
NIELS TEN OEVER:

Thank you very much, ICANN staff. Thank you very much, participants and observers, for this meeting of the Cross-Community Working Group on Accountability Work Stream 2 Subgroup on Human Rights. It is 19:00 UTC and three minutes, so we're a bit late, so I'm sorry very much. I would like to ask everyone who is on the audio bridge and who is not in the Adobe room to please identify themselves so that ICANN staff can take a roll call from the Adobe room for the records.

Excellent. Thank you very much. Does anyone have an update to their Statement of Interest?

No updates to the Statement of Interest. Does anyone have addition or questions to agenda?

If not, then I will continue with some more administrivia, and that is that we had a small hiccup with getting the questions to ICANN Legal. Luckily that has been now all sorted and streamlined with the Legal Team here kicking into action. I think we can be very lucky that we have also a participant in this subgroup who is also on the Legal Team that can then provide context there. That is David McAuley. And as I understand now, our questions are well under way to the Legal Team and the proper processes and procedures for the streamline between our subgroup, the Legal Team, the CCWG, and ICANN Legal, have been established.

Have I summarized that correct, David?

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.

DAVID MCAULEY: Yes you have, Niels. The questions are on their way to... they are in front of the Legal Team and ready to go. I haven't heard anything from Leon that would change that. Thank you.

NIELS TEN OEVER: Excellent. Thank you very much and I made indeed a mistake because we have double representation on the Legal Team having Greg and David there. So we have a strong representation. That's a good thing.

For today we have some interesting work. We have some work to finish from the last week, namely our first reading of the two last parts of the draft Framework of Interpretation, and then we can continue with the second reading with the first part and the small changes that have been made as per the discussion last week. I hope we can make some progress on that document today so that we can, before the end of the year, also get a fresh start on the second part of our work which is coming up with recommendations what the follow-up work would look like.

Without further ado, let's go ahead into the discussions unless someone else has something to add.

I see a request from Jorge Cancio that he'd like to have the questions distributed to the list just to keep track of them. I think we can do that because we have just summarized the questions as they have been forwarded to ICANN Legal. David, do you have the latest version of how they have been forwarded to ICANN Legal? Could I ask you to be so kind to forward them to the list?

DAVID MCAULEY: I will do that. I don't have them at hand right now so it'll take five to seven minutes, something like that, but I'll find them and send them to the list.

NIELS TEN OEVER: We'll give you a margin of a day, David.

DAVID MCAULEY: Okay. Thank you.

NIELS TEN OEVER: Okay. So ICANN staff, could you please be so kind to pull up the document? It has been distributed via the list and other people who would like to can also pull up the Google Doc for the live minute-taking and changes.

Now let's continue to the part where we ended up last week, and that was the part after "internationally recognized," we had the "applicable law" part so with the last two parts... and we were at the "This core value does not create and shall not be interpreted to create any obligation on ICANN outside its mission or beyond obligations found in applicable law."

I personally found it quite insightful to have people from the Drafting Team read them out and provide some comments as needed. If people do not have a problem with that I would like to continue with the

traditions. I would like to ask Tatiana, Jorge, Greg, or Matthew to be the first in line and read out these two sentences.

Tatiana, please come in. We haven't heard your voice yet as reading out this work and this has been definitely part of your work as well.

TATIANA TROPINA:

Thank you, Niels. Yes, I'm very sorry that I missed the last call. I was traveling and I am sorry for this.

The sentence in the Bylaw which is being explained in this section is the sentence, "This core value doesn't create and shall not be interpreted to create any obligation on ICANN outside its mission of beyond obligations found in applicable law."

We decided in the small Drafting Team that this sentence is basically self-explanatory and this sentence states again the basic concept that Human Rights core value cannot and does not create or be used to create any obligations that go beyond the limits of ICANN's mission or applicable law.

So basically, anything that is in this sentence has already been stated above.

NIELS TEN OEVER:

Excellent.

TATIANA TROPINA:

That's a very short explanation.

NIELS TEN OEVER: And with no doublings and no lack of clarity there. I was wondering, does anyone have any comments or questions on this?

No, I see that there is no discussion on this because it's quite clear. I see Avri has her hand up. Avri, please come in.

AVRI DORIA: Sorry, I dropped my microphone.

