

Jurisdiction Meeting #56 (21 February 2018 @ 13:00 UTC)

Attendees:

Sub-group Members: Avri Doria, Cheryl Langdon-Orr, David McAuley, Farzaneh Badii, Finn Petersen, Greg Shatan, Herb Waye, Jeff Neuman, Kavouss Arasteh, Philip Corwin, Steve DeIBianco, Tatiano Tropina, Thiago Jardim

Observers/Guests: Leon Sanchez, Taylor R.W. Bentley

ICANN Org: Bernard Turcotte, Brenda Brewer, Berry Cobb

Apologies:

*** If your name is missing from attendance or apology, please send note to acct-staff@icann.org ***

Transcript

- [Word Doc](#)
- [PDF](#)

Recording

- [Adobe Connect Replay](#)
- [mp3 Replay](#)

Agenda

1. Welcome
2. Review Agenda
3. Administrative Minute (SOI's, Audio or Phone Number Participants)
4. Resolve Current Open Items in Report (See attachment for details)
 - a. Review two alternatives for "(reasonable) best efforts"
 - b. Decide whether and how to revise "applicant is otherwise qualified."
 - c. Decide whether to recommend the way that Choice of Law selection is made.
 - d. Review summary of work of subgroup before, during and after comment period.
 - e. Review proposed language added to OFAC general license recommendation.
 - f. Review and approve Stress Tests.
5. Finish second reading of Comment Tool (starting with line 9.01)
6. Timeline and method for confirming consensus on revised Subgroup Report
7. AOB
8. Adjourn

Raw Captioning Notes

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- [Word Doc](#)
- [PDF](#)

Decisions:

- From the OPEN ITEMS TO RESOLVE IN REVISED DRAFT REPORT document (all decisions to be confirmed on list):
 - 1 Best Efforts - agreed
 - Use BEST EFFORTS with the following footnote - The term "best efforts," as used throughout, should be understood to be limited by "reasonableness," meaning that an entity (here, ICANN) must use its best efforts, except for any efforts that would be unreasonable.
- 2 REVISE "APPLICANT IS OTHERWISE QUALIFIED."
 - No agreement GS will propose text to list.
- 3 RECOMMEND A METHOD OF SELECTING FROM CHOICE OF LAW MENU – agreed
 - Revise menu proposal to (A) recommend that the party contracting with ICANN have the choice of jurisdictions from the menu, and to (B) remove all mentions that it could be negotiated with ICANN.
- 4 SUMMARY OF WORK OF SUBGROUP BEFORE, DURING AND AFTER COMMENT PERIOD. Agreed
 - Suggestion by Thiago to be put to the list by GS.
- 5 REVIEW PROPOSED LANGUAGE ADDED TO OFAC GENERAL LICENSE RECOMMENDATION – agreed
 - The utmost importance of these recommendations for ICANN to carry out its mission and facilitate the global access to DNS should be considered when implementing them. Taking into account this importance, the implementation phase should start no later than six months after approval by the ICANN Board.
- 6 REVIEW AND APPROVE STRESS TESTS. Agreed with friendly amendment by D. McAuley and GS.

Action Items:

- [GS to post updated document to the list ASAP.](#)

Requests:

- Given the next meeting should be last participants are urged to contribute to the list prior to the next meeting.

Documents Presented

- [OPEN ITEMS TO RESOLVE IN REVISED DRAFT REPORT](#)
- [v1-Jurisdiction-Final Draft v1.2.4](#)
- [Jurisdiction-Public Comments-Jan 2018-Summary-post](#)

Chat Transcript

Brenda Brewer: (2/21/2018 06:52) Good day! Welcome to WS2 Jurisdiction Subgroup Meeting #56 on 21 February 2018 @ 13:00 UTC.

Brenda Brewer: (06:52) When not speaking, please mute your phone by pressing *6 (star 6). To unmute, *6. This call is recorded.

Brenda Brewer: (06:53) Reminder to all, for captioning and transcription, please state your name before speaking and speak slowly. Thank you!

Bernard Turcotte - ICANN: (06:59) Hello all

David McAuley: (07:00) Hi - I am 4154

Brenda Brewer: (07:00) Thank you, David!

Tatiana Tropina: (07:02) Hi all

Bernard Turcotte - ICANN: (07:03) Our next comment to review is 9.01

David McAuley: (07:04) The 9.01 from Paddington

Bernard Turcotte - ICANN: (07:06) ;-)

Tatiana Tropina: (07:06) :)))

Tatiana Tropina: (07:06) strange I see Steve and Kavouss in Adobe room

Bernard Turcotte - ICANN: (07:08) Tatiana - when there is only a phone icon next to a name it means phone only

David McAuley: (07:10) I support 'reasonable best efforts'

Thiago Jardim: (07:14) apologies.

