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LEON SANCHEZ: Thank you very much and welcome to the Legal Committee meeting number two, on December the 1st 2016, at 16:53. We started a little bit late but we now have quorum for the call. And, of course, attending the call we have members: David McAuley, Edward Morris, Michael Abejuela, myself and as a guest we have, Thomas Rickert, and of course, our staff.

So, we have a short agenda and a review of the pending requests. We have no pending requests but all the requests that have been sent to the Legal Committee have been already assigned. We have the Ombuds group request that has been assigned to ICANN Legal and we have already received replies from ICANN Legal. And we have also the Human Rights subgroup request which was recently sent to ICANN Legal for input and, well, that was just yesterday. So, we would expect a turnaround from ICANN Legal maybe the next week. So, we will be following up on that request. So, I just want to confirm that there are no other pending requests. If I'm mistaken, please do let me know but I think that those are the only requests that we have received. Okay, so, it seems that that is right.

So, our next agenda item is the review of the answer received by ICANN Legal to the questions raised by the Ombudsman group and we have in our streams the replies from ICANN Legal and I see David McAuley's hand is up. So, David, could you please take the floor.

DAVID MCAULEY: Leon, hi, it's David McAuley. I meant to speak after you. If you wanted to make a comment on the reply? So, I should probably come after you.

LEON SANCHEZ: Okay perfect. So, let's go to the reply and then we'll open the floor. So the question was, is the current ICANN Ombudsman and his predecessor placing themselves in a conflict of interest by participating in the subgroup which will have responsibility for the external review of the Office of the Ombudsman? If so, what should the Ombudsman do to avoid such a conflict? Completely recuse himself from all aspects or only from making or approving recommendations? And the response from ICANN Legal is that, quote, "We do not believe that the scope of the Work Stream 2 work on the Ombudsman poses a conflict of interest, such that the ICANN Ombudsman, or his predecessor, need to recuse themselves from the work of the subgroup. The current and prior Ombudsman each have identified interests in this work. The current Ombudsman has a contract with ICANN and is paid for his service as Ombudsman. The prior Ombudsman used to be. Any and all contributions of the Ombudsman can be considered with that identified interest in mind. The current and the prior Ombudsman each have a unique perspective on the ICANN Office of the Ombudsman and the current Ombudsman is addressing how to take on the new role assigned in the new bylaws. Each likely has information that is invaluable to the group's deliberations. The ICANN Ombudsman is a unique role, and excluding the Ombudsman or his predecessor from attempts to improve and better understand that role, could impair the achievements of the

best results. We would also expect that the current and possibly the prior Ombudsman will likely be interviewed by the Reviewer, once selected. Once recommendations are made, just as any organizational review process, where the entity on the review provides reactions to the recommendations, seeking the reaction of the Ombudsman may also be a valuable step here. In summary, if the Ombudsman or his predecessor is willing to participate in the subgroup's work, we see no legal reason why they should not participate." Unquote. So, this is the reply that we got from ICANN Legal and at this point I would offer the floor for comments. And the first in the queue is David McAuley. David?

NIELS TEN OEVER:

Leon, thank you. David McAuley for the transcript. I read this when it came in just a short while ago and my reaction to it is, it's a happy intersection of legal thinking and common sense. I think it's a great confirmation that the Ombudsman group will be happy to get. So, I was happy to see it and see no reason why it wouldn't get sent right on to that group. Thank you.

LEON SANCHEZ:

Thank you very much, David. Next on queue I have Ed Morris. Ed?

EDWARD MORRIS:

Yeah, thanks, Leon. You know, when we sent this question out I came close to putting my hand up and saying, "Look, this isn't really a legal question per se." They're not board members. The group is not a board group. I think the response illustrates this as more a policy than it is a

legal question. And I'd suggest putting it out to the Plenary. I mean, there is a problem, in my view. I'm part of the group, although not the most active of members, like most of the members of the group. And there is a bit of a problem there in that there are so few people showing up, and two of them that are showing up are the former and current Ombudsmen. And it could be argued that the group has been somewhat captured. not totally, but partially. That's not a legal question in my mind. Because of their positions in the role and the ICANN governance of these groups. But I would suggest that, yes, we send this to the subgroup, but perhaps also with the recommendation that this may be a policy question they may want to throw out to the Plenary. Just an idea. Thanks.

LEON SANCHEZ:

Thank you very much, Ed. I do agree with what has been said by David. I think that this is a nice intersection of legal opinion and common sense. And I would suggest that we forward this reply from ICANN Legal to the subgroup with the comment that maybe they would like to pose this question to the Plenary, as Ed has suggested. So, I guess if there are no objections we could just move forward in the suggested way. And I see David McAuley's hand is up again, so, David, you have the floor.