I understand that it's just a repeat of the no-obligation but I thought that the written above goes further to say that there's also no prohibition from taking things beyond applicable law into account, and by explaining it this starkly it seems to leave that component out. I think what we have already is somewhat unfortunate, but we have what we have.

It does go further and to say it is permissible to take things beyond applicable law into account, and this kind of makes the interpretation seem more stark than the actual statement is. And the actual statement is bad enough. Thanks.

NIELS TEN OEVER: Thank you, Avri. So Avri just made clear that the interpretation here seems to be stronger than the initial text. What do other people think about this?

I see Greg and Kavouss have their hand up. Greg, please come in.

GREG SHATAN: Thanks. To my mind, the interpretation really says just about exactly the same thing as the sentence. I don't see it as being starker. It's almost word for word the same in many ways. I don't see that it in any way forecloses any other actions, but the point is as far as the Human Rights Bylaw goes it doesn't form the basis for creating obligations, or certainly not ones that go beyond applicable law or the limits of ICANN's mission.

So if we get to those obligations relating to Human Rights in some other way, it's not because the Human Rights core value exists in the way that the Bylaw itself is drafted. Thanks.

NIELS TEN OEVER: Thank you very much, Greg. So what I guess from Avri's comment is that Avri says that this line seems to prohibit – that's Avri's interpretation of this interpretation – is that it prohibits ICANN to create any obligations outside of this framework, but this seems only to be applicable to the core value. But perhaps the comments from Kavouss can give a little extra perspective. Kavouss, please come in.

KAVOUSS ARASTEH: Yes. I can [inaudible] the sentence. I cannot [read] the [past] little box I was [inaudible]. I tend to agree with Avri but I have to see the sentence. What I hear from her it seems that she is right. Could you please show us [back] to the sentence, the second part of the [core mission] because it is right on the screen? The screen says this limitation requires an analysis.

NIELS TEN OEVER: No, it's the next paragraph, Kavouss. It's the paragraph that says, "This sentence restates the basic concept that the Human Rights core value cannot create or be used to create any obligations that go beyond the limits of ICANN's mission or applicable law."

KAVOUSS ARASTEH: Then what is the statement of what Avri talking about prohibition? It is the interpretation of Avri of this sentence? Why do we have talking about prohibition? I now understand. I agree with [Greg] that we don't need it because the sentence [are] clear. So what is the prohibitions that Avri referred to? Thank you.

NIELS TEN OEVER: It might be good to get Avri on the line again to make the topic a bit more clear. Avri, would you take the floor again?

AVRI DORIA: Sure. Thanks. I guess I shouldn't be putting static on the line, so apologies. So basically what I'm saying is, by only listing the top sentence, only listing the limitation of obligation on applicable law, it leaves out the considerations of the second sentence which say, one, it can't violate a human right and which is also in the Articles and such, and that a human right may be given consideration.

The way this is written, it basically by only listing the first sentence it leaves out all that other stuff and that, while you're not creating an

obligation, there still may be some strong reasons for paying attention to a human right that isn't represented in applicable law.

Unless we're taking a more expansive definition of applicable law as was defined in that OECD document that was passed on, but we haven't done that. So at the moment applicable law could indeed be too narrow. And the second sentence provides the layers around that that make it permissible to go beyond, though without creating obligation. Thanks.

NIELS TEN OEVER:

Avri, could it be that you are looking at the paragraph above and not at the text that Tatiana just read out because that's only one sentence?

AVRI DORIA:

I'm looking at both of them. I'm looking at the sentence above which was the Bylaw and I'm looking at the sentence that tries to interpret it.

NIELS TEN OEVER:

No, Avri. The sentence below –

AVRI DORIA:

I see what you mean. I'm sorry there. Yes. I see what you mean. No, I'm not quoting from the Bylaw. I'm quoting from the applicable law paragraph.

NIELS TEN OEVER: Yeah, so the things that are in the right column [inaudible].

AVRI DORIA: So perhaps it's already taken care of in there. I'll have to think about it. Sorry.

NIELS TEN OEVER: Okay. I'm very happy we have that cleared, and sorry for not having a clearer document.

But then it seems things are clear except for the outline I provided. Avri was seeing another order. But I think that this sentence is pretty much 1:1 the explanation also. The sentence "This core value does not create and shall not be interpreted to create any obligation on ICANN outside its mission or beyond obligations found in applicable law." We provide interpretation of that that is "This sentence restates the basic concept that the Human Rights core value cannot be used to create any obligations that go beyond the limits of ICANN's missions or applicable law."

