

Annex 4.3 – Jurisdiction Sub-Group – Transcript of Jurisdiction Discussion at WS2 Face-to-Face Meeting at ICANN 60 – CCWG-Accountability WS2 – March 2018



ABU DHABI - CCWG Accountability WS2 Face to Face Plenary Session @ ICANN60

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This is an excerpt from the official transcript which only captures the discussion on the Jurisdiction report. The text dealing with elements before and after this discussion of the Jurisdiction report have been removed for convenience and no other editing has been performed. As agreed by the WS2 plenary this will be included as an official annex to the jurisdiction report.

Note: The following is the output resulting from transcribing an audio file 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.

THOMAS RICKERT: Thanks very much. Let's just check that we have Greg on the phone line.

GREG SHATAN: This is Greg, I'm here.

THOMAS RICKERT: Greg, great to have you. So I think that we can start this session with the Rapporteur being on Board in the first item and this is sort of following up to what I said at the beginning of this meeting is the presentation, discussion of minority opinions. And for that, I would like to invite the colleagues from Brazil to make the first intervention. Again, the report, as was discussed and presented to the Plenary does not go far enough for some in the sub team. We do want to make sure that these views are not being ignored, but just the opposite, that these views are properly recorded and archived because jurisdiction related debates will surely continue beyond the life of this Work Stream 2 or even the CCWG as such, and, therefore, we want to make sure there is a repository of the various views that have been held so that future debates can be informed by those views.

And I would like to acknowledge and thank Brazil for refining their minority position. As you will have noted, the process related points have been removed, which I think is great because even though not everyone might agree with the substance of the work products of the CCWG, what we should all take care of and be responsible for is the process. Because following the process for coming up with our recommendations is actually giving legitimacy to the recommendations and the multi-stakeholder model as such. And, therefore, thanks again for refining your minority opinion. And as promised, we want to give you ample opportunity to make your views heard. And this does not only go for Brazil, but also for Parminder who has asked for a dial out and I would like to remind the operator that Parminder wanted a dial out ready for the

jurisdiction session, so we will be sure to make sure to put Parminder's views on the record as well.

But before we do that, let me hand over to Benedicto, is it going to be you to make that intervention? If so, the floor is yours. Please.

BENEDICTO FONSECA: Thank you, this is Benedicto Fonseca from Brazil. Thank you, Thomas, for this. I would like to take this opportunity to thank you and the Co Chairs for offering us the opportunity to speak to our minority opinion. We have since you guys have indicated revised version focusing on the substance of our concerns, I'd like to also take this opportunity to thank all those who have been participates in these jurisdiction subgroups. We understand there have been very complex and sometimes difficult discussions. We understand we have been working under severe pressure of time, dealing with issues that are in itself complex, that relate to different areas of work within ICANN. So I'd like to take this opportunity to thank all those and to acknowledge the good work that has been done. Although not exactly addressing some of the issues I would like to have addressed, but I would like to acknowledge the impressive amount of work of time, of manpower, that has been invested in this process.

With this, I'd like to state that the I would not like to try to reformulate what we have stated in our document. We think we have been, as I have said, the process of further refining the idea to make sure we have a very clear message in regard to what are the important points for us and why we cannot accept the document, although we viewed the document and the process that lead to it, we cannot accept it because we do not consider it to address adequately the some of the main areas of concern to us and others, I assume. So I would like, with your indulgence to talk to my colleague, Thiago to make a very short presentation of the document. As I have said, I think the documents speaks for itself. We would not like to reformulate, but just highlight those areas the document would like to take advantage of this opportunity to have it on record. And maybe on that basis, to elicit some discussion and have some feedback from other colleagues that might also illustrate us and further provide some input in our thinking. Thank you. So with this I turn to Thiago.

THOMAS RICKERT: Thanks very much, Benedicto. We do not have a two minute timer running, so Thiago, please take the time that you need in order to convey the message and bring the points across.

THIAGO JARDIM: Thank you, Thomas. This is Thiago Jardim speaking for the record. I was about to say just that I would perhaps probably go over the two to three minute time limit to present the position on this issue. I think it's perhaps appropriate for us to go through the document that we submitted as a dissenting statement for those

who have not had an opportunity to have a look at it, to be familiar with it. And as Ambassador said, perhaps this will instill some discussions.

In the [indiscernible] statement, the revised version that we submitted, we maintained the substantive points and we started the document I'm not sure whether there's a PDF version that could be displayed on the screen for the remote participants to follow it as well. In any case, I'll start by mentioning the introductory points of the dissenting statement. In the introduction, we recall what we understood was a principle endorsed by the Subgroup on how we would proceed when drafting recommendations and that principle was brought to our attention by Bernie. And I thank him for that. And the principle is that the Subgroup would be drafting policy recommendations, which is to be distinguished from important because it sends a clear message that the Subgroup doesn't have to get into too much detail when providing for guidance for ICANN to proceed when perhaps implementing measures and when considering the measures that were recommended by the Subgroup.

Let me then quote what was said at that point in time, referring to that principle. The Subgroup should be looking at the outcomes they are looking for and less trying to be specific about what is implemented. Having that in mind, we would like to recall what was discussed and eventually decided at ICANN 59. The concept of immunity during that meeting featured prominently as an indispensable condition as we understood it at that time for the CCWG to, as a whole, to accept the proposal that you would not pursue recommendations to change ICANN's jurisdiction of incorporation or Headquarters location. This was fine. This was fine for the CCWG as a whole on the condition that immunities would be discussed and eventually feature in the recommendations.

Subsequently at the Subgroup level, those who follow the work of the Subgroup will recall that there was in our view some room for agreement to discuss immunities and there was a legitimate concern expressed by many Subgroup members that U.S. [indiscernible] could possibly interfere with ICANN's core function in the management of DTMS. So we thought the immunity aspect shouldn't have been discussed and we regret that in the final recommendation it was not discussed and it did not appear as one of the issues that should be should have a recommendation about.

We'll also share the concerns expressed by some members of the Subgroup on the need to design immunity in a way that did not or does not immunize ICANN from arbitrary lawful actions. And to address these concerns, we believe ICANN could have

[indiscernible] alongside a recommendation on immunities, a detailed set of exceptions to make sure ICANN is not immunized from lawfully actions. So there can be a set of ICANN activities that would still be subject to laws of tribunals and laws of configuration. And we continue to believe even for those activities that would be immunized from U.S. jurisdiction, those immunities would be subject to accountability mechanisms devised by the ICANN community itself. This is particularly the case, for example, if you think of the IRP tool that currently exists. And there could be other mechanisms to make sure that ICANN remains accountable, even for those activities that are immune.

In point two then of dissenting statement, we expressed the fundamental aspect that we think should have guided the work of the Subgroup and that is that the Subgroup should be trying to recommend measures that will make ICANN accountable towards all stakeholders. And we recalled into that effect the net [indiscernible] stakeholder statement which [indiscernible] that the process of globalization of ICANN speeds up, leading to a truly International and global organization, serving the public interest with clearly implement and verifiable accountability and transparency mechanisms to satisfy requirements from both internal and emphasize the global community.

So in this connection, let me recall you that the charge of Work Stream 2 expressly relied on the [indiscernible] statement in order to define ICANN as accountability course, to our understanding, ICANN's accountability mechanisms currently do not meet all stakeholder expectations because ICANN, again, is more accountable to the country of incorporation and its citizens because it is subject to the country of incorporations jurisdiction more than it is to the jurisdiction of other countries.

Again, we would have hoped the draft report would have recommendations aiming to increase ICANN's accountability as defined in the multi-stakeholder statement, accountability towards all stakeholder, by recommending that steps be taken to recommend that no single country individually can possibly interfere with the policy development and policy implementation activities ICANN performs in the global public interest.

Moving on to point three, and then there's a brief explanation of why, we consider ICANN is more accountable towards the country of incorporation than it is to other countries. We explain very briefly that the country of incorporation has a superior, and in many respects, exclusive claim to jurisdiction over the activities of ICANN. One example of is that it is the territory state with the necessary authority to enforce legislation, court rulings against the entity that is based in that territory. So ICANN, in that sense, is subject to more jurisdictional authority of the United States than it is subject to the jurisdictional authority of other countries.

I think this is borne out by the fact that the draft recommendation, and I think this is a plus aspect that should be praised, recommends measures in relation to OFAC sanctions. The fact that the Subgroup on jurisdiction singled out OFAC sanctions is an indication that the measures adopted by the United States are a reason of concern other than the measures adopted by other countries. So we would have liked that the Subgroup on jurisdiction recommended wider measures, not just OFAC measures, are taken care of, but the U.S. regulatory bodies and that they continue to have the possibility to continue to interfere with ICANN's function.

Moving to point four. The measures recommended by Subgroup and jurisdiction, which to give this one example, targeted OFAC sanctions, are insufficient in our understanding because again it leaves uncovered the other measures. The current legislation that exists in the United States that can be applied and enforced against ICANN in ways that will effect ICANN's development and core functions. So there are other legislations and measures that can still be adopted and will possibly be adopted in the future is a matter of concern.

I think it's important in this respect to highlight that our understanding is that the Subgroup should have recommended not just specifically that measures start against specifically and currently known regimes that exist and that currently effect ICANN. It would have been an incremental gain, if you will, if the Subgroup had recommended measures that could be used in general and would make sure that ICANN is aware that it needs to take steps to obtain exemptions from unknown interference on the part of the country of incorporation.

