

ICANN

**Moderator: Brenda Brewer
August 28, 2015
9:00 am CT**

Leon Sanchez: ...for a meeting which is our first formal meeting on 28 August, 2015. And the objective for this working party is to draft high-level wording so that can be included in the bylaws as part of our Work Stream 1 work. And this high-level wording should prefer of course to how ICANN needs to embrace (unintelligible) in the different activities that it carries out.

So we have a proposed agenda for this working party's work. And while we have received the initial documents by Nigel Roberts. He drafted a couple of documents. One, stating the different background on how human rights are defined and how different approaches may be taken on referring to human rights versus fundamental rights.

I hope that everyone has gone through that document. And he also provided us with an initial high-level wording draft to kick off discussion. And I see that we have already had a couple of comments on that initial draft in the list which is very good for our work.

So the way forward would be to of course carry these calls forward and to hopefully finalize these high-level wording and the rationale and explanatory

notes on this high-level wording by August 31 and maybe September 7 at the most so we can then forward this input or this product that we have built here to the larger group for discussion and hopefully approval on our call on the week of September 14 so that we can of course include this in our final version after finishing the second public comment period.

So with this I would like to ask staff to please display the documents on the high-level wording that Nigel drafted.

David McAuley: Leon, and can I make a comment?

Leon Sanchez: Yes of course.

David McAuley: Hi, it's David McAuley. I just wanted to note that I'm on the phone but I'm traveling and I have no computer power left and my adapter is broken so I will just be on the phone.

Leon Sanchez: Thank you very much, David. I didn't see you in the AC room and now I know why. And yes of course feel free to please speak whenever you need to do so and we will happily add you to the cube so you can have your voice heard.

So this is the draft on the high-level objective. I believe that everyone has gone through it already. And what I would like to concentrate on is not only the first affirmations but mostly - or not the preliminary statements but mostly on the affirmation that closes this high-level wording which state that hereby affirms its support without reservation for the United Nations guiding principles on business and human rights and attempts to develop bylaws and policy to give it full effect within the work and the foundation of the corporation.

As I said, we have already had some feedback from a couple of members from this sub working group. And I believe that there was already a proposal to modify these in order to not only -not restricted to the United Nations guiding principles on business and human rights but also to tweak a little bit on the wording about without reservations.

So at this point I would like to open the floor for discussion since I think that this is what will actually help us shape this high-level wording. So please feel free to fire away.

David McAuley: My hand is up.

Leon Sanchez: Yes, David, please go.

David McAuley: Well thank you. First off I just want to say thanks to the people who have been discussing the issue. It started I think what Avri back in Work Party 2. And thanks to Nigel, it's a lot of work that he's obviously put into it and research.

I come down a little bit differently, and it's no surprise probably but what I would like to suggest is for Work Stream 1 at least is we have out there to draft commitments - to draft formations of a commitment. I personally think that would be good to stick with those two.

If we were to move on I think it would be a good idea to come up with a high-level commitment along the lines that we've been talking about and leaving the rest of fleshing out what we mean by all this for Work Stream 2.

I did appreciate Nigel's work but I do have some concern too with language like "ensuring, without reservation" etcetera. And I think it's important -- frankly I think that for ICANN be important thing would be to have a commitment that people could point to and say look, this is what we believe, when things go wrong we have to adhere to this rather than have something that might be interpreted as linking ICANN or its contracted parties or anyone acting or operating through ICANN to have some kind of an obligation like that HR police. And we get into a point like we've been with the intellectual property. That would be my take on it, Leon, so thank you very much.

Leon Sanchez: Thank you very much for this, David. I think it's very useful. And I share your view in a certain way. So I too think that we need to tweak this definition or this high-level wording that Nigel kindly put together. And I would like to listen to other voices and other opinions. I see that we have of course highly involved people in the human rights arena. So please don't be shy and step forward to have your opinion listen to.

So I see Niles, Niels could you please take the floor.

Niels ten Oever: Thanks, Leon. And, sorry, I'm in a quite noisy environment, sorry about that. I would like to express also my thanks to Nigel for coming up with this text which is already pretty detailed which I really appreciate. The one thing that I did not completely understand is that we give support without reservation to the United Nations guiding principles whereas I think at a high level it would perhaps fit better to confirm support without reservation for international and fundamental human rights and then in deed leave it to Work Stream 2 how we're going to - what tools we are exactly going to use to operationalize that, whether that will be that Human Global Compact and the UN guiding principles and or other tools.

I personally - that if we get the commitment to human rights in there that would perhaps be a bit more suitable than specifically the guiding principles. If there is a strong (unintelligible) on the guiding principles that's also great for me. I just think they are relatively specific for a high-level commitment. Thank you.

Leon Sanchez: Thank you very much, Niels. I get your point if I understood well what you're proposing is to -- in order to keep it high level not narrow it down to a couple of documents that are recognized by the United Nations but leave it open to a wider range of documents that then could be narrowed down on Work Stream 2.