I see Greg and Kavouss hands up. So Greg, please come in.

GREG SHATAN: That's an old hand and the confusion has been taken care of. Thanks.

NIELS TEN OEVER: Thank you, Greg. Kavouss, please come in.

KAVOUSS ARASTEH: Now I'm convinced that what Greg mentioned is absolutely right. We do not need to cross reference another part and [this is] something from the previous paragraph. The sentence which refers to here is quite clear and because of the interpretation is quite corresponding and coherent with what the text says. So I don't think that we need to add anything to this. Thank you.

NIELS TEN OEVER: Thank you very much for that discussion. So now let's move on to this last part and I would like to invite anyone from the Drafting Team to read this out for the last part of the first reading of this Framework of Interpretation.

Tatiana, please come in.

TATIANA TROPINA: Thanks. I think if I start it I can just go ahead. So the last part the interpretation is the part which states – now I'm within the Bylaw – “This core value does not obligate ICANN to enforce its Human Rights obligations or the Human Rights obligations of other parties against other parties.”

We interpreted it in the following way and we took into account the discussions that we had in the Work Stream 2 while drafting this interpretation. So the interpretation is, “This part of the Bylaw draws the clear line between respect for Human Rights and the core value, and any attempt to extend the Bylaw into requiring ICANN to enforce on

[occurs] third parties to avoid Human Rights violations on the part of those third parties. The core value does not suggest/represent any enforcement obligation by ICANN in any sense.”

Now a bit of my explanation again. This stems from the discussions that we had in the Work Stream 2 and of course the discussions that we had in the beginning of the Work Stream 1 and the discussions that we had at the beginning of the Work Stream 2 on how to draw the clear line between respect for [text] and enforce. This part is doing exactly this.

It states that respect doesn't mean any enforcement, it doesn't mean any coercion, it doesn't mean enforcing this obligation on the account of the third parties. Basically if there are any questions I believe that the Drafting team would be happy to answer why we interpreted it in this way. Thanks.

NIELS TEN OEVER:

Thank you very much, Tatiana. I see the hand of Kavouss is up. Kavouss, please come in.

KAVOUSS ARASTEH:

I believe in the first part of the interpretation but the second part is not quite clear and in understandable language to everybody. [Inaudible] and this is [inaudible] not quite clear for [inaudible] third parties to avoid Human Rights violations on the part of those third parties. It's not quite clear this part. Could we define the language to be more clear? Thank you.

NIELS TEN OEVER: I'm having a bit difficulties hearing you, Kavouss. Could you be a bit closer to the speaker and if I summarize you I think the second part of the text you didn't found that clear. Is that correct?

KAVOUSS ARASTEH: Yes. The second part [that is] after "or" is not clear. [Inaudible] third parties avoid Human Rights violations on the part of those third parties. This is not quite clear.

NIELS TEN OEVER: Okay.

KAVOUSS ARASTEH: [Inaudible] Human Rights are [inaudible] on the part of those parties. [Inaudible] to the third parties against third parties, in favor of third parties, is not quite clear. Could we change the part after "or" in a more clear language, understandable to everybody? It is not [inaudible] but it is not quite clear. Thank you.

NIELS TEN OEVER: Thank you very much, Kavouss. I see David McAuley and Tatiana want to respond, and David has shown in the past to be a great text crafter so let's see what we get. David, please come in.

DAVID MCAULEY: Thank you, Niels. I was just going to say briefly that I agree with Kavouss. It just seems there's a little bit of a grammatical disconnect

and I can't on the fly come up with some language but I could certainly try and help the Drafting Team who I greatly thank for the work they've been doing. But I do see a little bit of a disconnect between the first part and the second part of the sentence. Thank you.

NIELS TEN OEVER:

Okay. So that is clear. So we need to come up with some text here. Are there anyone on the fly that would like to offer something? If not, I will simply mark it yellow so that we leave that for a bit more work.

I see Tatiana, Kavouss, Greg, David. Here we go. I think this will be a good text for that many takers.

Tatiana, please come in.

