just say thank you.

I think with that, as noted, we need to get our report, this last draft, out on to the list. Make sure that it says what we expect that it will say based on this call and all the work before it. And then we will let our baby fly away to the Plenary. I suppose it's a bird in that case, not a baby.

I think on 4.1, as I understand it, where we came to rest was that there would be more general sentences noting that the, where comments were taken into account that were in support of the document, these were not reflected, and that comments which did not change the consensus also are not reflected in the report. So I guess in terms of 4.1, Thiago is suggesting a particular paragraph on the jurisdiction related concerns issue. And whose revised text now reads: The late suggestion added to the report that further discussions of jurisdiction related concerns are needed, in particular jurisdictional immunities found echo in several comments subsequently received, but these comments did not bring any changes to the report,

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nor could they be considered in detail, on the understanding that the existing support for further discussions to address unresolved concerns, including in other fora, had already been acknowledged.

Is there any other comments on this suggestion?

David says, still needs to go to the list.

Is there are there any other opinions, pro or con on Thiago's suggestion that which call this out on in particular? I guess the question is, if we do that, would which not comment on other comments? I was hopeful that is more generic comment of how comments were dealt with would be sufficient and that we wouldn't try to move into specific discussion of specific portions of specific comments and how they may or may not relate to specific aspects of the report.

David, I'm not sure I understand your comments in the chat. If you could make take the microphone and explain.

>> DAVID MCAULEY: Thanks, Greg. David McAuley speaking for the record. I was just agreeing with your point that shouldn't we also summarize other comments? With respect to the language that's drawn up, my plan is to look at it on the list and then look at it in the context in which it appears. So, thanks.

>> GREG SHATAN: Thank you, David.

I would suggest as a late addition that has not come into the report that this be submitted separately to see whether there is whether this gets traction in the group since we really don't have the amount of time to discuss it further. We've lost two or three people.

We can submit it to the list and see what the result is.

Thiago, I see your hand is up.

>> THIAGO JARDIM: Thank you, Greg. This is Thiago speaking for the record. On this call I see there is some support from Kavouss, from myself, from Jorge as well, but I think it is reasonable to do as David suggests, that is to send it to the list and see if there is opposition to it. So as I can sense it, there's some support to my suggested paragraph. And I think it would be reasonable to see whether in the list there would be opposition. So and I am being very explicit in using the word "opposition" here because this is the standard we have been applying to the other comments. Thank you.

>> GREG SHATAN: So what is the objective of this statement? The reason that this is needed specifically in addition to the general statement, the sentence that would be added about how comments are handled?

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>> THIAGO JARDIM: Thiago speaking, again. Well, the point was raised, not just me, but also by Steve before, and it would give some satisfaction to the comments, as I understand, that were not actually considered in detail and the reason they were not considered in detail and this was noted by Steve himself is because there was perhaps the implicit understanding within the Subgroup that the further discussions that might eventually take place, already took care of the comments in this regard. So the specific reference to this point is, you see, the comments on the need for further discussions on jurisdiction related concerns were not the only once that were really taken into account because of the understanding because they were already taken into account. And the paragraph I suggested intended to show this. Not more than that, just that. Thank you.

>> GREG SHATAN: Thank you, Thiago. I'm a little troubled by the idea that we would want to imply that certain comments were less taken into account than others. That's not really my recollection of how we worked. That we took all comments equally into account whether they changed the report or not. So I don't think we glossed over any comments. And I would also note that what you are citing as Steve's support was actually his mistaken recollection that we had added language to France's comment when, in fact, we had not. So I think it's probably not really quite correct to find support in what Steve had to say. So I am just a bit concerned with the idea we would imply that some comments received less consideration than others or that the late addition of the further considerations paragraph reflected a late thinking that there should be further discussions of jurisdiction. I don't think anybody thought that this Subgroup was the last discussion about jurisdiction in ICANN.

I think this can be submitted to the list. The standard of non objection, Thiago, has generally been applied to things which have already been kind of broadly accepted within the group and given some time for consideration. The problem is that this has not really reached that and there have been many other times when we have sought support when it is something that is, you know, this early in the development. Since essentially this is what we are trying to find ultimately is consensus. And whether we find consensus by assuring ourselves that what seems to be broadly supported does not have significant objection, sometimes that is done by looking for objections where it seems fairly obvious that there is broad support, and sometimes we do that by looking for support where so far the support seems to come from a narrow group. It would be unfortunate to try to put something into the document that does not reflect the consensus of the group.

Thiago, I don't know if that's a new hand or old hand. It looks like an old hand.

>> THIAGO JARDIM: It was a new hand. Thank you. Thiago speaking. I was just going to say that in this call, there were some supports for my text and I don't think that David objected to it. He only suggested that the text should be submitted to the list. So I would, again, caution against not taking it into account, in particular because I believe that once the report goes to the SOs and ACs for final consideration, it would be a shame if, for example, GAC members feel their comments were not considered at all. Thank you.

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>> GREG SHATAN: Thank you, Thiago. I will certainly put this to the list and I think GAC members can rest assured that, in fact, their comments and participation have been fully taken into account. It would be regrettable if any impression was conveyed to the opposite.

But in any case, we will take your language to the list and see what the response is. And, of course, we have, you know, roughly, as I said, less than 60 hours to get this done, so and our call is now over, so what I will do is as soon as possible, turn this back to the list, including your suggestion, and we will see what the response of the list is.

So with that, I think we can call this call adjourned. And I thank you all for your participation and we can stop the recording. Goodbye, all.