Thiago Jardim: (07:14) I have to be absent for the next 5 minutes

Thiago Jardim: (07:14) could hear the question

Finn Petersen: (07:14) both are ok with me

Thiago Jardim: (07:14) I restate the point the I raised on my email a few minutes ago

Thiago Jardim: (07:14) not sure it was considered or discussed.

David McAuley: (07:15) i haven't seen an email lately either

Thiago Jardim: (07:15) ill paste it here

avri doria: (07:16) i find the discussion Kavouss is refering to in: https://urldefense.proofpoint.com/v2/url?u=https-3A__www.lexology.com_library_detail.aspx-3Fg-3D6a4c20dc-2D594d-2D4756-2Db710-2D7a2dc213e8c0&d=DwlFaQ&c=FmY1u3PJP6wrcrwl3mSVzgfkPSS6sJms7xcl4I5cM&r=kbiQDH54980u4nTPfwdloDLY6-6F24x0ArAvhdeDvvc&m=ri8sW-8dbD098pRIqW4r_SUcjDriwWry3OF8ONdArBw&s=uToVhEjc4Aj_wSnXEcjLhbfVzZzy1mRdt3cyRyqK6QA&e=

Thiago Jardim: (07:16) Dear all, On the "best efforts" discussion we will have in a bit, allow me to reproduce one or two passages below echoing the point I made in our previous call: 'with respect to limitations on the meaning of "best efforts", some case law [in Canada] suggests that while "best efforts" require "first class efforts", they do not require the party making them to sacrifice its own economic interest' ... 'The Courts [in Canada] have not yet addressed whether the addition of the word "reasonable" has any impact on the interpretation of the "best efforts" obligation. Arguably "best efforts" already incorporates an element of "reasonableness" by definition as the Courts have defined "best efforts" to mean: "taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned."' [https://urldefense.proofpoint.com/v2/url?u=https-3A__sheanerland.com_insights_best-2Defforts-2Dreasonable-2Defforts-2Dcommercially-2Dreasonable-2Defforts-2Dor-2Dreasonable-2Dbest-2D&d=DwlFaQ&c=FmY1u3PJP6wrcrwl3mSVzgfkPSS6sJms7xcl4I5cM&r=kbiQDH54980u4nTPfwdloDLY6-6F24x0ArAvhdeDvvc&m=ri8sW-8dbD098pRIqW4r_SUcjDriwWry3OF8ONdArBw&s=BoUeAXv3CklhW0bThCOy6G6oNlivfc6qRnc5BE-p_eo&e=

Thiago Jardim: (07:16) I had previously found the same points in English jurisprudence, but am unable to find it again now. In any case, I concede that "best efforts" is a higher standard than "reasonable efforts" (as it probably is in relation "reasonable best efforts" too), but the higher standard that is meant by a "best efforts" obligation has already embedded within it an element of "reasonableness", and it would be a shame to limit the ambiguity (and leeway to abide by a higher or lower standard) that already exists in the expression, by adding "reasonable" to it", which would come at the price of turning our call upon ICANN to obtain general licenses to OFAC even softer than it already is...

David McAuley: (07:17) can we get scroll control, please

Tatiana Tropina: (07:17) yes please scroll control

Bernard Turcotte - ICANN: (07:18) scroll is on

David McAuley: (07:18) thanks

Tatiana Tropina: (07:18) Thanks Bernie

David McAuley: (07:19) why not use the footnote language under alternative #2

Bernard Turcotte - ICANN: (07:19) Thiago - hand

Tatiana Tropina: (07:20) Thiago, are you suggesting to delete only "for example" sentence or everything after "for example"?

Tatiana Tropina: (07:21) Greg I also didn't get it :)

Tatiana Tropina: (07:21) may be we can say that the examples can't serve as limitation?

David McAuley: (07:22) Greg is reading from footnote to alt#1

Tatiana Tropina: (07:22) But most of what I don't get it whether Thiago wants to delete one sentence only or everything after "for example"

David McAuley: (07:22) I think Thiago was reading from #2

Tatiana Tropina: (07:22) Confusing :)

avri doria: (07:23) is any other fact and circumstance, is the same as inter alia, but more understood? are illustrative examples useful or necessary?

