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ICANN

GUIDELINES FOR GOOD FAITH CONDUCT IN PARTICIPATING IN BOARD  
REMOVAL DISCUSSIONS

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>> This meeting is now being recorded.

>> ALAN GREENBERG: But obviously nothing to record.

>> LORI SCHULMAN: Okay. I welcome everybody to Meeting 15 of the Work Stream 2 subgroup, guidelines on good faith and participating in board removal discussions. Attendance will be taken via the list. If you are on the phone bridge only, please let ICANN staff know so your attendance can be recognized. If anybody has changes to their

Statement of Interest, please let us know. And hopefully this will be a relatively short meeting as we plan to discuss comments posted as of the close of the comment period for our initial report or our draft report on April 24. And I thought the best way to proceed, since there were so few comments, is that we just posted them, as most of them were fairly brief. There was one comment from a contributor from India who had some interesting recommendations that I thought would be worth discussing as a group. And then we can talk about next steps for this subgroup.

So Yvette, any time you are ready, you could post the first comment. And I know before we started the recording, Alan had his hand up. Alan, do you still wish to be recognized?

>> ALAN GREENBERG: I was just going to say as Chair of ALAC to take credit for captioning, because that was an at-large innovation now being spread to the rest of ICANN. So if you like it, thank you. If you don't like it, I don't want to hear about it.

And the intent was to replace transcripts but not notes, just for the record.

Could we have a link to the -- to our recommendations so we could look at them in parallel with looking at the comments?

>> LORI SCHULMAN: Oh, I am sorry, I didn't think to do that. Yes, Yvette, would that be possible to put them in the chat, the link?

>> YVETTE GUIGNEAUX: Yeah, let me work on that. For on screen I just have the comments, but let me see if I can put them in the chat.

>> LORI SCHULMAN: Yeah, I understand. I thought it would be more efficient to actually have the comments up since they haven't been put in a chart or anything. I think there were a total of either three or four. There weren't very many. And I did read through all of them. I don't know if other people had the chance to read through them, and I figured we could use this time productively and just go through them as a group.

And I am very happy to see Nigel Hickson has joined. Welcome, Nigel.

Do people want to wait for the link to our draft, or can we start?

>> No, let's proceed.

>> LORI SCHULMAN: Okay. The first comment that was posted was posted on March 7 by Sam Lanfranco. He is a member of MPOC, the executive team. I know him personally. He is a Professor of Economics in Canada. And so let's -- Yvette, let's just keep that at the top or release the scroll. So people can scroll at their own pace. I forget the official. Unhook it from your control and let people control their own, they can read it at their own pace. Thank you.

So I'll ask Yvette to keep a scorecard, so to speak, of the comments. I do believe that typically comments are put into some sort of spreadsheet or scorecard for the ease of the subgroup. And I presume that will happen here.

The first set of comments is from Sam Lanfranco. He offered support for our stand alone recommendation regarding that a standard

framework be developed that guidelines apply to all discussions, even discussions that may not be indemnified. And he recommends that the scope of application should be as wide as possible in order to avoid standards for addressing different issues in ICANN. He writes this would minimize complications and delays resulting in struggles over appropriate frameworks in particular cases. He would be tempted to see these as first principles with regard to the task at hand.

Would anybody like to comment on this statement? Alan.

>> ALAN GREENBERG: I think all we have to say is thank you. He is supporting what we are saying and suggesting that should the principles be adopted by the CCWG -- because they are really something we tossed over the wall to the CCWG -- we will pass on this comment. So I don't think we need to take any action as a result of it.

>> LORI SCHULMAN: No, I think it's just we put it in the plus bin.

We can now scroll to the next one. I'll scroll too.

The next one is more complicated, and this one came from RR Krish in aa, who is the Legal Officer and Public Grievance Officer of the national Internet exchange of India, .IN. If you haven't read this, I will go through it in a nutshell. I did read it.