This would explain, therefore, the need for ICANN to have immunity from the United States jurisdiction, which is point five.

And just one brief word in relation to immunities before I move to the conclusion. We have, from the beginning, reiterated the concern that ICANN must remain accountable for its actions. And immunity doesn't equal impunity because, one, for the actions that are covered by an immunity regime, it's possible and there will be an internal accountability mechanisms devised by the community, but also there could be exceptions to immunity regime. And it's important to understand that exceptions to organizations immunity, something that is not necessarily the rule and International practice, if you look at the U.N. for example, it's the understanding that organizations have absolute immunity and here we were willing to accept that exceptions be crafted, that there is a regime carved out making sure that some of those ICANN activities that do not interfere with ICANN's global management of the [indiscernible], those activities would still be

subject to the normal laws and tribunals of the incorporation, which is the United States. I think that shows the willingness on our part to listen to concerns of the community and make sure that those concerns are taken care of, taken on board.

Having said that, we would have hoped that the draft report would have had recommendations and I'll ask perhaps to the last page of our document to be shown on screen, we would have hoped that the recommendations would have included at least two recommendations that we included in our dissenting statement. They are, again, reflecting the spirit that the Subgroup providing for policy recommendations, not too much concern with the details, which would be left and could be left if the Subgroup so wishes to the implementation stage. We also could have recommended the setting up of a team to discuss how to implement those recommendations. But here they are, those two first recommendations. First, that ICANN should retain jurisdiction in the United States under the [indiscernible] immunity act except for such ICANN activities that do not directly interfere with the management of the Internet's global resources, which exceptions would, for example, enable U.S. adjudication of claims related to ICANN's Governmental functions, for example, employment disputes, contracts that ICANN concludes with local service providers.

And the second recommendation typed into the first would be that ICANN shall maintain and further develop accountability mechanisms not subject to the jurisdiction of any single country for appropriate bottom up multi-stakeholder processes to ensure that ICANN can be held liability especially for [indiscernible] immune from jurisdiction.

Because these two recommendations did not appear in the draft report, not just as recommendations, but it did not appear not even in the text, so we believe that particular failure leaves out many concerns related to jurisdiction that lead to the establishment of that workforce 2 and because of that, unfortunately Brazil cannot support the draft report. Thank you.

THOMAS RICKERT:

Thank you very much, Thiago. Are there any questions for Thiago? Or Benedicto? That does not seem to be the case. I would like to Kavouss, I apologize. I'm sorry, I oversaw overlooked your raised hand. The floor is yours.

KAVOUSS ARASTEH:

Thank you. Thank you, Thiago, for the very comprehensive understanding of the situation. It's not a question to you, but just a clarification. Do you mean by perusal of the matter of the recommendations of this implementation to have something similar to the implementation oversight group or team to review the matter after Work Stream 2 to understand how it should be

implemented and if there is any shortcoming, this shortcoming could be inserted? Is that the case you are referring to? Thank you.

THOMAS RICKERT: Please.

BENEDICTO FONSECA: Thank you. I'll take that. I think the main point we have raised is that we think the Subgroup should not be concerned too much with the implementation phase, but the Subgroup should have looked into the issues and to the [indiscernible] importance of the issue to try to come up with the appropriate recommendations without at this point in time being concerned too much about implementation. So we thought it was not requested from the group to engage into that. We tried more to advise and to on the basis of the issues, what should be done in that regard. So we think that maybe one thing that constrained too much the group was the concern to make sure or even to have some kind of political assessment of what was viable or not and that I think the group itself, imposed itself too many constraints and that impeded the issues. I think this is basically what we are saying when we talk about implementation, that should not have been the focus of the work of the group. It was more trying to come up with kind of policy recommendations and the whether those and what would be required and if any, the timing or the political timing was right or not, I think this was not something that should have been addressed. It has consumed and constrained and guided the work of the Subgroup so much. I don't know if I have an answer to Kavouss's question.

THOMAS RICKERT: Thanks very much, Benedicto. Are there any more questions for Benedicto or Thiago?

THOMAS RICKERT: Steve had a question in the chat which I'm going to read out for you. Is it realistic to say ICANN shall obtain jurisdictional immunities with sanction relief our report recommendations that ICANN use best efforts to obtain, but we are not able to guarantee the result?

Thiago, would you care to respond to that?

THIAGO JARDIM: Yes, thank you. Thank you, Thomas. Thank you, Steve, for the question. This is Thiago for the record. I think the Subgroup is in the business of making recommendations toward ICANN. And I understand that there might be problems for ICANN to implement those recommendations. But then it could come down to how we craft those recommendations. Recommendations could be worded, for example, recommended that ICANN take steps to obtain. It is in itself a recommendation that would impose a soft obligation, an obligation of conduct rather than an obligation of result. And then we could also ask for ICANN to come back to the

community to seek more guidance on the issue. But at the end of the day, I think the problem with the draft report as it is currently drafted, it doesn't even take into account the need to discuss those issues the way we are discussing it now and I thank you for that.

THOMAS RICKERT: Thanks very much. So can I ask those who want to make statements, I know that Parminder wanted to speak, so can you please put yourself in the cue so that we can see how many interventions we can hear before we break for lunch? But in conclusion with respect to the statement from Brazil, you might remember that when we issued the Co Chair statement on the way forward for the jurisdiction recommendations, we reserved the right to publish a statement responding to the minority statement. And given the version that we discussed a minute ago, the Co Chairs do not see the need for any clarifying response to your minority statement. So unless the Plenary suggests otherwise, there will be no reaction to the minority statement, but we will just attach it to the report on a [indiscernible] basis.

THOMAS RICKERT: So there are two hands raised, or three hands raised, so it's good there's a cue forming. And just as a heads up, this is not to limit your ability to speak. What we should be doing is get a quick reaction from the group where there are whether any of those hands raised are related to my statement i.e. there will be no Co Chair response to the minority statement. If there were the case, then I'd like you to just make yourself heard. So that does not seem to be the case. So we can now move to the other interventions, so Parminder is first. Then Kavouss. Then Sebastien. Then Greg. Parminder, let's do a little audio test whether you can be heard. Welcome to the meeting.

PARMINDER SINGH: Thank you, Chair. I'm Parminder. Am I audible?

THOMAS RICKERT: You are audible and the floor is yours. Please go ahead.

PARMINDER SINGH: Thank you so much, Chair. And thank you for giving me this opportunity to [indiscernible] our views speaking on behalf on a lot of organizations and groups we work with. So thank you for that.

First of all, I would start by completely agreeing about [indiscernible] statement and would not repeat its point that were already said in the statement that we start with [indiscernible] points and the fact that we would like the recommendations which have been suggested to be the ones which should have been part of the report and [indiscernible]. And also, other statements or clarifications which [indiscernible] statement carries.

After that, I would come to the additional point that we would like to make. And the reason that we do not agree or reject the

statement, the report as it stands, is both because of the content and the process. And I would speak about the two sequentially.

About the content, we do agree that [indiscernible] among the few who first read this demand, but you think it addresses a part of the problem and the problem is conjoined. It is one problem [indiscernible] very well that one country is able to exercise jurisdiction over a very important global Government function, which leads people from other countries in an unequal position. And it is not just a political statement, but these developments are real and factual. And the kind of sanctions which effect [indiscernible] are not very different from the kind of things that many of the [indiscernible] Government [indiscernible] and so on can put on the main policies of ICANN which is something that is not acceptable. And, again, even some kind of political statement that all countries should have an equal rule and no country should be able to exercise no jurisdiction and extract more accountable from ICANN than others should have been part of this report because are the kinds of things which have been said earlier in many global texts. And we are also the mandated of this group to do, which somehow it was not considered the mandate. So at least make some operational, some political statement about equality between countries and people of the world is important within this jurisdiction. And none of that was done, which is a problem.

And also the third problem which is going to come from the process, in the discussions, they were not even acknowledged. Not acknowledged officially when the process was on and I will give instances of that, and not acknowledged in the final report even as something important, which was discussed, which was the position of many participants and very passionate and the [indiscernible] position of many participants.

Now do please note that the immunity under the [indiscernible] act was a compromised position because after all, this immunity, which is customized immunity under U.S. law is subject to U.S. legislative and residential executive accountability and it can be [indiscernible]. And, therefore, it is not the perfect solution we would we agree to because we do not want to be subject to [indiscernible]. But this wasn't a compromise, it was a climb down [indiscernible] we are ready to do it, we are ready to take immunity as many NPOs or NGOs in the U.S. already have and we were ready to give examples of that, we were ready to consider that. And we were ready to carve out any areas other people may not want to get immunized, get ICANN immunized against. But none of this was even a consideration. And that is a major problem with this report.

And to say why these issues are important because going into the future and [indiscernible] is utilized and this dominates all factors, [indiscernible] and factors GTID and business are going to be important and this puts [indiscernible] from other countries at great disadvantage [indiscernible] subject to U.S. rules. And [indiscernible] is dealing with the [indiscernible] is one of the most hotly contested political areas. And this conversation, the fact that there's the only [indiscernible] list, the fact of the U.S. jurisdiction is going to be a continuing problem. And we don't see the problem solved at all and these are actually practical reasons and not just political ones that we oppose the report about.