Bernard Turcotte - ICANN: (07:24) David M hand

Farzaneh Badii: (07:25) I am not comfortable with stating examples.

Tatiana Tropina: (07:28) I support the second alternative with only the 1st sentence

Thiago Jardim: (07:28) Support.

David McAuley: (07:28) support

Tatiana Tropina: (07:28) I would be more comfortable with the 1st one but ok just to end all this :-)

Farzaneh Badii: (07:29) we resolved something? fantastic I am thrilled

Tatiana Tropina: (07:29) Farz, wait we still have the language proposed by us

Tatiana Tropina: (07:29) I am excited to hear objections *superman kick emoji*

David McAuley: (07:32) I agree w CLO re: accredited

Cheryl Langdon-Orr (CLO): (07:34) approved is better in my opinion

Cheryl Langdon-Orr (CLO): (07:38) like I said Just prefer approved

Thiago Jardim 2: (07:38) favour second one.

Thiago Jardim 2: (07:38) having troubles with connection

David McAuley: (07:39) sounds right - take to list

Tatiana Tropina: (07:40) I do prefer status quo but I am not flying in the ditch over it

Thiago Jardim 2: (07:40) can't we just keep the status quo

Tatiana Tropina: (07:40) *dying

David McAuley: (07:40) thought you meant 'frying' Tanya

Tatiana Tropina: (07:41) LOL

Tatiana Tropina: (07:41) frying in the ditch is something new. To try.

Thiago Jardim: (07:41) Thank Steve, which language would achieve that?

Thiago Jardim: (07:42) Thank you*

Jeff Neuman: (07:42) None of the choices achieve Steve's goals

Farzaneh Badii: (07:42) I agree with Steve.

Jeff Neuman: (07:42) Steve's concerns are for those that seek to become "qualified" or "approved"

Thiago Jardim: (07:43) Add a footnote

Thiago Jardim: (07:43) :)

Jeff Neuman: (07:43) ICANN would need a license to accept funds

David McAuley: (07:43) my old suggestion of viable candidate would address Steve's concern

Jeff Neuman: (07:43) Its for those seeking to become qualified

David McAuley: (07:43) I should add "probably"

Bernard Turcotte - ICANN: (07:44) Time check - 45 minutes left in call

Tatiana Tropina: (07:44) what another footnote O_o

Tatiana Tropina: (07:44) :)

Thiago Jardim: (07:44) What did Sam Eisner say in the previous call on this point ?

Tatiana Tropina: (07:44) with examples I think ;)

Cheryl Langdon-Orr (CLO): (07:45) t does " seeking to be approved work?

David McAuley: (07:47) on #3 I support second alternative

Finn Petersen: (07:51) I support no. 1

Thiago Jardim: (07:53) Hence, support no. 1

David McAuley: (07:55) also agre to check on list

Cheryl Langdon-Orr (CLO): (07:57) dropping from phone bridge, staying in Accordance only

Cheryl Langdon-Orr (CLO): (07:57) no objection

Thiago Jardim: (07:57) hold on, page 11 ?

David McAuley: (07:58) no obj

Thiago Jardim: (07:59) what about France's request to have her comment added to the report ?

Bernard Turcotte - ICANN: (07:59) time check - 30 minutes left in call

Thiago Jardim: (07:59) It did dissent against the subgruop's recommendation

Thiago Jardim: (08:00) I see.

Thiago Jardim: (08:02) If i can come a step back,

Thiago Jardim: (08:02) should we not include in this new addition to page 11 the suggestion of taking the discussion on immunities further on in a different setting ?

avri doria: (08:03) gramatical nit: a them in a first pragrapgh migh be a bit of a dangling referent.

Thiago Jardim: (08:03) It is descriptive of what happened following the report's adoption by the plenary, and echos points raised in comments like those of France ?

Thiago Jardim: (08:04) My hand was up to call your attention to the points I raised in the chat, regarding p.11 additions. I hope I'm forgiven for inviting us to comea step back

avri doria: (08:05) ... a 'them' in the first sentence of a paragraph is a dangling referent

Thiago Jardim: (08:07) I suggest we add reference to that on p.11.

Thiago Jardim: (08:07) as descriptive of what happened.

David McAuley: (08:08) I agree w/Greg on this point

Thiago Jardim: (08:08) I thought the addition of the immunity reference at the end of the report "happened"

Thiago Jardim: (08:08) (I know it did)

Thiago Jardim: (08:08) It happened after we submitted our dissenting statement

Thiago Jardim: (08:09) and as a result of that and of the discussions at the plenary meeting.