TATIANA TROPINA:

Actually, I wasn't going to propose a text. I was just going to say that whatever text is suggested now you can still mark it in yellow and we will have a look at it before the next call and then we will have the second [version] of this text anyway. But I do hope that David or Greg can come up with a good suggestion. Thanks.

NIELS TEN OEVER:

Excellent. Thank you very much, Tatiana. Kavouss, please come in.

KAVOUSS ARASTEH:

Yes I suggest that we replace [inaudible] by some other word and we clearly mention whether we're dealing with parties to avoid or to

replace. I want to be clear [inaudible] between the two. [Somebody] avoiding, some people [inaudible] refraining to do something.

But I agree with Tatiana, we can't [inaudible] and put it in color in yellow or whatever color you want and come back to that and give it to the team to find an alternative. Thank you.

NIELS TEN OEVER: Thank you very much. Greg, please come in.

GREG SHATAN: Thank you. I apologize that I couldn't make out the words that were said, so I'm not sure what is being objected to and I would just like some clarification so I can think about the concern.

NIELS TEN OEVER: Hi, Greg. The problem is with the text after "or." So it's the subsentence, "Coerced third party to avoid or refrain Human Rights violations on the part of those third parties." So it's the second part of the first sentence of this last part that people find unclear. And I put the text in square brackets in the Google Doc.

GREG SHATAN: Okay. I guess the language is a little awkward. Conceptually though I don't see the –

NIELS TEN OEVER: It's more of a grammatical thing than anything else.

GREG SHATAN: I think part of this, too, may come from the fact that we're implicitly thinking back to Ruggie here with Ruggie's idea that a company or a business enterprise should use its contracting power and its economic leverage to attempt to force third parties to adhere or to improve their Human Rights considerations, and the concern here and the belief that the last sentence here goes against the grain of that concept and therefore that –

NIELS TEN OEVER: No, I think there is no problem with the content. I think that it's that there is twice "third parties," "of those parties," in there. It seems a bit of a reflective loop which is especially a bit unclear at least for me, as non-native English speaker, it is a bit of a whirlwind there at the end [inaudible].

GREG SHATAN: Yeah, we don't have to use the word "third parties." We could use some other term to make clear that we're talking about an entity other than ICANN. People are often confused by that because who is the second party? There's always first parties and third parties but whatever happened to the second party?

NIELS TEN OEVER: Exactly. So if we can create some clarity there I think that would help. But maybe this is not the best venue to rework this. We can also put this on a to-do for the Drafting Team.

Let's first finish the queue. David, please come in.

DAVID MCAULEY: Thank you, Niels. I agree with you. I don't think there's a problem with concept, but I do think maybe the language could be improved. What my concern is was began a little bit before the words you chose, Niels, when you mentioned "or coerce." I actually think the problem is the verb "impose," – the way it's used. I recognize what I'm going to say is difficult when you're doing a Framework of Interpretation to use words that are actually used in the thing that you're interpreting, but I think what we're talking about is extending the Bylaw into requiring ICANN to take enforcement action or to require taking others to take enforcement action.

To me, the concept of enforcement is different than the concept of imposing on someone the obligation not to violate. So maybe, I hope, that may help the Drafting Team. But it's hard to do this on the fly. I recognize that, and I think maybe hopefully that could help. Thank you.

NIELS TEN OEVER: That's very interesting, David. I've made direct note of that in the text. So we can make use of that. David just suggested, "This part of the Bylaw draws the clear line between respect for Human Rights as a core

value and any attempt to extend the Bylaw into requiring ICANN to take enforcement action or ask others to take enforcement action.”

That’s quite clear.

Kavouss, please come in.

KAVOUSS ARASTEH:

Yes. Apart from the refinement of language or possibly to use another verb instead of coerce, my problem is that this [inaudible] adjective of those [this part] of those third parties. Who are those third parties? Who we are referring to? The third parties we have already mentioned or the one you say third, we have the most [inaudible] actions or the [inaudible] adjective that – it seems before and now we’re referring back to them so I think we should have a clear text here. It’s a very good interpretation for the first part but unclear for the second part so [inaudible] try to find some alternative, first for “coerce” and second mention whom they are referring to as “those”. Thank you.

NIELS TEN OEVER:

Thank you very much, Kavouss. I think we all agree that the third parties need to go as well. I will come up with alternative text for that.

Avri, please come in.