Now having said it, our main position on the action content, we would briefly speak about the process. The problem has been noted and can be noted from two day proceedings that this is the statement, this is the position which is very passionate and practical measures, too, we very strongly associate with. [Indiscernible] being the case from the [indiscernible], if you look at the kind of public comments, I mean, we have participated in many meetings among stakeholders and all of them said jurisdiction was the most important. [Indiscernible] of the world's population. And I know in developing countries every year this was a very important issue.

But the problem was that even when we came up with a compromise which was under the U.S. law and we were ready to carve out exceptions to immunity, this was not given an official space in the year and a half to be discussed at all. And that really [indiscernible] the process and because of that the legitimacy of this report.

Now many processes were kind of proposed by the groups, too. The initiative said you cannot talk about solutions, you can only talk about issues, and at that time we kept on coming out with the customized immunity discussions, but whenever we give that particular proposal, people said, no, no, jurisdiction issue is something that we know is a problem, but whatever you do with it, the problem will remain. And then we say, no, we have a solution because that's how we can show that what you are arguing is wrong and we would give the solution of customized immunities and they would say, no, you can't discuss solutions. It was a very difficult situation. Really nothing was being done over month base things were stalled, people wanted to discuss the political thing and we were not allowed to discuss.

I will fast forward and come to Johannesburg meeting where suddenly it was decided by [indiscernible] and the CCWG chair that certain solutions are out of mandate. Now this is very strange that while we are not allowed to discuss solutions and we are at the issue stage how solutions disappeared from our table or our mandate. Anyway, there were again talks around it and people

said at least customized immunity should be stripped from that particular [indiscernible] and people agreed it could be in this draft and it looked like it implied [indiscernible] that this would be discussed.

Now we went along with this promise and the process again meandered in many different directions and for them there was another process position, which was the [indiscernible] which said that everyone can suggest clear issues with clear solutions in an e mail with a clear header and we can combine them. And we, of course, did give this as one of the issues and the solution being customized immunity. And excuse me to go into details because I think these details need to be recorded and [indiscernible] available here.

At that point when people gave these specific issues and specific solutions and [indiscernible] was done to [indiscernible] into a few set of issues, which we found was fine because we don't repetitions or overlaps and we came up with six other [indiscernible] that would then be discussed. And for some reason, number 1 and 2 were [indiscernible] and Choice of Law issues and the discussion started. And while the discussion was going on on [indiscernible] and Choice of Law, we were not bringing up immunity discussions because we thought that was not proper because there were two types of recommendations being drafted right now. And it is the chair's job to see that the deadline is coming and we have this problem, so what to do about it? It seems that was taken [indiscernible] and people were not the process minder have a different responsibility than the workers as minders. And once the working group's job is done, these are the recommendations. Now this is complicated and appropriate and obviously as we have been saying and [indiscernible] has said, the most important issues were not even in a year half discussed.

We are happy to have that discussion done, for other people to come and see that these are the reasons we don't agree with customized immunities, for us to say we probably can meet the concerns in this manner, and then people say, [indiscernible] and honestly say, well, this was done and this was discussed and this was the status of consensus of of our lack of consensus of this issue. This did not take place. And this is a fact and I would like that fact to be contributed by the people that are chairing this meeting. And if this is accepted, then it should be explained why, when the most important issues are brought up by an important part of the group was not recognized and taken up.

Really, unfortunately, not only was it not recognized, it was said that the talk which some people are doing is about change of place of incorporation of ICANN or change of location of ICANN. This was done in an official document including a final report

which said we suggested change of [indiscernible] and then was never discussed. One thing is to show the discussion that some people are trying to do and which is being refused and the discussion on change of location and incorporation, which was not. And this includes, it has nothing to do with the proposal which was one of the most important proposals for part of the group. This does not happen. I would like a statement and explanation of that.

Now we do [indiscernible] as we said and try to meet the concerns of other people and we had not met consensus. It is possible then through the report, in this final report, that this happened and we did not get the consensus, but advantaged and disadvantages were discussed. But this was not done. In fact, the report did not say we discussed immunity. It says we discussed change of incorporation. It does not say we discussed advantages and disadvantages.

Now let me briefly say the Board does say about some issues where they [indiscernible] as part of the report like the four or five choices of option issues which are not recommendations, but they were just a reflection of discussions.

Now if you ask me, I was there most of the time in the group, I do not recommend discussions on fixed law approach, which I'm sure it would have been discussed in some of those calls which I was not there, but these were major discussions about the possibility that fixed law should replace the Choice of Law solution, which is fine. But this talks about the advantages and disadvantages in one part of the report, the same report which refuses to acknowledge, much less talk, about the issue about customized immunity which [indiscernible] is not putting an objection against, which I'm objecting against and many people here wanted to be brought up. We would like to know where the report can talk about certain discussions even if they are not recommendations, but not other issues.

So that finishes my intervention on the customized immunity. Very briefly, if you would allow me to talk for about four minutes? Okay, by silence, I take it that I can. These are the two particular determinations I had asked for before the first reading which the chair and the Subgroup Rapporteur were kind enough to explain in the first reading which I could not attend because it was very late hour in India. But I have a brief comment on those clarifications.

I would first go to the one on Choice of Law. The issue here, I was told that it is clear that the group is recommending a [indiscernible] based approach. That recommendation and the rest of the discussions of other options do not constitute recommendations,

but are merely [indiscernible] discussions or the kinds of things the group considered.

Now if this is so, my first question is to let the report make it clear as it is present that the recommendation is only that we would like to see a [indiscernible] based approach. And the rest of it, in the report, if at all, needs to be in a manner which does not imply that it's probably also the options being offered to ICANN. I agree that there is some [indiscernible] which says this is the recommendation, but there is also not enough clarity. So please be clear with me about the recommendation being clear that we would like a [indiscernible] based approach. And the others are not our recommendations because of discussion. And I'm sorry, but I refer back to the call of the discussion which area which was very briefly discussed by the group, why can't the discussion of immunity, which were tried to be brought in by many people, many times, and there's a lot of text there, could not also be regarded as part of the report. And this is a question I would like to be clarified about.

And even now, coming back to the new [indiscernible] based approach, I think it is not enough to recommend to ICANN that the [indiscernible] approach where one of the options could be a fixed law [indiscernible] which is not actually many options because fix law [indiscernible]. One of the options could be, of course, use of [indiscernible], which I agree would be part of a menu. And others could be probably the country of history and other could be [indiscernible] where it is not mentioned at all. I agree with that menu.

But I think unless we also make further recommendations because recommendations between ICANN and [indiscernible] is a very unequal relationship. ICANN is the principle party which holds all the cards in its hands. Now if we just tell them that you can choose one of them and that's all, there's nothing stopping ICANN from consistently choosing [indiscernible] formula, for example, almost automatically every time. And I think we need to clearly see, if we don't want to make it compulsory that we don't use California law, we can just say, okay, use any of them, there's nothing from stopping them from using California law every time. So let's make some recommendation which is to give consideration to the fact that these are the problems that other countries may face and they may be better off if they have some Choice of Law which is closer to their country not affect their own country. And we would like to see at least a certain proportion of the contracts having a [indiscernible] region which is not California law or [indiscernible] and of other countries.

Unless you kind of nudge ICANN with some recommendation towards not automatically going for California law option, the

recommendation model doesn't say anything because we can't be in compliance with this recommendation and consistently go for either California law or no Choice of Law.

So this is a change which I would request.

THOMAS RICKERT: Parminder, this is Thomas speaking. You asked for another four minutes and we are now past 4:30 local time, so the lunch break is waiting. And maybe you can speak for another one or two minutes and then you can resume after the lunch break. So it's perfectly possible for you to get back after the lunch break, okay?

PARAMINDER SINGH: Okay. I [indiscernible] more than two minutes. So I will briefly talk about the clarification which, Thomas, you gave about for the history changes to be changed or not. I will say that what I was talking about is there is not a change of contract and I understand the legal issues contract and we are to change from draft templates. And when I say [indiscernible], they mean template contract and we can always recommend template contracts so we change all [indiscernible] future contract and that's about the contract [indiscernible] can dually change. And I think we should not have language that we cannot [indiscernible] ICANN to be –

THOMAS RICKERT: We would like to see the center of the portion of the contract.

PARAMINDER SINGH: You have asked for another 4 minutes. Maybe you can speak for another one or two minutes. Then you can resume after the lunch break. So change contract and place. When I say out of here I think they know the contract and they can always recommend the template contract and change future contracts or that's about the contract and about the change in the manner in which that I can bow. I was disclosing and while I come back after lunch. So happy lunch. Thank you so much.

THOMAS RICKERT: Thank you very much Parminder. And thank for doing this mostly. It's certainly a challenge to follow these long meetings through the phone line and the remote participation room. It's 3 minutes over time. But I would really like to ask your patients. Because I think with a couple of process related points that Parminder made, we should give Greg as the rememberatory of the team a opportunity to respond before we break for lunch. Then after lunch we will go back to Parminder then proceed with can calf. So Greg if you would like to make remarks in response to Parminder. This is the opportunity for you to do so?

GREG SHATAN: Thank you Thomas, Greg for the record. I want to reflect on the long and hard work on the subgroup and of course while we have a number of subgroup participants in the audience, there are also members of the plenary who did not participate or did not follow the work of the subgroup. So, it's important to note that your hearing one side of the story. So, I would just like to point out that

we discussed various points around immunity repeatedly and at great lengths. Often without regard to what was actually to agenda or the menu of the subgroup at the time. And I would say that there were a number of robust opinions expressed that were very different from those that you've heard today.