Basically what Mr. Krishna recommends is that we think about not just good faith but bad faith. What is bad faith in terms of how individuals may be behaving on behalf of their SOs or ACs within the empowered community? He also goes on to say that our guidelines must stipulate whether the indemnity forwarded to the indemnified party

should be allowed to continue if bad faith or a malified intent -- I have never heard of malified, but I am assuming it's the opposite of bona fide. His recommendation is based on the rationale things should be balanced, that if we are talking about good faith, that we should also be talking about bad faith.

So I had some initial thoughts about this, but if anybody would like to speak first. Alan?

>> ALAN GREENBERG: Thank you. I think he is trying to go back on what the CCWG recommended. The CCWG explicitly recommended that there be no specific cause, and it could be as frivolous or malicious as possible, as long as it is accurate and can be demonstrated. Just the purple pants analogy. I think he is trying to go back and think under what grounds we could remove someone, and I don't believe this is within our scope.

>> LORI SCHULMAN: Yeah, does anybody else have a hand up? Bernie.

>> BERNARD TURCOTTE: Thank you. On this one, I'll completely agree with Alan, but I originally put up my hand to say yes, I will be drafting up the standard form reporting the comments before the next meeting of this group. Thank you.

>> LORI SCHULMAN: Thank you. I am going to add in that I tend to agree with Alan. Maybe under a different rationale. I don't really think this goes to causation as much as it's saying, well, if we can't talk about good faith, we'll talk about the bad faith. And I think the issue of bad faith has to be handled within each SO

and AC. Am you know, and each SO and AC can decide whether a change or some other -- I'll just say change against a Board member for whatever reason, if their own member is acting in good faith, bad faith, or frivolously, that is an internal SO/AC issue. I don't think it's a communitywide issue.

And to a point Avri made two meetings ago, which I completely agree with, it's going to be up to the different SO/ACs if they do make a proposal to remove a Board member, they are going to have to convince other SO/ACs to join in the proposal. So whether or not someone acted in good faith or bad faith, regardless of the indemnity itself, is going to have to be evaluated by each SO/AC. And since we are looking at a legalistic remedy here, how does an indemnity get triggered? It gets triggered when you've acted in good faith. Then the parallel, you've acted in bad faith, so no indemnity, doesn't necessarily need to be proven. I think this goes more to an element of proof rather than a particular rationale for causation.

Alan?

>> ALAN GREENBERG: Yeah, note that the raising the concept of good faith and bad faith was in the explanation. The what he is suggesting, however, is focused on the underlined phrase, that is he does not agree that we should be able to use any reason, but he wants to be able to narrow the reasons and then you have to consider good faith and bad faith in interpreting whether you have actually identified a valid reason for dismissing.

But his premise is that it was too wide and therefore needs to be

constrained, and that I believe is against the CCWG recommendations.

>> LORI SCHULMAN: Right, I agree on that point, Alan. Absolutely. We are not in the constraint business. We are in a broad-based standard that can apply to any SO/AC in any situation.

>> BERNARD TURCOTTE: We are working under a law where there is no rationale needed for dismissing.

>> LORI SCHULMAN: Thank you for reminding us, yes.

Does anybody else have any comments? If not, we can move on to the next set of comments.

Why don't we do that. I am going to take a second to scroll to the next page, which I think is another brief one. This is from AFNIC, our friend, Matthew, who won't be there very much longer, so we look forward to meeting his successor. And of a nick generally -- AFNIC generally supported the recommendations, and they commended our group, which was very nice. They had two extra suggestions directed to Work Stream 2. I don't know how relevant it is or isn't, but I think it goes to our stand-alone recommendations. First, that the enhancement of SO/AC accountability may be included in a set of SO/AC best practices. This is a nice suggestion because it may not go to a manual framework as much as suggested best practices, which might be the route we decide is best for the community. Second, we believe similar guidelines may also be considered by the staff accountability working group, if issues of good faith were raised as part of its issue identification effort.

Oh, we skipped the second part of Chris's comment. I am sorry.

Let me go back. -- Krishnaa's comment. Let me go back. I don't see the second part that we didn't address. Which part, Alan?