AVRI DORIA:

Thank you. I apologize for being so conceptually confused as opposed to just confused by wording. So does this mean that if a human right [isn’t

in keeping] with mission and applicable law where the contract was first created is signed and therefore a human right, a core value but something that is within mission and applicable law is incorporated into a contract, that contract – is there compliance against that? Or would compliance against that be a violation of this interpretation?

I guess that's a place where I'm still confused. Perhaps I'm looking at it wrongly, but it seems to me that some of these human rights would indeed be captured in contract with contracted parties. If so, but if they're based upon a human right albeit according to prevailing law in one country but perhaps not in another, can there be compliance efforts on that contractual condition? Thanks.

NIELS TEN OEVER:

Thank you very much, Avri. I see David McAuley has his hand up, so I hope David will respond to that. David?

DAVID MCAULEY:

Thank you, Niels. I would like to offer my personal view on what the answer to Avri's question is, and I think that compliance efforts under a contract would certainly be appropriate and allowable. The Bylaw simply says that the Bylaw does not obligate ICANN to do something, it doesn't prevent ICANN from doing something, and if ICANN has a contract in place and a compliance requirement comes up, I don't see anything in this Bylaw that would prevent that. Again, that's my personal view and thank you.

NIELS TEN OEVER: Thank you very much, David. And I see Greg's hand is up. Greg, please come in.

GREG SHATAN: Thanks. I think on top of that there's also a section elsewhere in the Bylaws that says that nothing contained in the Bylaws should be seen to prevent ICANN from enforcing its contracts, or something along those lines. So I think that this is certainly not retrograde language that somehow keeps ICANN from enforcing contractual obligations that [have been] agreed to between parties.

NIELS TEN OEVER: Okay. So with that, I think we have a clear way. We have some suggestions. I think we have a very clear feel on where we want this to go now. So I think with this, I would like to end the first reading of the Framework of Interpretation and if there are no objections, I would like to scroll back up and then go back to the beginning to start the second reading from the top. Because as we all know, we need to do two readings of the text before we can accept it.

I see Kavouss's hand is up. Kavouss, please come in.

KAVOUSS ARASTEH: I am saying that usually the second reading should be [with] some interval after the first reading, not immediately [inaudible] still in the environment of the first reading. I'm not objecting whether you need to do second reading but we decided to do the [second reading] so far so good. But do we have anything else to do tonight and leave the second

reading for the next meeting, or [do] we have nothing to do than doing the second reading? If you have nothing to do, we have to take advantage of the time and [do] the second reading but I think [that it's] possible we have something else to go ahead with that and leave the second reading for some time if possible.

NIELS TEN OEVER:

Kavouss, we have done the first reading of the first part last week so there has been time between the first reading and the second reading of these parts. I indeed would not do the second reading of the parts we've just discussed in the same call because we need time to discuss, but for us to move forward we also need to finalize a Framework of Interpretation. So dragging that on would not necessarily help us in opening a new chapter of our work, it might actually complicate things.

So I would like to propose continuing with the second reading of the first part of the doc and not doing a second reading of the part that we only discussed this call.

Let's start with the first part, "Within the scope of its mission," it says, "ICANN's mission is set forth in Section 1.1 of the ICANN Bylaws" – which we've put in Annex 1 below – "The mission established the boundaries of ICANN's core value to respect Human Rights. Due to the broad scope of Human Rights, attention to this limitation is necessary to ensure that ICANN will not step outside of its defined scope and mission. In this regard, any interpretation of the application of the Human Rights core value provided in the Framework of Interpretation

must be checked against ICANN's mission to ensure compliance with the general limitations provided in this part of the Bylaw."

Are there any comments or suggestions to this part?

Kavouss?

KAVOUSS ARASTEH: Can you show the text please? Because it's [inaudible] is not clear. Can you show that? I do not [see] the written document before me. Can the [inaudible] go back to the section you have read, please?

NIELS TEN OEVER: I'm reading from the Adobe Connect screen. It is the "Within the scope of mission" row. So it's the top row below "Proposed commentary."

KAVOUSS ARASTEH: Yes. Okay. I'm sorry I misread that. Okay.

NIELS TEN OEVER: No problem , Kavouss.

KAVOUSS ARASTEH: Give me one minute. Just one minute please.

NIELS TEN OEVER: Sure.