So, one shouldn't get the idea that these were unanswered points or unanswered opinions. It's not my place nor is it my place when lunch is awaiting to go over those other positions. But we have at least orally a minority position that has no majority opinion or other divergent opinions expressing other views. But though other views were amply expressed during the life of the subgroup. And I think that we just need to be cautious about identifying opinions as facts when they are opinions. As a wise man once said you are entitled to your own opinions but not your own facts. So I think that's what went on and I would have liked to have had more time. I would of also like to have had more are participation in the final weeks of the group. If you go back and look, some people were absent. I do not speak of Brazil in this case. They were fully engaged throughout. But sometimes things could of been brought up that weren't in the course of our time. Finally, I would just like the under score what Thomas said at the very beginning that this is not the last time. That issues that do fall under the heading of jurisdictions will be discussed. In the ICANN space or around ICANN. And I do note that the report indicates that there will be a number of annexes to it, which will include and supplements. And so a good number of the working documents and documents reflecting the discussions that took place, even if they did not come to a conclusion will be reflected in the full report as it's packaged up with its annexes. So there will be ample opportunity for others to see the course of our discussion. What was summarized were the discussions that led to the recommendations that were in the report primarily. That's why they are there.

So I won't keep you from lunch any further. I may come back after lunch if there's anything further for me to respond to. But I do want to thank everyone, even though I was holding the minority opinions for all their work in the subgroup and of course this will be this is an inflexion point and not the end of these discussions. And we will see where they are taken next.

Thank you.

THOMAS RICKERT:

Thanks very much Greg. Thanks everyone for this good discussion which will continue after this lunch break. We will have a full hour for lunch. We will reconvene at 1314 local time which translates to 940 UTC. We will have a full hour then continue with the discussion. I will ask the staff not the clear the list of hands in the Adobe room so we can start with the same order of speakers

that you see in the Adobe room now. Thanks very much and recording can be stopped.

THOMAS RICKERT: Thanks very much. This is Thomas Rickert speaking for the record and we would now like to resume our discussion on minority views or other expressions of thoughts on the jurisdiction topic. And we will now continue with the queue. So Sebastien will go first. Then Greg then Kavouss then we go back to Parminder. Those that want to be added to the list, and speakers please raise your hand or should you be on the phone line only give a signal so we can add you to the queue.

SEBASTIEN BACHOLLET: Thank you very much. I'm very honored to be the first speaker in this session.

I wanted to make three remarks or comments. So first one, it's regarding the discussion we have to see where we come from. And of course where we are going and what is the step we are doing here and what could be the next step.

I don't think it's the end of the journey and I don't think, if ICANN is still alive, we will have a long journey. And that's to be taken into account in our thinking.

Concerning the subgroup report, I would like very much to support it like it is today for to go for public comments. And I would like to add what else from my point of view, the next step possible. I suggest that during the discussion about the document gathering the work of all subgroups, we study how and where the next step regarding up the lives is very important. One about community. Beyond there is and push a step forward after the completion of the work of our Work Stream 2. Thank you.

THOMAS RICKERT: Thank you very much Sebastien, Kavouss is next

KAVOUSS ARASTEH: Thank you Thomas. I have one comment and I have two short questions. I hope I don't go beyond two minutes.

THOMAS RICKERT: We don't have the clock running.

KAVOUSS ARASTEH: This time you are very generous and I thank you very much. Danke schon [speaking in Japanese]

Chairman or co chair or Thomas, distinguished colleagues. I'm not comfortable and even surprised to refer to the minority view and majority view. On this particular issue. Jurisdiction is in the governments is not within some private people or individual on one hand and government other hand.

So let us not refer to minority view and majority views. Let's say statement by colleagues that may not be comfortable with the results, but not minority.

An individual or someone representing 250 million people cannot be seen as minority, it's two or three individuals may represent themselves or represent some other people. So we cannot say that. The issue is between the governments.

I think I support the statement made by ambassador [indiscernible] indicating after all of this issues, discuss the union lateral governance of the jurisdiction remain within the hand of one single government.

During the final stage of the Work Stream 1 when the people wanted to justify that single government agree with the process of the transition, in particular during the testimony before the subcommittee of senate, it was several to mention that don't worry, we maintain the jurisdiction to remain within hand of us. That means the government. So the issue was designed and [indiscernible] orchestrated as such. So we did not expect that this group doing more than they have done.

Because that was the situations.

And I think that what was said is exactly correct. That the jurisdiction remains within the governance and hand of that single country. So it is not majority, just minority. It's something that the beginning part of transition was more or less technical part, apart from some accountability which is very good now community has some actions to take. So our support to this statement made by ambassador and other colleagues may make it ever. My question, this is the comment, my question chair to you, question 1, how the course of action mentioned in the two recommendations will be carried out and is there any guarantee it will be carried out successfully. Saying irk can will do that and ICANN will take that. Apart from some words and wishful thinking whether in fact would have some reality. It may be some visions and whether in term of reactions, I don't know.

And the second question is that the statement made by ambassador and maybe by some other colleagues that joined him, what is the next step? To consider thousand follow up this course of action. I am not thinking of ART, ATRT procedure. I want a practical. How do we do that? We should not take it on statement to be noted. Is cause actions it cause attentions. The issue stays there and must be continued to be resolved in one way or other. Thank you very much.

THOMAS RICKERT:

Thank you very much Kavouss. Let me try to respond to the points you made. Firstly, the term minority report is used quite commonly in the ICANN processes. And as you well know everyone in this room as well as joining remotely is participating in this effort in the personal capacity. So as much as David is not here, Asvarson is here as David McAuley we are not here representing the people of our nations if we are government he representatives of our companies or of our associations. Nonetheless, I think it's an important point that you make that certainly governance if they speak in their capacities as governance have huge populations they represent and the term minority statement might suggest to somebody who is not familiar with the model that we are using to create policy, that populations or governance might be marginalized. So I don't have any issues whatsoever with calling this statement for dissenting opinion or some other term that Thiago or Benedict might find the nature of this paper.

You mentioned that things might be said during hearing in Washington and that the process was designed to make it stay within Washington. I have followed those hearings and to my recollection, there has been no statement made by a CCWG representative. I do remember that Farzi testified on the hill so has Steve bee angle owe and others. But nobody has made any information on behalf of the CCWG precluding the outcome of the CCWG deliberations. And I think that our process was very open and I'm sure Greg will be in a position to speak to that as well. So the topic of changing jurisdiction or even changing place of incorporation was not out of scope. But it was just that during the course of the discussions in the sub team such ideas didn't get sufficient traction to be legible for consensus.

With respect to the question about the cause of action, as you know, our recommendations, once adopted by the plenary need to be approved by the courting organizations and by the board. And there will be enacted. To the extent that your question relates to the OFAC licenses that should be sought we certainly have no authority to OFAC to grant those licenses but what ICANN can do if our recommendations are adopted and if we get them through the second reading first which is an important prerequisite for that, then ICANN needs to use best efforts to get these licenses. But what is done by OFAC is not within our control.

With respect to the second question, and I hope I got the question right, I think it relates to the concrete actions that will be taken based on the Brazilian statement. And I think what we should be doing is discuss this once we have the second reading. Now that the plenary has the opportunity to listen to all the arguments, there may be a change of positions in the plenary. So the plenary might raise substantial objections against the report. Right? So I think it's premature to assume that the second reading will be successful.

But if it were, then our suggestion is to do two things. The first of which is to make more explicit reference to the points that have been raised in the documentation that has been developed in the course of the work of the sub team. And as Greg mentioned before we broke for lunch, he said that a lot of those points that have been mentioned by Benedict or Thiago and, also, Parminder have been subject of debate in the sub team. So we will highlight the reference to the appendices where these, can be found so it doesn't get sort of buried in the appendices.

Second we suggest doing is actually creating a second document with the transcript of this very session and, also, make that part of our report. So that for everyone to see during further debates on jurisdiction, what points have been raised and how this interaction went on in the CCWG. So that we have a tangible take away for future jurisdiction related to debates to build on.

So I think that covers the four points in total that I have noted from your intervention. And now I think we can move to Parminder again. Parminder the floor is yours please.

PARMINDER:

This point was about when the report is that we cannot recommend changes to registry and [indiscernible] I will arguing that this agreement for me is the template contract and not the specific contract and therefore I do not want [indiscernible] statements to go in the name of CCWG in the final report this is up to you now to look at it whether this is a correct or not. I will close it at that.

Just add that [indiscernible] so much time to make these comments but I would regret that the questions and the proposals in these comments in which they respondents too. For example, I mentioned that the menu approach should be operated by saying we match ICANN to consider not automatically choose in California law or some such thing. And that part of the report. So please I would like you to consider those things. And I have to now the mic, respond to the statement which I will Greg made who said that indeed discussions took place between these points and then the quotations without regards to what was on agenda.

And that is true. That's what I have mainframe yes. We kept on trying to push these discussions the question however is what was it never on agenda? Never during the year and a quarter was this issue on agenda. And that is the question, you're right Greg, they will discuss in on agenda. The question is why didn't it ever get to the agenda which is the problem. Even when there was six discussed it was not discussed.