Greg Shatan: (08:10) Thiago, the dissenting statement will also be part of the package.

Thiago Jardim: (08:11) I understand, Greg. But if we are recalling what happened "beforem during and after the comment period", we should recall that the insertion of the immunity reference did happened.

Greg Shatan: (08:11) In any event, the reference was there when the Report was circulated for public comment.

Tatiana Tropina: (08:12) I think it's a reasonable text that is not going to far in anything, just highlights the importance.

David McAuley: (08:12) no audio

David McAuley: (08:12) ??

Tatiana Tropina: (08:12) either I got deaf or I hear nothing.

Thiago Jardim: (08:13) Greg, I'd like my suggestion to be taken up and decided by the wider group.

David McAuley: (08:13) Suggest going to list on Thiago issue

Thiago Jardim: (08:14) Thank you

Tatiana Tropina: (08:14) If it's only grammar editing am fine but it's it's watering down of what is already watered down - I will be against :)

David McAuley: (08:14) cascading water

Tatiana Tropina: (08:14) LOL

Tatiana Tropina: (08:14) frying water

Farzaneh Badii: (08:14) watering down in the frying ditch ...

Tatiana Tropina: (08:14) frying water in the dying ditch.

Bernard Turcotte - ICANN: (08:15) time check - 5 minutes left in call

Bernard Turcotte - ICANN: (08:15) time check - 5 minutes left in call

Bernard Turcotte - ICANN: (08:15) sorry 15 - typo

Tatiana Tropina: (08:15) Oh typos seems to be contagious :)

Bernard Turcotte - ICANN: (08:16) David hand

David McAuley: (08:17) here is what I suggest on ST#1: This clarification should encourage registrars to specifically ascertain the law applicable to them in the circumstances and accept domain registration requests from citizens of any country or, if and where needed, seek ICANN's assistance in securing an appropriate license to accept such registrations.

Farzaneh Badii: (08:17) I support thechanges. I have to go. thanks a lot. great meeting

David McAuley: (08:20) March 2 or we fry in the ditch

Cheryl Langdon-Orr (CLO): (08:21) ð

Tatiana Tropina: (08:21) David :D :D :D

Thiago Jardim: (08:24) A quick observation on those comments that are portrayed as opposed to Brazil's dissent:

Brenda Brewer: (08:24) Page 13

Brenda Brewer: (08:24) scroll is on

Thiago Jardim: (08:24) A quick observation on those comments that are portrayed as opposed to Brazil's dissent: The opinion of Brazil is being misconstrued in the comments by I2Coallition and ISPCP. In our dissenting statement, Brazil has not advocated that ICANN should change location. What Brazil has been asking for is that ICANN seek to obtain jurisdictional immunities from the US. In fact, the solution of jurisdictional immunities, which is at the core of Brazil's statement, is not even incompatible with ICANN's remaining a private law entity incorporated under US laws, were ICANN to remain physically located in the US. Hence, both the comments by I2Coallition and by ISPCP, which are portrayed as disagreements with Brazil, are not real disagreements. In fact, their opposition to ICANN's changing its jurisdiction of incorporation is not incompatible with the fact that ICANN, while remaining a US-incorporated entity, could still seek to obtain immunities. Hence the comment may not necessarily be taken as disagreeing with Bra

Thiago Jardim: (08:25) zil.

Bernard Turcotte - ICANN: (08:25) Time check - Now 5 minutes left

Thiago Jardim 2: (08:26) I'm having troubles with my connection

Thiago Jardim 2: (08:27) but I ask my observations above to be taken into account when categorising those comments as opposed to Brazil's dissent. They misconstrue Brazil's dissent.

Thiago Jardim 2: (08:27) misconstrue

Bernard Turcotte - ICANN: (08:29) last minute

Thiago Jardim 2: (08:29) Thank you, I guess.

Bernard Turcotte - ICANN: (08:33) next call Wednesday 28 Feb 1300 UTC

David McAuley: (08:33) Thanks Greg, and all. Good bye

Cheryl Langdon-Orr (CLO): (08:33) ø bye ø for now then, I think we have good resolution likelihood on the outstanding issues from today... more on the list... Thanks Greg and everyone

Tatiana Tropina: (08:33) Thanks Greg and thanks all :-) have a great week without frying in the ditches!

Thiago Jardim 2: (08:33) good bye, thank you.

avri doria: (08:33) bye

Tatiana Tropina: (08:33) see you next week on Adobe and in PR soon

Greg Shatan: (08:34) Goodbye all! Thank you for a productive call.