KAVOUSS ARASTEH: When we say, “Must be checked against,” but if there’s no phrase anything to be right after, you can check against but I think to be checked against to conformance or consistency or for coherence is –

NIELS TEN OEVER: “Ensure compliance,” it says, right? Down that sentence.

KAVOUSS ARASTEH: Compliance, yes. But we should say you compare from this to that but you say what is the result of this. The result of that it should be “complied with” or “in compliance” or “in agreement” or “consistent with” or “coherent with” such and such. To comply with, yeah. Then to check against ICANN mission... Okay, to ensure compliance, yes, that’s okay. Sorry. That’s okay. Thank you.

NIELS TEN OEVER: Excellent. So it seems we have agreement on the first of the Framework of Interpretation. That’s great. So now I would like to continue to the second part of the Framework of Interpretation, which is the interpretation of, “Within the scope of other core values.”

And here I go. “It is important to stress that the Human Rights Bylaw is a core value and not a commitment. The commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.” This is a quote from Bylaw Section 1.2C. “In contrast, core

values are not necessarily intended to apply consistently and comprehensively to ICANN's activities. Rather, the core values are subject to the following interpretative rules in the Bylaws."

And here comes a quote from Bylaw Section 1.2C: "The specific way in which core values are applied individually and collectively to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect [fidelity] to all core values simultaneously is not possible. Accordingly, in any situation when one core value must be balanced with another, potentially competing core value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best served ICANN's mission."

And so here we continue further with our interpretation at the end of this quote: "The Human Rights Bylaw needs to be balanced against other core values in the case where not all core values can be fully adhered to simultaneously. Furthermore, this interpretive rule recognizes that there must be flexibility in applying the core values based on many factors that occur in any given situation. This is also made clear in the core values section of the Bylaws which state that the core values are intended to guide ICANN in its decisions and actions. The Bylaws also prominently stress that the core values have to be respected – 'ICANN will act in a manner that complies with and reflect ICANN's commitment and respect ICANN's core values as described in Bylaw Section 1.2.' Finally, there is no legal hierarchy among the core values according to the Bylaws. The balance must be determined on a case by case basis on the basis of [proper] proportionality without automatically favoring any particular core value. The result of

[inaudible] balancing test must not cause ICANN to violate any commitment, as commitments are binding. The other core values are set forth in Annex 2 of this document.”

So there was the second part. I’d like to invite comments, suggestions, and thoughts on this.

I see Kavouss’s hand is up. Or is that an old hand, Kavouss?

KAVOUSS ARASTEH: This is a new hand. I think in the third paragraph from the bottom starting at [reference] Section 1.2 you said that “as described.” Is this described in the Section 1.2 or this is stipulated in Section 1.2 or is it stated? It is described there or it is speculated there?

NIELS TEN OEVER: It is a literal quote.

KAVOUSS ARASTEH: Okay. I know. If it is quote, it isn’t stipulated. It is [inaudible]. Because you quote whatever is there.

NIELS TEN OEVER: Yes, it’s a quote. I’m not sure if I understand what you’re saying.

KAVOUSS ARASTEH: I’m saying that replace “described” by as “stipulated in” Section 1.2.

NIELS TEN OEVER: You would like me to – instead of between parentheses you want me to write “as stipulated in”?

KAVOUSS ARASTEH: Instead of “described” replace “described” as “stipulated in.”

NIELS TEN OEVER: Okay. Perfect. I replace “described” as “stipulated.” Excellent. Thank you, Kavouss.

Greg, please come in.

GREG SHATAN: A fairly minor point, but I don’t think we need “legal” before “hierarchy” in the last paragraph unless there’s a reason for it.

NIELS TEN OEVER: I see Jorge’s hand is up. Jorge’s hand is not up anymore.

I remember that we had some discussion on this and I thought we came to agreement.

Jorge, please come in.

JORGE CANCIO: The inclusion of “legal” had some meaning, at least for me, as we are talking about a legal document and we are stressing that in that balancing test there is no hierarchy between the core values, and the inclusion of “legal” means that there is no legal hierarchy so there is no precedence in legal terms. I wouldn’t like to get into a discussion where we want to talk about hierarchy in more general terms between the core values because at least for me it’s clear that materially and perhaps not legally the Human Rights core value has a very special value if we compare it with some other core values which in my view have a more practical or pragmatic importance and not so much a value in themselves – so a value which is very, very, important for many of us as Human Rights [inaudible]. Thank you.