>> ALAN GREENBERG: Page 4, paragraph 4, the rationale for recommendations, he is suggesting that all ACs and SOs should have uniform procedures. At least that's the way I read it.

>> LORI SCHULMAN: Oh, okay. You know what? Yeah, let me quickly look again. I just didn't recall it. Thank you for reminding us.

I will read it aloud for people. The recommendations in this paragraph stipulate that different guidelines, different internal (Inaudible) can be framed for each SO/AC. So the reason he provided in the said paragraph supports such a recommendation in a good perspective taking into account the noninterference and decision-making of the individual SO/ACs, it should be noted such differences should not become a legal impediment or hurdle in the future a dispense is raised or setback cause for the process of removal that different standards and guidelines are in place for SO/ACCs. I understand that point. As a matter of of abundant caution, guidelines may be put into place which is approved by consensus of all SO/ACs. This may certainly be time consuming, but uniform guidelines are key for such crucial critical process of removal of directors to avoid any objections later.

I have a reaction to that in that we discussed this. This was an issue we had talked about, you know, how conformtive or restrictive we wanted to be. And while I think that Mr. Krishnaa raises a very, very good point and there definitely could be defense of a board



member that there's different standards, I think, again, we are talking about whether or not an individual representing the empower community has acted on good faith. And I think that's a little different than having uniform standards about what would or wouldn't be acceptable and how a board member is proposed to be removed.

If people agree with that, could you let me know with a little green whatever, if people still want to think about it, let me know.

Alan?

>> ALAN GREENBERG: Thank you. I agree with it, but moreover -- and moreover -- I am not sure which has precedence -- we took a very specific approach that is in line with ICANN's rules that each AC and SO sets up its own operating procedures, and we are not going to dictate that they must all come together and come up with a uniform set of processes. That just doesn't fit into ICANN --

>> LORI SCHULMAN: I agree. I think the response there if we choose to respond is that we appreciate it, understand the rationale, but we considered this in our deliberations and came to a different conclusion. I think that's the polite response to that particular comment.

>> ALAN GREENBERG: And cite what our rationale was.

>> LORI SCHULMAN: Right. Of course.

Now I'll go to AFNIC. Sorry about that, guys.

So AFNIC was generally supportive, as I said. They offered two other suggestions, which I thought were very worth considering, and

these go more to our stand-alone suggestions than the actual guidelines. And that is that the enhancement of SO/AC accountability may also benefit from considering how this type of good faith guidelines may be included in a set of best practices. Secondly, we believe similar guidelines may be considered by the staff accountability working group, if issues of good faith were raised as part of its issue identification effort.

And I think those are all laudable recommendations that we certainly can include in our report. Does anybody have a different reaction? Oh, yes, Avri is writing in the chat, but those aren't this group issue. We should pass this on to the other groups.

We can do that. Bernie, I want to ask you, if we have issues for other groups, is this something I raise as the rapporteur in a plenary, or should we write a letter? How do you suggest that we convey these ideas?

>> BERNARD TURCOTTE: I think it's perfectly fine if you write to your fellow rapporteurs from the other groups directly, copying the co-chair so they are aware of it because they like -- they are trying to keep track of intergroup activities.

>> LORI SCHULMAN: Okay. So Yvette, could you put an action item here for making a draft of communication, I guess to the chairs of the working group in terms of the best practices generally, and then to the rapporteurs for the staff accountability for the second suggestion. It could be an easy email.

Does anybody have any other comments or questions about this input

from AFNIC? Okay. If not, we will move on.

Okay. The next one is from the Business Constituency, and it was an endorsement from Steve Dell Bianco, pretty straightforward. Always appreciate Steve's endorsement. He knows his process inside out.

Oh, I see Avri in the Chat has commented a little more about my suggestion to send communications to the co-rapporteurs, and email is good enough. I agree. I can make it a formal email, not a hey, you guys kind of thing, but you know, write a very nice letter. If people would like to see the letter before I send it, I can certainly send it to the list. Would people like to see the letter before I send it? If you would, raise your hands.