One of the issues is we don't talk about it but to look forward in the positive manner. I feel a lot of mentioned including by Thomas and Greg that this is not the end of the road. There will be other

forums. And an observation by George in the chat window if there's a way to reflect in the report whether we can make it clear that yes, again I go back to the report where Greg says that we could not discuss other issues because we were short of time. That's why we took two and not the other four. But these are important issues. Now I don't agree that this is okay to be done, but even if it was done it needs to be put on record that these were the issues, we could not include them, due to the range of loose and kind of combination that the value puts it was proposed. But there are advantages and disadvantages. And I again, I refer to the fact that advantages and disadvantages of options like 6 option in the choice of law section and other possible options have been put there which were actually only discussed but never recommended.

So records of important discussions and possible recommendations do exist in the report in the same way. Why can't we put [indiscernible] discussions and one possible recommendation which is the current record recommendation by Brazil in the report saying we were rushed for time we could not either take it up fully or during taking it up we did not see there would be a consensus and it's a work in progress and fighter for them to look at it.

If this kind of thing can be considered as missing scope to agree to a few things though I keep saying the process has been initiated by the fact that this issue was never formally on the agenda for a very, very long time that the group met on the jurisdiction issue. Thank you very much Thomas.

THOMAS RICKERT:

Thanks very much Parminder. I would like to briefly respond to a few points that you made. One is related to the change of contracts. Were you said you were asks for response, why those can't be changed. ICANN has contracts with hundreds, if not thousands of contracted are parties. And our group does not have any authority whatsoever to change those contracts or to force ICANN to change unilaterally it's contracts. The contracts with registries and registrars is through changing one is which through consensus policies, EDPDPs that go through GNSO. And the other root is contract negotiations and the process for contract changes is specified in the registrar accreditation and registry agreement. And therefore our forces, our powers are limited to recommending to look to those issues and those contracts and change processes to come up with some amendments or changes to those contracts.

The second point is, the discussion of immunityies. I'm sure that Greg will be able to point to specific meetings where that has been discussed. So I think that can be clarified. And with respect to your point that the recommendations or the points that were discussed that didn't make it to recommendations should be referenced to

better I think I said earlier in response to Kavouss intervention that we will make sure there's stronger links from the report to the the appendixes including the transcript from this very meeting so these few points and substantive discussions are visible.

Let's now move to farce they.

FARZANEH BADII: Jorge was before me actually.

THOMAS RICKERT: I don't mind. Jorge go ahead.

JORGE CANCIO: For the record. Thank you Farzi. That was actually expecting your intervention to response to it afterwards. But now that we can be the other way around.

Now seriously, I think that there have been many interventions in the direction of saying, okay we had substantive discussions on some issues. However those discussions for instance on the issue of limited tailor made be spoke immunities didn't really get to the final point be it for scheduling reasons for timing issues, for whatever reasons. But I think it would be kind of unfair to leave it by that. And I understand or I think I understand that you want to make some clearer linkages to the where we discussed that. But I think that it would probably make sense to describe this explicitly in the report. And, also, kind of agreeing because in the end it's not an agreement of on a specific recommendation but an agreement on a fact that we have these substantive discussions that we didn't get to a point of conclusion on them. And that probably it would make sense to have some sort of follow up, I don't know, in a Work Stream 3 or in a different kind of process on these issues. Because they are issues that are put on the table by different stakeholders. They are of course legitimate. We haven't discussed them to the end. And so I think it would make sense to include something in the report. Recommending or suggesting that there should be a way forward on them. Thank you.

THOMAS RICKERT: Thanks very much Jorge. Now Farzi.

FARZANEH BADII: Thank you very much. I'm astonished because it says a statement comes from a ghost it should be given more weight. We should know that the issues that were reported, the jurisdictional issues were reported by mostly non governmental people. People that faced jurisdictional problems. But when using the DNS. And I also liked to point out that I want the hear more about support for the process of this subgroup. And it's recommendations because until because it has been very criticized by some. I would frame as unfairly criticized and I don't think delegitimizing the process of the subgroup will benefit the DNS users that are facing sanctions.

And the recommendations of the subgroup will be fast if implemented will facilitate their access to the end and it's something that we have forgotten them for the past 19 years. So it is time now to set aside the political battle of jurisdiction and think about pragmatic solutions that can help DMNS access if DNS access.

So I do want to know that even without minority statement there is support for the recommendation. Especially for OFAC recommendations. And I think that is very important thing for the for us for later to advocate for its implementation of the recommendation.

The other and another small point that I wanted to make, I do I have supported the discussion about partial immunity of ICANN. I think it's something that we should definitely discuss. We have been having problems with CCTLD delegation and I dot IR was as we know there was a case already about dot IR in the U.S. court about its attachment. I think for that reason we need to definitely look into partial immunity for ICANN. But I don't think this subgroup has demanded or can do it.

THOMAS RICKERT:

Thank you very much Farzi since you also mentioned further debate and Jorge made the suggestion I think we at CCWG are not in the position to kick off a new process. We have been tasked to look into a limited number of issues for a limited period of time with a limited budget given. And with us coming up with proposals to come into existence with various reincarnations over and over again, I think can't be done procedurally. I think what we are doing is make the report very useful tool for further debates which will surely takes place but I'm not sure that we can really trigger this. Because we don't have the mandate to do so.

I think that if there shall be another course constituency effort or there should be that within ADRTs that something else would be decided but not by CCWG. I'm cautious about not creating expectations but what the group can and cannot do without over stepping over reaching or actually powers. But more than happy to reassume the discussion on that for now with the minority statements once we get to the recommendations and the second reading.

I now have Greg then Olga they David. Greg.

GREG SHATAN:

Thank you Greg Shatan for the record.

A couple of quick points, first I would like to let the members of the plenary not in the subgroup not what our working method was and what we attempted to do over the longer period of our work. Was

to identify issues before remedies. And immunity was identified as a remedy.

But throughout the conversation about immunity when it was brought up in the A group seemed to start with remedies without identifying the issue that it was intended to resolve until really kind of the very end of the process. So that's one reason why immunity didn't come up as often as it might in our formal agenda. The discussion seemed to start with the idea that there was a remedy that was needed rather than with an issue that needed to be remedied.

Second, I would say that it was not only the lack of time that you would in some issues making it to consensus and some not, but there was also a lack of a clear path forward based on the views that were being expressed in the subgroup. And in the we didn't come to the end of the road on those, where that road led was at best unclear and I think for that reason rather than dwelling on what might have happened, because that's difficult to predict, the point that we need to look at is where these conversations might takes place next.

And the last thing is, the issue of immunity actually is extremely complex and multilayered. Indeed I was thinking about the very case involving dot IR that Farzi mentioned and ICANN was not a party to that case. So immunity as to suit, which is the type of immunity that is contemplated in the IOI, would not have shielded the dot IR consideration that took place in that particular case. Would it be needed to be some other sort of immunity to have there. And of course in the end the decision of the Court was that it was beyond the reach of the Court to attach the dot IR CLD. So in that instance I think many of us would agree justice was served.

But, I think that only goes to point out how that subject is really a subject in and of itself and may not even fit quite so neatly into an accountability group, given that our predicate document for this entire CCWG accountability, when it lists existing forms of accountability, and I think its annex E or appendix E to the Work Stream 1 report, cite litigation and recourse to the courts as an existing form of accountability for ICANN. And I would note that we spent a considerable amount of time in the group, and I would not call it stalled. We spent a considerable amount of time in this growl examining each litigation that ICANN was a party to. And what it's ramifications were for the work of the group. It's interesting to reflect if immunity existed even the so called partial or tailored amind that was referred to I don't believe any of those cases could on have been brought because they did in factorylate to the core functions of ICANN and not things like employee disputes or whether the garbage was being put out properly. So those cases which sought the hold I would of been barred at least

from the courts. That's something to contemplate I know second recommendation in the dissenting opinion of Brazil is that there be a further multi stakeholder forum for those sorts of things to be adjudicated. But that is another thing that is way down the line, certainly beyond the line of Work Stream 2.
Thank you very much.

THOMAS RICKERT: Thanks very much Greg. Now we move to Olga please.

OLGA CAALLI: We like to support and concern the concerns about colleagues from Brazil in their minority statement. Perhaps we agree with our distinguished colleague from [indiscernible] that it may not be named minority statement perhaps dissenting opinion or what they think is best for this important opinion.

We would like to also support the idea from Gore Jay in Switzerland for the convenience of a follow up process on this important issue. We understand your concern Thomas we are not creating a new process that is not a mandate and I agree with you in that. And we would not be triggering a new process or creating a new one. We would like to have the concept in the report of having a follow up on this important issue. Thank you.

THOMAS RICKERT: Thanks very much Olga. David.

DAVID McAULEY: I Thomas. I wanted to make a brief statement. We talk about substance and I make my views clear that before and I'm not a supporter on a immunity idea but I appreciate the government of Brazil putting it on paper.

On process I've been involved in substance I don't think I missed a meeting and my assessment of the process has been that it's been extremely fair. It was a lot of work for one basically one repertoire to handle. A lot coming at the repertoire. The process was fair. It formed our direction, our direction coming out of Work Stream one 1 is this subgroup would consider you jurisdiction by focusing on the settlement of dispute jurisdiction that makes the litigation study that Greg mentioned critical. That was our remit and that was the primary focus and immunity wasn't. So I think I want to say I think the process has been extremely fair. Thank you.

THOMAS RICKERT: Thank you very much David. Andreea.