NIELS TEN OEVER: Thank you very much, Jorge. I see Kavouss and Greg are queuing up. Kavouss, please come in.

KAVOUSS ARASTEH: If I take the logic of Jorge, he said that legal hierarchy – are there any other hierarchies? That we just pick up the legal hierarchy, do we have other types of hierarchy that we want to emphasize the hierarchy or hierarchy’s hierarchy. That is something to be done in the order that is there. Is that hierarchy? If you have one, two, three, you have to do two of the one and three of the two, these hierarchy? But what is a legal hierarchy? I don’t really understand the reference to legal. What is the issue of legal hierarchy? Do we have other type of hierarchy?

NIELS TEN OEVER:

I think if I can paraphrase Jorge, if he doesn't mind, Jorge says that there is for instance a moral hierarchy in which Human Rights would be higher than other practical or technical things, and since the balancing act in this core value is a legal hierarchy where we're talking about legal things where it's the paradigm in which we're looking at this and we're constraining itself in a precise description. So I hope I channeled Jorge well there.

I see Jorge also responded in chat. "This is a legal balancing test so legal to a hierarchy is fair to say. We don't need to go into general considerations of whether some core values are higher than others. We don't need that discussion. And I would also hope that we can keep this discussion to a minimum."

And I see Greg who brought up this point has raised his hand. Greg, please come in.

GREG SHATAN:

Thanks. I think this conversation shows precisely why the word "legal" should come out. It seems that what's intended is an unwritten implication which really goes against the concept of a Framework of Interpretation. That there could be some other kind of hierarchy other than a legal hierarchy – and I disagree that this is a legal balancing test – it is a balancing test that's part of the Bylaws but it's not in any narrow sense legal. It's a governance methodology for ICANN.

There's no parsing between legal and other types of hierarchies. The point is a broad one, which is that there is no hierarchy between the different core values. In the context of any particular analysis, different

considerations could take place but there is no preset hierarchy of any type. There is no special place for any of the core values. That's just to try to imply that or to hope that that can somehow be read in without being stated later on I think maybe just creates unnecessary uncertainty and ambiguity around the concept of interpretation.

The conversation, I think, has made it clear that "legal" needs to come out. Thank you.

NIELS TEN OEVER:

Thanks, Greg. I see Tatiana and Jorge are queuing up. Tatiana, please come in.

TATIANA TROPINA:

Thanks a lot. I can only second what Greg says and I believe that putting it like this, no legal hierarchy should limit it to legal hierarchy but there is no hierarchy at all, not legal, not any other. I completely agree with Greg that it's not a legal test. It's a balancing test in terms of law, governance, any other factors that one might take into account and if we leave legal as it is it makes no sense and it limits the interpretation of the Bylaw and maybe it diverts us from the real meaning of the Bylaw itself, and not only of this Bylaw but from the whole context of the ICANN Bylaws because core values is not only here – it's not only in Human Rights – so we cannot just interpret it like this. Thanks.

NIELS TEN OEVER:

Thank you, Tatiana. Jorge, please come in.

JORGE CANCIO:

Hello. I just wanted to go back to some of the arguments put forward by Greg and Tatiana. I guess it's rather unfortunate that we reopened something that was agreed by the subgroup. This is a bad precedent and I would feel free to reopen other issues if we go down this path. Let's be clear on that.

On the arguments, they are in the end going back to legal certainty. If we are saying that there is no legal hierarchy, we are being clear that in the balancing test all core values legally should be treated equally. That's the key aspect of a key element to take into account in the balancing test which after all, I'm surprised to hear that this is not a legal balancing test. Perhaps this is a difference in traditions.

But here in Europe at least you would be clear that a balancing test established in the statute of the corporation is a legal element and not something different to that. If we want to infer from the deletion of legal that there is no hierarchy on the material, and the material or the moral or the ethical [confidence] of the different core values, I couldn't agree in no case. So we should re-discuss the idea of hierarchy or the absence of hierarchy because that's an element that is not literally in the balancing test or in the Bylaws.

So we could start the discussion all over again. I think it would be much more easy and much more clear to stick to what we are discussing about the [just] legal document, legal interpretation of what is in the statutes, in the Bylaws, of this corporation and leave it by that.

Otherwise, we really open other parts of the Framework of Interpretation. Thank you.