Seeing no hands -- oh, Bernie.

>> BERNARD TURCOTTE: Just a note that regardless of whether you get the formal approval, it's usually common practice if you will send something out from the group to copy the group list.

>> LORI SCHULMAN: Yes, that's what I meant. Yeah, if I send something to the other co-rapporteurs, I will let the group know that I sent it. I will copy the group. I was asking whether or not they wanted to see before I sent it, and people have said no.

And Alan, you are next.

>> ALAN GREENBERG: Yeah, I would suggest send it out to the group and give us three days. If anyone has any -- or two days, whatever -- any riveting comments to make, then -- you probably won't get any, but I think it's a matter of good form so we can catch your spelling

mistake, if not something more substantive.

>> LORI SCHULMAN: Yeah, I am notorious for that, so that's an excellent point. All right. I will send to the group before I send anything. And appreciate all comments about typos and grammar, as I am the worst proofreader of my own work, as many are. So thank you.

Now, this next one, I don't see who this is from, and I don't remember reading it. Interesting. This is a long one. Yvette, could you help me out? The one after Steve DelBianco's comment. Jason. Jason signed it. I don't know who Jason is, and I can't see on the screen.

>> YVETTE GUIGNEAUX: The person's name was Jasoner Schiller.

>> LORI SCHULMAN: Okay. He is commenting as an individual?

>> An individual.

>> LORI SCHULMAN: Alan, is that an old hand or a new hand?

>> ALAN GREENBERG: It's a new hand. This one needs comment. He is commenting as an individual, but as an individual within that community and several different parts within that community.

What you are seeing is a combination of different things. Part of it is the angst over the fact that the ASO is part of ICANN almost due to a technicality, and they are not part of the operational part of ICANN. They have a memorandum of understanding that is very limited, and none of the empowered community things really fit within that model.

However, during the accountability process, it was very clear to

some of us, including some of the ASO people, that the empowered community wasn't likely to go forward without them participating. There were not enough people left. And they agreed with that and said they would participate, but exactly how they are going to participate is really a very major question in their minds. And a lot of that is coming through here.

All of that being said, he does raise a couple of questions that I think we are going to have to think carefully about. For instance, he -- and I haven't gone back to our ours, but he says at -- back to our recommendations, but he says at one point we talk about the whole AC or SO must be involved. That's very problematic for them, and we probably want to change those words to the appropriate body within the AC or the SO. For instance, you know, for the ACs, it's easy. The ALAC is the committee, and we have a larger at-large around us that is not mentioned as a committee. In the GNSO, it is the GNSO that is the empowered community, and its council, a subset, acts on behalf of the GNSO.

The comparable thing within the ASO is a bit more complex, and the concept of involving the whole community, that is all of the RIRs, just is outside of the scope of what we are talking about. So we probably need to look at our wording and make sure that when we are talking about the ACs and SOs we use wording that does fit within the scope of the ASO.

He also later mentions -- and it is a very long document, but he does mention that no one can speak on behalf of the ASO. When we

talk about who is being indemnified, it's represented as "of," but we don't make clear what is reasonably clear but perhaps not enough in the CCWG report itself is that whoever is being indemnified are people who have been identified by the SO or its governing body or whatever or the AC, and we need to make sure that is explicit in ours too.

I think there are a few wording changes we need to make, and I am not prepared to make them on the fly because I just read this comment very briefly before the meeting. I think he has identified perhaps a couple of small wording changes where we need to be more precise to make sure that what we are suggesting fits for the ASO, even if it's still a bad fit, but we are not going to fix that altogether.

>> LORI SCHULMAN: Right, I appreciate that, Alan. I was wondering if you wouldn't mind taking that particular task on, suggesting which wording should be changed and where, given that you understand the context? I will read it myself, of course, and make suggestions, but I would like to hear your suggestions independent of what I conclude to see if we reach similar conclusions.

>> ALAN GREENBERG: Yeah. Well, it may not get done until at least a week or a bit from now, so --

>> LORI SCHULMAN: That's okay.