ANDREEA BRAMBILLA: For the record it was me speaking earlier in morning when person ear introduced me as Canada. I want to note that we support the multi stakeholder process where the multi jurisdictions were developed considering the divergence that the subgroup started with a lot of to come up with concrete and practical solutions is that warrant solutions by the broader ICANN community. We

certainly recognize that jurisdiction is a complex multidimensional issue and we are not opposed to continuing the discussion. In doing so we should not lose sight of our collective goal which is really to reinforce the accountability framework that was part of the stewardship transition and we believe the additional have been proposed in that respect. Thank you.

THOMAS RICKERT: Thank you very much Andreea. Parminder.

PARMINDER: Thank you chair. I would first point I wish to make is about your observations that which follows from my and some other people's requests that can be effort to some follow up versus to which you said that it's not in our mandate to talk about these kind of follow up processes. I really do not agree with this conception of our mandate. Our mandate is to advise ICANN the do whatever is in the power of ICANN to do. Including to abolish itself. That's the what is authority. If I'm recommending authority to India I can recommend anything which is in the power of person who recommended too. It's not about my policy I have zero authority. Recommending bodies don't have authorities. But when they recommend it to and they are supposed to recommending authorities I'm repeating the point this is becoming earlier [indiscernible] conversation so I agree to catch his attention. Yet Thomas initially said we started very open mindedly to Kavouss point that whether U.S. jurisdiction is required or whether we have to act within it. It's show that our mandate is whatever our mandate is within the jurisdiction question. So I don't accept that we cannot tell ICANN recommend to ICANN that we think that we need a singular process like ours to keep discussing the situation.

So the problem here is we may not agree the make that recommendation but I would request here to reclarify rather this is the situation. Because if we can ask ICANN to make PPIE as reorganization and do all those things we can ask it to do anything because after all it's up to it whether it wants to do it or not. That's the frustration that I want, again to get few the chair on that.

Second point when chair is pointed to one of my points, what I was asking for was to mention [indiscernible] recommendation inside the report and not as index. In the same manner as some choice of law options exist inside the report right now eventhough they are not agreed by consensus. Many of them actually were not properly discussed here. For example, 6th California law option.

They are there just as things which could be possible with their advantages and disadvantages.

So please clarify my pure specific point which I'm now saying for the timer you I'm not talking about indexes being referenced

there's a record choice of law in the part of the report already. Non recommendations why can't we have immunity in the same manner inside the report assured of immediate was discussed and recommendation that was provided focused by many but not reach consensus as we all said but review the fact that we did not have time. This is my proposal and not put it in annex. Let me quickly also respond to what Greg said. He said immunity was shown as in remedy without showing the issues that it addressed. This is absolutely not a factual statement. And I would go on the A list to provide all of the evidence to prove that one of the first documents which was made regarding the influence of jurisdiction of ICANN, there was about 5 or 6 points put about whatever issues which create the problem to which the immunity discussion would try to solve. This happened from the start. It's public inputs also carry many examples and during my organization of all those issues and immunity was never shown as a remedy without with the issues. Absolutely I would say absolutely a false statement on record. And I'm sure there's proof are false.

And the second thing I said was there was not a clarity on the part of [indiscernible] I have no idea what that means. Because I would think what needs to be done and how another proposal has been very clear. So I would like to get clarification of what was the non clarity in part forward. And here I would also mention that repeatedly I asked chair to speak ICANN legal's opinion and whether a carve out can be made from a possible immunity to enable ICANN to function under the nonprofit law of California. And this reference was never made. So we were ready for being very clear on all kinds of parts forwards and there was not a fact that there was lack of clarity on the part forward. Thank you very much.

THOMAS RICKERT: Thanks Parminder after Parminder we have Delila.

DALILA RAHMOUNI: Can you hear me?

THOMAS RICKERT: Yes, we can hear you. Go ahead. Welcome.

DALILA RAHMOUNI: Thank you so much. This is the French government. We would like to report the question raised by [indiscernible] it's minority statement. We need to support for your proposal to its abilities for the ICANN we think this is not a policy question but a legal question. And concerning the mandate of this specific jurisdiction. We think if it is not a mandate of the subgroup we think that in the Work Stream 2, the subgroup can work on the guidelines of the option of partial immunity. And we think this is really the are start of this option to explore within this group.

THOMAS RICKERT: Thank you very much let's move to Greg then Kavouss. Those that want to be added to the list please do so now. Other you wise I'll now close the queue and take stock so we can move to the next part of the agenda.

Greg?

GREG SHATAN: Thanks Greg Shatan for the record. First, just to be clear I stand by my statements and I believe they are factually correct.

With regard to the process and the past that took place. Second, in terms of process, would like to point out that the second recommendation because one of our members took it on themselves to take the various pieces and put them together into a first a draft of that recommendation that was Raphael Boguardlaw. So I think we need to look to members of the subgroup in part when we think about why certain recommendations were more fully delated than others.

And not merely think about time and just to kind of refine the point about there not being a clear path forward, what I'm really referring to is the fact that there were significant and I think over all more objections to the concept of immunity even tailor immunity than there were those in support. I would not have used the word many to describe those in support. Which is not in any way to invalidate the opinions of those that did support that position. But it is being put forward as a descent or minority opinion in part because that support was not readily ascertainable. Nor did it become clear in any way there was any type of support for beyond the support that you have seen and heard today.

So I think that is what I'm saying when I refer to no clear path forward. It was clear there was strong support for the two recommendations that did ultimately gain the approval of the subgroup. And I'll leave it at that. Thank you.

THOMAS RICKERT: Thanks very much.

GREG SHATAN: One more sorry, one more point quickly.

The mandate of the subgroup [indiscernible] certainly not as broad as ICANN. And indeed there was quite disagreement about [indiscernible] our but tinge mandate as a whole I think really had a fair, very specific mandate. Thank you.

THOMAS RICKERT: Thank very much Greg. Last in the queue is Kavouss. Andafter that I'd like to close the queue and take stock. Kavouss, please.

KAVOUSS ARASTEH:

Thank you Thomas. I think what was mentioned by Greg I have tracked. Perhaps he didn't mean that when he said there was no any support. I perhaps put it in a way that you always mention there was no sufficient traction but not any. When you say any that means no support at all. That was not the case. Just make it clear.

But I agree with some term you use no sufficient traction or no sufficient support. That is one thing.

Second point I want to make it clear that reference was made on to distinguished colleagues to political statement and to fairness. No one in this conversation, this morning and this afternoon referred by any means to any political motivation nor fairness on the activities of the group.

When you say equal footing, it's not in government it's not political. You are talking equal footing you are talking gender equality. There's legal issue but not political. So I don't think people can tailor them and put them in the framework of political. And fairness I don't think anybody at this meeting talk about all fairness of the activities of the group. There auto for we should not refer to that. Thank you.

THOMAS RICKERT:

Thank you very much Kavouss.

I think we should probably do two things. One is to again confirm that we were get the transcript which is currently in captioning format cleaned up. And tidied up so it can be made an appendix to our report the. And several of you have asked we establish stronger links between the report and the issues that did not make it to recommendation status. Including Parminder that said he wants the immunity topic to be explicitly mentioned in the report. And what I think that quite some sympathy and support was the proposal made by gore jaya a little bit early your on which I'm going the paste into the Adobe room chat again for everyone's review. I'm going the read it out for you.

Discussions in the jurisdiction subgroup were inconclusion on some issues. Again was the partial immunity for ICANN. It may be that ICANN community wishes to full out discussions on these issues many which are recorded in the annexes to this report. So we suggest that we use this language add that into the report and then as suggested a add the transcript of this meeting to the report. But now, before we can actually move to making something in the appendix to report, we need to get the report adopted.

And that leads us to the next agenda item and that is the second reading of the jurisdiction subgroup report. And at the end of or after Greg has shown us through the recommendations, you need

to make a decision whether you want to raise an option to the report or not. In the absence of substantive objection we can call this a successful reading. Now you have heard all of the by those that were proposing to some or all recommendations in the report so all of the facts are at your fingertips. And I think we have done a much more thorough job on the second reading than we have done on any of the second reading. Because you got all the first handed information from those that don't like the recommendations.

Right? And I think we have never done such an can exercise before. So if you think that we can't proceed with a successful second reading, then you should object. If you think we should keep the report and that it should make its way into the final report then you should not object.

All the facts are on the table. We know the timing issues we cannot make substantive changes or any changes to the report. Otherwise we run the risk of not having anything on jurisdiction on our final packet. So with that I'd like to hand it over to Greg to show us through the latest findings of the jurisdiction sub team. Over to you Greg please.

GREG SHATAN:

Thank you Thomas, Greg Shatan for the record.

So, we will go back again through the report for the second reading. Once again, at the request of member of the subgroup we have this comment here. It's not part of the report. But just notes that we looked at various issues regarding a registrar that had was not doing business with people with Iranian passports and we included in if that was related to OFAC there was no clear showing that it was. That the recommendations that we have deal with it in deal with it in an adequate fashion. And noting again that subgroup will consider creating stress tests based on these scenarios. And as Kavouss and Steve DelBianco both noted earlier Steve has created a three stress tests related to the group.

So if we go on to the next slide.

The this is the first of our set of recommendations regarding sanctions and specifically on OFAC sanctions. We noted that before ICANN to enter into an RAA with a applicant from a sanction country it means to get an OFAC license. The terms of the application to become a registrar state that ICANN is under no obligation to seek such licenses and in any given case OFAC could decide not to issue a requested license.