So I see some comments from Marilia. Marilia, would you like to make a comment on the line? I see you're agreeing with Niels and that I think I captured it well what Niels said on that document should be narrowed down and identified on Work Stream 2 and our high-level statement for Work Stream 1 should limit to estate this compromise on ICANN respecting human rights and of course developing more detailed framework during Work Stream 2.

So Tatyana is proposing a broad formulation. Niels has also put a proposal in the chat which state, "Hereby affirms support without reservation for internationally recognized fundamental human rights and intends to develop." So I think that is a nice tweak, Niels.

I would however, still have a concern on support without reservation. I don't know what that could imply. So I think that could be a point of discussion for the group. But I do like how it's been tweaked from the original proposal from Nigel.

So anyone else have any comments on...

David McAuley: And I put my hand back up.

Leon Sanchez: Yes of course, David, please do. Your next.

David McAuley: Thank you. And I listened to the suggestion from Niels. It sounds to me preferable to the one that Nigel stated. Again, hats off to both for putting them forward. I still am of a belief that we should stick with the two in Paragraph 151 of the second draft proposal.

But the other thing I'd like to say - and I'll say that I certainly want to say that with respect. I know this is difficult because there's a lot of passion around human rights, as there ought to be, and it's just sort of difficult to - the verb that Niels used was "operationalize" and that's a good one. It's difficult to operationalize and try to avoid unintended consequences that might be difficult to manage.

In that respect I would like to put a verbal hands up or a 1 rather to some of the comments that Paul Twomey has put on this subject previously. I don't have them in front of me. But I think that we should listen to Paul with some deference inasmuch as he has been the previous CEO of ICANN and has a pretty good sense of the impact of some commitments like this as they would work through to ICANN on a day-to-day basis. So I would put a +1 to that and say, you know, given his previous position we ought to listen hard.

Thank you, Leon, that was my comment.

Leon Sanchez: Thank you very much, David. Next in the queue I have Niels again. Niels, please.

Niels ten Oever: Thank you very much. I think those were very good comments. But if we are discussing specific comments from Paul and let's try to (recapitalize) which those were because some might have been more substantive than others. And while we have some great lawyers here on the call it would be great to evaluate them because I really do not think that putting in a commitment to human rights will put ICANN in a higher danger for lawsuits whatsoever.

So I really think we should examine that argument thoroughly because I do not think that it actually represents a risk for ICANN. And I also do not think that Paul's email and argument make that sufficiently clear.

Leon Sanchez: Thank you very much, Niels. Well that's the point of our discussion exactly so it's good that we're putting all arguments on the table and confronting them. I see that the comment on "without reservation" has a couple of questions. Not sure what is different between support and support without reservation. And then Tatyana states that she doesn't understand the idea of no reservation clause, what's behind it.

And I think that I'm pretty much in the same position as Tatyana since I would need to, I think, explore the different options or caveats on the meaning of no reservation in order to effectively assess or evaluate the meaning and implications of having the wording of no reservation.

And I think this is something that we could of course discuss off-line. And I don't know if anyone has any other feedback or opinions. So far I see many attendants typing on the chat.

Yeah, then I too understand it as you have pointed in the chat, Niels, support is support and it doesn't necessarily mean without reservation. My concern

would be that one can choose what to support and went to support it and if you state that you support it without reservation then my sense is that you would be constrained or obliged to support it under any and all circumstances.

And I'm not sure what that could imply with regards to ICANN - ICANN's day-to-day work. So that's what I would like to - I would like to further analyze or assess what the implications would be of acting than no reservation wording into what we're trying to build here.

Matthew Shears says, "Agree, no reservation is superfluous. One can cherry pick human rights. There are some qualifiers in the ICCPR but not reservations." Okay so Tatyana will also check that's just to check on wording and implications.

Are there any more comments on this high-level first draft? I don't know, I would very much like to hear maybe from Marilia or Avri if you have some points that you would like to highlight or what are your thoughts on this initial draft?

Okay, Avri, thank you very much for raising your hand. Your next definitely. Might you be on mute?

Avri Doria: Sorry, I had to get unmuted.

Leon Sanchez: Okay thanks.

Avri Doria: Okay, I've been very much with the (unintelligible) the beginning that sort of was concerned at some of the paths we've been going down so I've been more watching us go down those paths then jumping in with opinions. Certainly, you know, I don't believe that this incurs legal liabilities that of course I'm not

a lawyer so having uttered the word “liability” we have to get it stricken, you know, with legal advice that says no, there's no legal liability.

I tend to think that we are making it complicated and I tend to think that words like no reservation are indeed superfluous and don't need to be there and that simple statement we can make the better. I'm very much hope that we get to the guiding principles on business and human rights but I agree with people that say they are general guidelines and applying them specifically to ICANN is something that will take WS 2 a bit of work to do just to figure out what they all mean in our sense.

They are not necessary though, for a commitment to respect, you know, international and fundamental human rights and therefore I still very much favor, you know, simple statements that don't go further into detail leaving that as work. We're talking about a core value not a plan of action at this point. Plans of action, if any, come later. And, you know, respect doesn't even call out the necessity of a plan of action, though one would expect it to.