>> ALAN GREENBERG: I don't know if we have our next meeting next week or in two weeks. I just have a very, very tight schedule right now that is getting tighter, but I would be glad to do it. I think

I do understand the issues, and interesting, they came up in a meeting with the chairs of the empowered community, the chairs of the groups of the empowered community, that was held during the last meeting in wherever we were, Copenhagen, I think. You know, yes, they are part -- the ASO is part of the community. No, they are probably not going to back out. But it's a really difficult fit, and I think we have to be cognizant of that.

>> LORI SCHULMAN: Okay. I think that's workable. I think we are flexible enough that that's workable, Alan, and it looks like Jason may have identified a typographical error in the formatting. I will go over that too. In the very end he said there is a section 3.2.d.b, several sections, so I will go ahead and make sure that the formatting -- I saw that several times, but we still may have missed something.

So next meeting is Wednesday, May 3, and we were planning to meet weekly but for the week of May 24, as my organization's annual meeting and 10,000 of my best friends and I will be meeting in Barcelona. So I will not be conducting a call that week. But other than that, I plan to conduct weekly calls unless we feel otherwise.

>> ALAN GREENBERG: It's Alan. This is the last comment we have, I think. And --

>> LORI SCHULMAN: Is it? Okay.

>> ALAN GREENBERG: There were only five comments, and two of them, the AFNIC and the business constituency, were essentially, you know, thanks for the good work. So there's only two comments.

>> (Inaudible).

>> ALAN GREENBERG: I don't know who that is.

>> LORI SCHULMAN: Somebody please mute your microphone.

Olivier? Is that Olivier? Olivier? It's not Olivier. He is not on the call. I thought it might be, but it's not. He is not even on the call. I thought I recognized. Forget it. Whoever it is, but thanks.

>> ALAN GREENBERG: I am going to suggest I don't think we are going to need more than one more meeting. Why don't we let Bernie work on the formal, you know, the response form, and I'll do something probably not until the weekend of the 6th, and if we then meet --

>> LORI SCHULMAN: So do you want to --

>> ALAN GREENBERG: I think if we skip next week and meet on whatever the date is, April 10 --

>> LORI SCHULMAN: May 10.

>> ALAN GREENBERG: Or May 10, rather, I think we'll be finished. Unless someone sees a tiger lurking in the bushes.

>> LORI SCHULMAN: No, but so I am going to ask Bernie, because this is the first time that I've chaired a group like this, so if we decide to acknowledge -- we will acknowledge the comments in the final report. Do you recommend that we do more than that? Like I don't know that I want to go in and parse out Mr. Krishnaa's comments except to say very briefly that we appreciate them, we considered them, we decided against them for a very brief rationale. I don't know that it requires a real deep dive of a response.



Bernie?

>> BERNARD TURCOTTE: Thank you, Lori.

That's really up to the group, but a summary response with a rationale for the response is probably minimal and acceptable.

>> LORI SCHULMAN: Okay, because I don't want to get into a back-and-forth. I think it's an issue that is just not -- doesn't require that kind of attention. I think we need to acknowledge it, but not parse it out.

All right. So do we have any other business, or did we get through this super efficiently, which would be so great and everybody could have a half an hour back in their life?

So, let me just reiterate what the next steps I think should be. I draft two communications to the respective leaders regarding the suggestions from AFNIC, one being on a best practices guidelines for lack of a better word to go directly to the CCWG chairs, and then a letter to the co-rapporteurs on staff accountability with the suggestion. So those are two follow-ups. Staff to do the comments chart. Alan to look at responding to the ASO concerns, Lori to do the same, and of course, any other member of the group is welcome to do the same as well and see where Lori and Alan come out on proposed language changes.

And I think that's it. Did anybody else have any comments or questions?