The subgroup recommended that this sentence be amended to require ICANN to apply for and to use best efforts to secure an

OFAC license rather than merely saying they are under no obligation to seek such a license.

This of course would only apply if the parties otherwise qualified to be a registrar.

And is not individually subject to sanctions.

We also recommend that during this licensing process ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar. That is the first of the OFAC recommendations. Next slide please.

Second, recommendation relates to the approval of gTLD registries to subgroup noted it was difficult for residents of sanctioned countries to file new gTLD applications and make their way through the process.

The applicant guide book noted that ICANN sought and granted licenses as required in the past but OFAC could decide not to issue a requested license. The subgroup recommended that ICANN should commit to applying for any and best efforts to secure an OFAC license for all new gTLD registrants that fell into this category as long as they are otherwise qualified is can not individually subject to sanctions.

Again, we recommend that ICANN should be helpful and transparent with regard to the licensing process including ongoing communication with the applicant.

That's the second OFAC recommendation.

Next slide please.

Third OFAC recommendation, subgroup noted that some non U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants based on a mistaken assumption that they must do so simply because they have the RAA contract with ICANN. Non U.S. registrars may also appear to apply OFAC sanctions if they cut and paste registrants agreements from U.S. based registrars that contain OFAC provisions. We saw a couple of examples in the subgroup one of which was recommend identified by that registrar during the course of the group. May have been coincidental but in any case it was recommend identified.

We note that ICANN cannot provide legal advice to registrars but it can bring awareness of these issues to the registrars the.

So the sub group recommended that ICANN clarify to the registrars that the mere existence of RAA with ICANN does not require them to be required to comply with OFAC sanction we also recommend that ICANN should explore various tools to understand registrars the applicant laws by which they operate and accurately reflect those because e laws in the customer relationships including the customer contract.

I'll pause here and see if there are any remarks other questions? We have one more OFAC recommendation.

Let's move on to the next I see a hand from Kavouss I don't know if that's a new hand?

THOMAS RICKERT: Kavouss if you have a question go ahead.

KAVOUSS ARASTEH: Yeah just a small question. In the two recommendations refer that ICANN use best effort wishful thinking to secure OFAC license. I'm not asking him, I'm asking ourselves, what is the degree of assurance that this sort of license be secured?

Thank you.

THOMAS RICKERT: Greg floor is yours.

GREG SHATAN: Thank you. First I would not describe best efforts as wishful thinking or any of this as wishful thinking. Indeed we have seen that in Work Stream 1 our recommendations, once approved by the board, after of course being approved by the charting organization were put into effect. So I would expect that if these recommendations are approved all the way down the line, that they will be put into effect. And of course there's no assurance because we are talking about party under over which we have no control as to whether the licenses would be granted. I will note that with regard to the individual licenses, that ICANN seems to have a perfect track record in secure these licenses when they have been applied for.

So, I think while past performance is no guarantee of future performance, one would generally expect the same degree of success in the future especially since we are asking ICANN to increase its commitment to getting these licenses. And even with their somewhat equivocal commitment they have in fact gotten the licenses that were sought.

That's I think as much as anyone can say about that. Or at least certainly as much as I can say.

Why don't we move on to the next slide he please.

The last of the OFAC recommendations relates to a general licenses. Not the specific licenses that we have been discussing so far.

OFAC general licenses cover particular classes of person and types of transaction.

ICANN could pursue general licenses to cover transactions integral to ICANN's role and managing DNS and contracts for Internet resources. This would enable individual transactions to proceed without needing specific license as long as they fell into the type of transactions and class of person that the general license covered.

A general license would need to be developed with the U.S. department of treasury, which is where OFAC sits within the structure. Which would then need to amend the OFAC regulations to add the new license or licenses. This regulatory process maybe a significant undertaking. With that in mind, the subgroup recommended that ICANN takes steps to pursue one or more general licenses. And that ICANN should first as a priority study the costs, benefits, timelines and details of the process. ICANN should then pursue the general licenses as soon as possible, unless it discovers significant obstacles are through the study. If they do discover significant obstacles ICANN should report this fact to the ICANN community. That's us.

All of us, even though it's not in the CCWG accountability. And seek the advice of the community on how to proceed.

If ICANN is unsuccessful in getting a general license then ICANN needs to find other ways to remove friction from transactions between ICANN and residents of sanctioned country.

Lastly, ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with effected parties.

That is the last of the OFAC recommendations. Next slide please. We move on to the set of recommendations regarding choice of law and choice of venue provisions in ICANN contracts. The first of which relate to choice of law and venue provisions in the registry agreement.

We identified in the subgroups several alternative approaches for the registry agreement. And we also note these could also apply to the registrar accreditation agreement.

The menu approach, the fixed law or California approach. The carve out approach. The bestowing approach and the status quo

approach. These are explained and discussed in the following slides. Next slide please.

First the menu approach. As it says here, the subgroup supports a menu approach. Where the governing law would be chosen before the contract is executed from a menu of possible governing laws. The menu needs to be defined, this could besting left to ICANN and the registries to define the menu.

The subgroup discussed the number of possible menus, which could include either one country or a small number of countries from each ICANN geographic region. In addition the menu could include the status quo which is no choice of law. And or the registries jurisdiction of incorporation and or each of the countries in which ICANN has physical location and which thus have jurisdiction over ICANN.

Subgroup has not determined what the menu items should be. But believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA. This likely suggests having a relatively limited number of choices on to the menu.

The subgroup has not determined how options will be chosen from the menu e.g., the registry could simply choose from the menu or it could be negotiated with ICANN. In spite of what Parminder said in his remarks we do not identify, nor do we contemplate that it would simply be chosen by ICANN. If it's either a negotiation point or something that should be chosen by a the registry. But we did not make a determination.

So that in essence would need to be agreed on as part of the agreement as any agreement would be. But the question of how, if the registry gets to impose it on ICANN or whether it's a negotiated point is an implementation point that's beyond our subgroup's recommendations. Next slide please.

These are the remaining options. The California or fixed law approach which would make all contracts subject to California law.

And U.S. law as the governing law of the contract.

To be clear that's not the governing law of the parties to the contract. It's the law under which the contract is interpreted.

Next is the carve out approach. Where parts of the contract that would benefit from uniform treatment would be covered by uniform predetermined law. For instance California. And other parts perhaps those that relate more to the actions of the registrar within their own country would be governed by the law of the registries jurisdiction or by a law chosen using the menu approach.

Next is the Bespoke approach or the custom approach that would fit each contract to the country of of the registry operator. That would be the governing law essentially home law for the registry operator. Last of course is the status quo approach which is to retain the status quo of having no governing law clause in the RAA.

I see question from Steve in the chat.

Negotiate implies that ICANN would need to agree with whatever menu item selected by the contracting party right?

That is correct although we also contemplate the possibility that it would be selected by the registry operator without ICANN having the opportunity to object as long as it was on the menu that had already been agreed toacy an overall concept.

Next slide please.

Next recommendation has to do with choice of law provisions and in are regular start accreditation agreements.

Here we simply note that the same approach should be taken for the RAA as for the RA.

The last choice of law approach this up with relates only to choice of venue and not to choice of law. So this is in registry agreements. Under the registry agreement disputes are resolved by binding arbitration pursuant on ICC rules. The RA base agreement contains a choice of venue choice provision stating the venue is Las Angeles California as both the physical place and the seat of the arbitration.

When entering into contracts with registries, we recommend that ICANN could offer a list of possible venues for arbitration rather than imposing Las Angeles California venue.

So there could be a venue menu. The registry that enters into the registry agreement could choose what venue it prefers at or before the time of execution of the contract.

If we take this menu approach. I see series of questions from Parminder in the chat. Little hard to wind back and see them all.

These options are listed as I said before because they were part of the discussion that led up to the recommendation that ultimately went there. So they are kind of fold in the recommendation itself as it goes. Immunity is not in the path of any of the recreations that were chosen. That's why it's not mentioned here. And is not

does not fall within the discussion of any recommendations that were adopted that's why it doesn't appear in the main report.

So that concludes the second reading. Of the jurisdiction subgroups report. And I'd like to see if there's any questions?

THOMAS RICKERT:

Thanks very much Greg. Now let me ask the floor whether there are any questions?

I

see Parminder's hand is up. And since this is not the part where we all express our views to the extent required to make our views heard, we should go back to the two minute rule. So please make sure your intervention is not exceeding two minutes. Parminder the floor is yours please.

PARMINDER:

Yes thanks I will not take that long at all. My question remains why the report carries a record of options which were actually not discussed at length they were never discussed on the maybe discussing some of the things that are missed. They are there in the report but why can't we do the same with immunity in the discussions which were put up in public inputs by many members repeatedly and asked for great thing that they do not connect to any particular recommendation that is not a very valid point but could effective also of a kind of immunity from one part of the whole machinery and here does connected to that part.

In any case it connects to the whole mandate. Why can't we have immunity options as part of the which we have other options which actually were discussed many times lesser than immunity issue. Thank you very much.

THOMAS RICKERT:

Thanks very much Parminder in accordance with the usually work practices this report has reached consensus in the sub team. And therefore we are considering it as a plenary and for those who are think that their disliking of the recommendations go as far as objecting to the report as you such they should use that opportunity.

Any more questions for Greg?

The line is now or the queue is now clear.