It really leaves it open for accepting that this is an important issue to ICANN, accepting that we are going to respect them and take them into account and move on. But so - but as I say I merely spoke because I was asked to.

Leon Sanchez: Thank you very much for this, Avri, very useful. So I think that maybe the next steps could be of course begin building our documents for delivery. And for this I would try to tweak these first high-level draftings that Nigel provided in order to include what we have discussed today and of course begin working on the explanatory notes on how we achieve these - this definition or this highlight -- this high-level wording.

And I see some comments on the chat from Tatyana that says, “Briefly in general I do believe that concerning Paul's email, the general commitment to human rights won't cause any court cases. If at all this would be carefully formulated in policies.”

So I think that at least we have a common sense or understanding that putting this into ICANN bylaws would not open the door necessarily to lawsuits or it wouldn't be a way of threatening ICANN or putting it at risk for my mind, if at all, it would heighten ICANN's actions and ICANN's perception from the outside world. So I think we definitely need to put this into our bylaws.

So the next step, as I said, I will try to refine this high-level wording. I will begin drafting some notes on the rationale to propose this high-level wording. And will circulate to the list. So until then I don't think we have much more to discuss in this call. And well of course we need to share this with the rest of our subgroup because I know there are views from Nigel, from Greg Shatan from different other members that might also be useful and interesting to listen and confront to what we have discussed today.

So Matthew is proposing to have a more iterative approach and perhaps use a Google doc. I am very happy to set up a Google doc, Matthew. I think that we've been working this way in many working groups so count on it. I will put whatever I build, I will put it into a Google doc and of course share the link for everyone to comment.

If you agree from previous exercises we have set up a Google doc in which we assigned added privileges to all and it kind of was a problem. So what I will do is to assign commenting privileges to everyone so that we can of course follow the different comments and incorporate the comments as they come.

And Avri's radiating her support. And she says, but I reiterate my support is that I will ultimately support most any wording that gets general agreement on a value of respecting human rights in the bylaws or articles of the incorporation.

Okay, now, Marilia, you had your hand up, did you want to say something?

Marilia Maciel: Yeah, Leon. Thank you very much. Just take the opportunity to say that I did not speak before because I'm pretty much in agreement with what has been said in the chat. I think that Nigel proposed a very good text and made (unintelligible) forward. My question to you is just about - because I have just joined the accountability discussion in this working group, so taking from here I think Matthew made a very good suggestion that we work together in Google docs. I'm a bit lost on the (unintelligible).

But after we discuss it in Google docs then what is the procedure for us to reach consensus? Would it be like a work consensus? And where if we send the text back to the whole group on accountability, what are the next steps just seek clarification on that. Thank you.

Leon Sanchez: Thank you very much, Marilia. Well, I think that the path that we could follow of course if we all agree is that I will put this document, which will of course allow us to work in a collaborative way. And since this should be reached not only by collaborating in the document but discussing the document itself in our calls. So my aim or my guess would be that maybe within one or two more calls we could be able to actually have a final product that we could then forward to the larger group for them to review, discuss and hopefully have it approved so it can be included into the final proposal.

So the path would be to finalize are draft documents in this iterative way, get consensus in a call and then after we reach consensus and we agree that that is be version that we want to forward to the larger CCWG then we forward it to the CCWG, we discuss it with them, we take them by the hand around or through the document. And if we get their approval then it will be included in our final proposal.

Of course this can take different ways once we release it to the larger group but I hope that if we do build a document that has consensus within the subgroup I think that it most likely will reach consensus too in the larger CCWG.

And I see - I don't know if that answers your question Marilia, if that clarifies the path that we should follow. And I see a comment from Matthew Shears suggesting is there any possibility on looking at slightly rewording Article 4 of the articles of incorporation to make a more explicit reference to human rights? Well that's a possibility, Matthew.

If we think that that is the way that we could fit this into the articles of incorporation or the bylaws then we should definitely look at it, I don't see why not. I mean, our purpose is to make sure that this is addressed in either document. So, yes, it's definitely a possibility. And I would definitely encourage all of us to think on how we could go forward on that.

I do agree with Niels that changes to the articles of incorporation might entail another process and might not be as easy as changing the bylaws. And okay so thank you, Marilia.

So are there any other business or any other comments that anyone wants to raise at this point? Okay so having no other comments and no other hands up I

don't know, David, David McAuley, would you like to make another comment since you're not in the Adobe Connect room I don't know if you want to comment or are you just okay?

David McAuley: Thanks, Leon. No, I'm okay with what I said before and the comments that I've heard. I just want to thank you for reading out the comments in the chat, that was very helpful.

Leon Sanchez: Thank you, David. Okay so thank you very much, everyone, for attending this first call. I will set up the document and circulate the Google docs link so that we can all work on it. And hopefully we'll reach consensus and come to a high level definition in time so that we can include it in our final proposal.

Thank you very much. We have finished early. We all have 30 minutes back to our day. Thank you very much.

David McAuley: Thank you.

Avri Doria: Thank you. Bye.

Leon Sanchez: Bye-bye.

David McAuley: Bye.

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