NIELS TEN OEVER:

Thank you very much, Jorge. Tatiana, please come in.

TATIANA TROPINA:

Sorry, I lowered my hand but anyway I do understand Jorge's argument and I think that what basically Jorge means is that there is no predetermined hierarchy. Like if we are referring to moral hierarchy or any factors that we have to take into account. In a way what you mean is legal means there is no pre-established hierarchy but every time on each individual basis we have to assess these core values.

Can we just rephrase this? Can we rephrase legal to something like this? Then it will suit all of us. But again, this is just a brainstorming suggestion but a good argument. Thanks.

NIELS TEN OEVER:

Thank you very much, Tatiana, for keeping an open mind there. Very much appreciated. Greg, please come in.

GREG SHATAN:

Thanks. I think Tatiana's suggestion makes sense. We could say there is no pre-existing hierarchy or predetermined. I like "pre-existing" but there's not a big difference between the two. But to put "legal" in front of "hierarchy" with the idea that it creates an implication that there is

some other form of hierarchy that could somehow be brought to bear on an overall basis I think is inappropriate. I frankly wouldn't read that into this if it were there. It just creates ambiguity and I think if somebody were to attempt to bring that up in some other context in an argument that there is always a certain core value that was the king of all core values every time, I would say there would be absolutely no basis for that. And if somebody were to say that the statement about legal hierarchy implied that there were other hierarchies I would consider that to be a highly inappropriate argument if you could even call it an argument.

So I think trying to create hidden Easter eggs perhaps in the interpretation here would be most unfortunate and it might call the entire contributions into this into play as well. So I think that if you want to change legal to pre-existing as a way to square the circle here, that works for me. Thanks.

NIELS TEN OEVER:

Thanks, Greg. Tatiana's hand is up. Tatiana, please come in.

TATIANA TROPINA:

I want to answer Jorge's question what is the problem with "legal" because it gives us legal certainty. Well, I believe that for certain native speakers it might rather create the legal uncertainty because there are different interpretations of what legal certainty means or what legal means because it might adhere to applicable law, it might adhere to Bylaw, and I believe that if we replace it with "predetermined" or "pre-existing" hierarchies it might absolutely will address Jorge's concern, or

“predetermined certain hierarchy.” So just to rephrase it a bit, to address Jorge’s concern and to express what he is saying but at the same time to provide the certainty of the language. Thanks.

NIELS TEN OEVER: Thank you very much, Tatiana. Kavouss, please come in.

KAVOUSS ARASTEH: Yes, I said in the chat that if we retain “legal,” it means that there are other type of hierarchy that is [legal]. There is no other hierarchy. Whatever is hierarchy is implicitly legal and we don’t need to mention that legal hierarchy. It gives the impression there might be other type of hierarchy. So I suggest that Jorge accept what other people say and let us move forward. Thank you.

NIELS TEN OEVER: Okay. I see Jorge says, “We have an issue with this sentence of which we do not have complete agreement yet. So let’s see if we can find a solution with this sentence in the Drafting Team.” So I’m just putting this sentence between brackets so that would give the Drafting Team two sentences to work on the coming week. I hope we can find some space to work on here but I think it would be better to take it back to the Drafting Team because it seems we had the Hyderabad consensus on this work and we might need to discuss it again.

Are there any other points that we would like to discuss in this paragraph – in this part? No?

So then let's continue to – I see we are at the top of the hour, actually. We are through our time. So we didn't completely finish the second reading. That is a pity.

I will work with the Drafting Team on the two sentences, namely the, "Finally, there's no legal hierarchy among the core values according to the Bylaws," and the sentence on the imposed on [coercement] of third parties. Then I hope we can finish the second reading next week and perhaps we could also with the Drafting team already dip our toes in the follow-up work [of really] we'll then be informed by the weekend or by Monday how far we've come.

And then I hope that by the end of next meeting we can agree on the Fols, we can forward it to the CCWG so we can discuss the first part of our work there as well.

I would like to thank you all very much, ICANN staff, for making this possible, participants and observers, for your attention, your contributions, the Drafting Team for their great work, and also greatly looking forward to continuing this work with you. See you all next week at the same time in the same place, and in the meantime on the mailing list. Bye all.

UNIDENTIFIED FEMALE: Bye.

[END OF TRANSCRIPTION]