Now, we as a group now have the opportunity to get the report ready for public consultation to get some input from the community, whether they think we have done a good job with the recommendation and they support us in putting this into our final package or not. So I see that two hands are raised again. Can we keep this very brief since Parminder just spoke let's move to Kavouss or was that unrelated Kavouss? Kavouss go ahead.

KAVOUSS ARASTEH: Just a question when and how you treat [indiscernible] as related to the approval the recommendations and green light for the approval. Don't want we approve then the source remain and over. Please define a relation in them and take this reaction as we would not be for complete thank you.

THOMAS RICKERT: That's a good point Kavouss we can certainly go through the stress test now although they are not part of the recommendations I would suggest that we in pause this for a moment. Steve can I ask you to join us over here. Steve has not only volunteered to draft the test that has been communicated on the list but he's also volunteered to show us through the stress test what they mean and whether they were successful.

So I he will review the results of your work in a moment right? Thanks so much Steve and for the others that will get back in the queue once we have gone over the stress test.

STEVE DELBIANCO: Thank you, Thomas. I assume you can take the PDF that was circulated this morning and just load pages 1, 2 and 3 and we can scroll through those. As you know you can click on the Adobe right hand corner and it will expand to the full screen if you want the read it in detail. Or you can refer to an email that Thomas sent 3 or 4 hours ago.

The stress test prepared at the request of Kavouss and I pulley supported the idea of doing a stress test instead of coming up with specific media reports and can examples. The facts of which are always open the dispute. When they are presented.

The elegance, the attractiveness of a stress test is to propose a plausible scenario that is not necessarily a probable scenario. But it's plausible and it's degree of abstraction the scenario where there doesn't need to be a debate about whether it did happen or whether it will happen. And there's to debate over the particles. It's stated in general terms which are sufficiently general that enable us to focus not on which registrar did it, when did they do it and what was the reason, but instead focus on whether the accountability recommendations we come up with would actually improve the accident ability of ICANN and it's bylaws over what the status quo would be. There's three of them for the sanctions related recommendations and when I go through them I think you will quickly see we don't need to spend very much time on them in this group since they are very close what was used by the subgroup as they developed these three sanctions recommendations. In other words, the sanction recommendations include the stresses they sought to alleviate. If you recall the Greg led us through each of the sanctions anticipated the problem that occurred in the previous round or occurring today or could occur in the future.

First stress test number 1 is where registry or registrar would decline to the don't main registrations because they believe they are subject to sanctions that apply to the ICANN.

For example the U.S. has OFAC thanks this stress test should apply to any sanctions of any nation that could impair the ability of ICANN registrars to serve the community now the consequence of stress test is always listed as second. And it ICANN fail to provide the domain name in the bylaws. Left the existing and right hand corner is how the proposed measures change that.

Under existing we noted the fact that ICANN management can at any point the legal or GTLD team could tell contract parties they are under no obligation to worry about sanctions the sanctions relate to their entity nobody is subject to a sanction just because it applies to ICANN and they are a contract party.

If ICANN failed to do this diligently, the community has the ability to challenge ICANN's inaction via a community IRP thanks to the work we did in Work Stream 1. Every five years a accountability and transparency team can make secondations and if they are rejected IRP can be brought to board to challenge that action by board.

Flipping to proposed measures we discussed what the proposed measures were in respect to clarifications and the clarifications conduct can which if it were credible and substantiated it should allow registrars to have the you insurance they need to go ahead and except registrations from the registrars that that country. So we prove that it's an a profit and ICANN is for the registrants. I can proceed I didn't care quickly to the other two Thomas.

THOMAS RICKERT: Let's check whether there are questions related to the stress test?

Okay.
Good to go Steve.

STEVE DELBIANCO: Thank you. The second one relates to a stress test of ICANN declining to enter into a registration agreement. Registration accreditation agreement or IRAA with an aspiring registrar a country that is subject to sanctions in a corporation. For example the United States applies sanctions through the on OFAC many European nations have sanction regimes of their own. I didn't think it was appropriate to focus only on OFAC by the stress tests are an example. The consequence of doing so ICANN failed on one of the core values that is "promoting con with the domain names with the respected qualified in the countries.
Today ICANN is under no obligation the seem a license to get around that sanction however one if the proposed measures in the right hand column is for ICANN to pursue general licenses to

cover transactions and the general license would work but if a general license is not achievable another proposed measure is ICANN stated policy so ICANN is apply for and use best efforts to obtain a specific OFAC license for that party. General OFAC license for all parties and specific license in respect to a single party. I note that the recommendations includes requests that ICANN can be transparent and interactive in had discussing with the community and the potentially registrar the progress of its infliction pore the license. The conclusion for this stress test is the proposed measures are an improvement helping ICANN meet I core value and be accountable to the domain registrants.

The third and final stress test is similar to that that we have a gTLD.

THOMAS RICKERT: Sorry Steve let's pause for a second to see if there's any questions relating to the second stress test?

Doesn't seem to be the case. Let's proceed.

STEVE DELBIANCO: Thank you. So a applicant in the next round or subsequent rounds of gTLD application, the applicant in entering into an agreement with ICANN, ICANN in a stress test number 3 would suggest that it might fail to provide sevens. Services lying excepting a application, processing the application doing the evaluate that if it failed to provide services to a new gTLD applicant for a country that is subject to sanctions that apply to the corporation. ICANN would again fail at the core values same as the previous. And one is for ICANN to pursue, to be committed to pursue specific OFAC license for all specific applicants that are qualified to be a registry applicant. Under the previous stress test the recommendation for a general license for ICANN to obtain one eliminates the need for specific ICANN it's repeated here. The conclusion is that proposed measure would be an improvement with respect to accountability and serving the core values.

So Thomas those are the three stress tests. I think it's obvious that they don't add substantial incremental value to the work of the subgroup at this point because the subgroup considered these kinds of scenarios when they put together the recommendation. Nonetheless we recycled some methodology we achieved in Work Stream one where we came up with with plausible scenarios and ran them by existing and proposed measures to see if we achieving ability.

THOMAS RICKERT: Thank you very much Steve. Any questions on the third stress test?

There doesn't seem to be the case. So thank you again Kavouss for recommending that we do these three stress tests and Steve

for drafting and explaining them. And since you know that the stress test which have been requirement for Work Stream 1 are not a requirement for Work Stream 2, you know nonetheless we did them which I think was very helpful. So we again exceeded the expectations of the plenary didn't we?

He's smiling.

Okay, so we had a queue that was and those in the queue were patiently waiting to be heard. Thanks again Steve. Parminder the floor Parminder is now lowered his hand. Parminder did you still want the speak?

Okay that seemed to be an old hand to Tijani, please.

TIJANI BEN JEMAA:

Well on behalf of the government of Brazil liked to formerly object to both recommendations as read out by Greg stat an. As we consider they do not address adequately areas of key concern to us. As clearly indicated in our minority opinion or dissenting opinion. That we have filed. So in the light of the CCWG charter, we request that our document, minority opinion or dissenting statement to be attached to the report and be when it is submitted to for public consultation. And in that regard Mr. Chair I understand you are also proposing that a transcription of this session also included, attached we do not have any objection to that of course. We would like to just make sure that it will be identified in a distinct way from what is requested per the charter which is the report itself in the minority opinions. And I'd like also to take the opportunity to invite subworking group participants the wider CCWG participants in the wider community to consider the all the elements that would be before them. Thank you.

THOMAS RICKERT:

Thanks very much Tijani. Parminder your hand is raised again would you like to make a recommendation?

PARMINDER:

Yes thank you. I would like it in the [indiscernible] but let me also speak that I do also object to the board as it stands and they associate for it to the reason it's very adequately addresses the mandated given to it and does not even fully explore the issues that were to its mandate. And because of that, because it was initiated by the small concentration of important issues considered by many but they would not put one of them in there and given adequate time.

And I also would like to at that if during the reading, and the recommend will not need to the obtain those would like to make a point in making this part efficient and time has really been the problem as it was said also in the last stages of subgroup then it should of been managed better because people wanted certain all times to discuss those issues. And thank you so much. It was

really to be [indiscernible] a lot of planning. Thank you for everything [indiscernible]

THOMAS RICKERT:

Thanks for your kind words Parminder and thanks for all your contributions.

Let's now proceed to the second reading. So get ready for marking objections with a red flag in the Adobe room. We are using the Adobe room for this exercise. It makes it easier to capture what the plenary wishes including the remote participants. And Olga is asking how we include the stress test in the report? We make them an appendix to the jurisdiction sub team's report as well as the paper from Brazil, I intentionally did not call it minority statement now as you may have noticed and we will include the additional language as you have suggested by Jorge. With these qualifications, those that object to submitting the report for public consultation and deeming it a successful second reading please use the red flag in the Adobe room.

If you are support the recommendations there's nothing you need to do. Because we do the consensus test by just checking the level of objection.

So I sigh Parminder's objection and Brazil's objection is also noted.

We have Deliala and KavoussKavouss objecting.

Okay.

Thanks for this. And I guess with this level of disagreement the over all support level or objection level hadn't really changed from the second from the first reading, I apologize, so therefore let me congratulated Greg and his team for a successful second reading. Let's give him a round of applause.

[applause]

Great, so we can conclude that agenda item. Which now allows us to go to AOB. So can I ask when there's any AOB from the floor?

[END OF TRANSCRIPT