>> CHERYL LANGDON-ORR: Lori, Cheryl here. I just want to draw your attention to GNSO has been using various (Inaudible) on the pro

forma that was developed quite some years ago, I guess, where there is a simple way of showing that you have attended to all the piece that is have come in, and it is important. It goes back to the (Inaudible) where we called for SOs and SOs, but the SAs in particular, to show that when they call for comment or input, demonstrate that it had been recognized, discussed, and dealt with. So Bernie's suggestion of a simple recognition piece is important, but I think you'll find there's probably a couple of simple pro formas that are out there circulating of various antiquities, and if we just grab one of those or create something simple ourselves, I think that will be useful.

And if we are going to create simple ourselves, Bernie, I would suggest it's probably something that should be done across all of the topics, not just for ours. I don't know whether staff's already got one of those on the shelf or not.

>> LORI SCHULMAN: Okay. Bernie? Oh, Bernie typed in the chat he is considering it now. Okay.

>> CHERYL LANGDON-ORR: Yeah, it's probably important to look at that because it is an important part of the accountability to community that we owe them.

>> LORI SCHULMAN: Right, but -- yeah, I would just want to caution that in using pro forma responses that we make that balance between not dismissing as well. I think given the effort that Mr. Krishnaa put into the response, I would probably want to do pro forma plus. You know? Just to let him know we really did read it.

>> CHERYL LANGDON-ORR: Lori, I am sorry I can't pull one up and share it with you. It can be as much or as little as we need. The ones I am thinking of are glorified spreadsheets, for want of a better word, in a landscape format, which the PCs have a synopsis or summaries of the key points and indicates that it was received, it was noted, it was discussed, and changes were or were not made.

>> LORI SCHULMAN: Okay. And yeah, I see Alan typed into the chat: With Cheryl and me here (former ATRT folks) we will not let this go without a "reasonable" response. Thank you.

(Laughter)

>> CHERYL LANGDON-ORR: And Avri.

>> LORI SCHULMAN: And Avri. Oops, and Avri. That's funny.

So I think I can give people back, what, 24 minutes of your life. So yeah, does anybody else have any suggestions or comments? We agreed we would meet in two weeks.

Bernie? Is

>> BERNARD TURCOTTE: Okay. I was just trying to be clear. We are canceling next week's call?

>> LORI SCHULMAN: Yeah, we are canceling next week's call and will agree to meet again on May 10. Normally then if we do it every two weeks saying we need to meet after that, it will have to be the first week of June as I am out of commission May 24.

>> CHERYL LANGDON-ORR: We will have it all put to bed by then. Don't you worry.

>> LORI SCHULMAN: Good, because there's so much more coming down

the pike.

>> CHERYL LANGDON-ORR: Oh, you have noticed that, eh?

(Laughter)

>> ALAN GREENBERG: We got a late start of this, but we are coming out of this race ahead of everyone else.

>> LORI SCHULMAN: Yeah, I wanted to particularly thank the group, recognize all the stall warts who have been on the call. We have been a small but mighty group, lots of really good engagement and participation.

I just want to let you guys know that I have received incredible feedback on how well we've worked, how **wm** the process worked, the clarity -- how well the process worked, the clarity of the report, the clarity of the reasoning. So I just -- I want to just give you all a real big thank you because we did a good job, and it's being recognized, and I think we have to pat ourselves on the back occasionally. Bernie?

>> CHERYL LANGDON-ORR: And credit to you too.

>> ALAN GREENBERG: We should also give credit to those who gave us a relatively easy task.

>> LORI SCHULMAN: We acknowledge deceptively easy because when you think about it, it's not really that easy, given all the different actors on the stage. But I agree.

>> ALAN GREENBERG: Thank you, Lori.

>> LORI SCHULMAN: Yeah, this is not jurisdiction or human rights. Yes, I agree wholeheartedly.

(Laughter)

>> CHERYL LANGDON-ORR: Oh, she read the subtext. How did that happen?

(Laughter)

>> LORI SCHULMAN: All right. Good night, good day.

>> CHERYL LANGDON-ORR: Thanks a lot. Bye.

>> LORI SCHULMAN: Bye.

>> All right. You are having way too much fun. Bye-bye.

(End of call, 1939 UTC.)

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