DAVID MCAULEY:

Leon, thanks. I just wanted to react to what Ed said because I was not aware of such low participation in that group and I think it's a valid point to raise here. I stand by what I said earlier and it's my understanding that whatever recommendation comes out of the group

at the end will go through the full Plenary. And my hope is that it'll be noted, at that time, the level of participation. It seems to me that many of the groups, the sub-teams, are grappling with the, I guess, it's volunteer fatigue, but whatever causes it, it's a lower level of participation, and I do my best to encourage people to join various groups but we just need to keep on pressing. But it's a fair point that Ed raised and, nonetheless, I stand by what I said earlier. Thank you.

LEON SANCHEZ:

Thank you very much, David. So, I'm reading the notes and I will currently ask staff to correct the first note that says that, although there is no quorum the meeting will continue. We do have quorum. We have, as I said, David McAuley, Edward Morris, myself, Michael Abejuela and now Greg Shatan has also joined, which are all members of the Legal Committee. And we have, as guest, Thomas Rickert. So, please, do correct that note. Thank you.

And so, I see that Thomas is commenting on the chat, the solution is not to limit the two Ombudsmen' participation but to make the work sufficiently effective (inaudible) showing. Yes, indeed that is, of course, a way forward.

So, I see that there is no objection for forwarding this reply to the incumbent subgroup, which is the Ombuds group. And, of course, we will add the note that there seems to be a policy question. So, we'll give the choice to the Ombuds group to raise this question to the Plenary and, of course, have the Plenary provide input should this question be raised by the Ombuds group.

Okay, so we have no other issues standing for the Legal Committee. So, at this point I would like to open the floor for any other business. I see David McAuley's hand is up. And Bernie after that. So, David?

DAVID MCAULEY:

Leon, thank you, David McAuley again. I have a question and it was referenced, I think it came up, maybe Greg raised it, I can't remember who. But it has to do with what we've just done and that is, received an answer from Sam and now forwarding it on to the Ombudsman group. My question is, what is our role there? I mean, I can see a filtering role getting the questions to ICANN Legal, to make sure that we're not sending forth questions that are going to waste money, that are frivolous or whatever. But when the answer comes back, my concern is that we act with some dispatch. And so, if we do have a role I would suggest we would want to handle it either at the next call, if there's going to be one within a day, or on list as quickly as we can. So, that was my question and comment, thank you.

LEON SANCHEZ:

Thank you, David. I guess our role, and of course, this is subject to any comments that we might receive, is not only to assess the questions that we receive and then in turn assign them to what we think is the appropriate legal advisor, in this case, ICANN Legal, but also have a look at the replies that we get back from whomever actually turns that answer to us. But to see that reply, in case ICANN Legal is providing that reply, actually sounds reasonable to the Legal Committee and whether we can evaluate if there is any bias on the reply that we receive. So, in a

way, I think we're here also to help guarantee that the replies that the subgroups get from the legal advisors, in this case, ICANN Legal, are reasonable and don't need to be assigned to external advisors. I'm not sure if I'm getting this clear but I think that would also be our role as Legal Committee. David?

DAVID MCAULEY:

Thanks, Leon. I think you do make a good point that if there is a role for us to decide whether we need to seek outside advice at that point. I guess my comment would still stand as, somehow, we need to find a way to handle all this pretty quickly and get the information into the hands of the sub-teams. So, thank you.

LEON SANCHEZ:

Yes, that is definitely also true and if the case arises that we didn't have a call scheduled to, of course, address this in a expeditive way, we should definitely continue the discussion or the assessment in the list as soon as we get the answers. In this case, the answer was just received late night yesterday, at least, in my side of the world, so I literally didn't look at the answer until a couple of hours before our call. So, I guess that's the lack that we have in this issue, about a two-hour lack. But yes, we should definitely address and follow up on each reply as soon as convenient. So, next in the queue I have Bernie. Bernie, could you please take the floor?

BERNARD TURCOTTE: Thank you, Leon. I was simply wondering on who the action item falls to forward this to the Ombudsman group?

LEON SANCHEZ: That would be an action item for myself. So, I will be forwarding this answer to the Ombuds group and I will be adding the comment made by David and supported by Michael, in the sense that this seems to be a policy question and that we suggest that it is raised to the Plenary.

Okay, so is there any other business that anyone wants to raise in this call? Okay, so, having no other business, I would like to thank, again, everyone for their attendance. And this call is now adjourned. Thank you everyone. Bye bye.

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