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WORK STREAM 2

GUIDELINES ON GOOD FAITH CONDUCT IN PARTICIPATING IN BOARD REMOVAL
DISCUSSIONS MEETING #13

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>> BERNARD TURCOTTE: Just fair warning here, the standard rule is we should cancel a call if there are not five participants at five after the hour. However, the group that is present can decide to override that if there are no significant decisions going on. So just putting that in for the official transcript. And given the nature of our discussion today, I don't see -- oh, we have five! We are good. All right. We're golden. Over to you, Lori.

>> LORI SCHULMAN: Yeah, okay.

>> BERNARD TURCOTTE: Yay for Alan.

>> LORI SCHULMAN: It's 9:02. We appear to have our quorum, so to speak. So if you would start the recording, we'll get to the meeting. And I promised everybody a short one.

>> This meeting is now being recorded.

>> LORI SCHULMAN: I want to welcome everybody to the meeting of the Work Stream 2 Success Team, Guidelines on Good Faith Conduct in Participating in Board Removal Discussions. I failed to put what meeting number this is. I think it's 15 or 16, but I am not sure. But perhaps the ICANN staff can put that in the notes when we are done.

I just wanted to give a quick report on the update regarding

ASO concerns with our guidelines, our suggested guidelines.

Bernie reached out to -- and Bernie, correct me with the names of the appropriate people because I read this earlier today -- but as the rapporteur, it was recommended that I reach out to Jason and that the ASO would gather interested parties and that perhaps we would devote one call -- our call time slot to actually working on the language with the ASO participants in the room. And that's what I wanted to run by the work group today. I wanted to get your thoughts on that because we talked about inviting one person to our meeting today, and then what turned out was a suggestion that we have more than one person, that we have a variety of views, and that we perhaps have a deep-dive discussion for at least one call.

The second issue that I want to raise is Alan thought that he might have some tweaking, and we discussed this weeks ago, and I didn't know what Alan's schedule was, and I am glad he is on the call. If he had the chance to suggest some language or if we think we all just want to wait until we speak directly to ASO representatives.

Bernie, I see your hand.

>> BERNARD TURCOTTE: Thank you, Lori.

Just to expand a bit, since I am the one who spoke to Carlos Reyes, who is the Policy Department liaison to the ASO. So I forwarded Jason's response to him, and just to add a bit of depth and color to this, Carlos basically was aware of this, A. B, the ASO felt a little pressed for time to follow their full procedure to make a comment. So it was basically agreed that Jeff would post it as an individual comment, but internally, in the ASO, it's felt that the comments posted by Jeff represent general concerns by the ASO with our recommendations.

When discussing with Carlos a bit more in detail about the question of tweaking the language a little bit, he was truly uncertain about that. He felt it could go either way in that it could be either some language tweaking or the ASO may actually be looking for a real formal carveout on this one. And I explained to him that we were just really trying to make this as easy as possible on everyone because it's really about providing guidelines so people are covered as per the agreement for removing Board directors under the good faith.

So because of the way the ASO works, that's at that point that he recommended that Lori reach out to Jeff and say listen, we've read your concerns. We're more than willing to engage. We would love to find a solution. Can we sit down and talk about this? And once it was -- Carlos suggested that if we reach out to Jeff, then he will take care of gathering the ASO folks, and we can have that discussion with them.

>> LORI SCHULMAN: Thank you, Bernie. I think you mean Jason; right? Or am I guessing the name wrong?

>> BERNARD TURCOTTE: Jason. No, no, Jason. Sorry.

>> LORI SCHULMAN: Okay. I am reading in the Chat two comments

from Alan and then from Avri. Oh, Alan, do you want to speak?

>> ALAN GREENBERG: I did suggest specific tweaks once we were somewhat close to have a bit of time to review it, and I missed the meeting in between, so I apologize for that. I think just one meeting, maybe two.

My concern at the last meeting I did attend, though, was in regard to those comments from Jason, and that I noted that although part of his concern I don't think was really relevant because he was saying the difficulty that they may have in doing certain things, and if they don't do them, that's fine, but the language we used -- I am trying to remember now, and I don't fully remember. I think the language we used in terms of referring to the ASO and acting on behalf of the ASO, there was some problem in our language. He pointed out something that I thought was really relevant, and I am not in a position this moment to go back without reading the comment, but I think there is one thing that we can do to lessen it. So if we are going to call him and ask him to participate in a meeting, then I will certainly do my homework before then and propose at least the change that I am thinking about, which may bring some of his concerns to a rest.

>> LORI SCHULMAN: Thank you.

I recognize Avri and then Bernie.

>> AVRI DORIA: Thanks. Avri speaking. Yeah, I just wonder about -- I mean, I certainly believe that we have to work with the ASO to get language that they can live with. I am a little concerned about, you know, carveouts, and then I am concerned about a proliferation of carveouts. And I realize that this is not -- thank you, Bernie, for pointing out this is not a carveout for all EC responsibilities and responsibilities, but carveouts were such a big, hard problem, and the few that got into WS1 were really painful. And I am sort of worried about this group starting another process of carveouts because I am sure that each of the AC's SOs can find something they would like to be carved out from and exempted from, and I really worry about that. So I think if there's going to be carveouts, the subject has to go to the full meeting for just talking about doing a carveout in general, and whether that's even in the books.

I may be wrong about thinking that carveouts are to be avoided at almost all costs, but -- and that's fine. I'll argue the case here. I'll argue the case in the full meeting. But I do think it would need a full meeting to get into that. And as I say, I am worried about a proliferation of carveouts because as soon as somebody gets one, somebody else wants one.

Thanks.

>> LORI SCHULMAN: Thank you, Avri.

Next Bernie, then Cheryl, then Alan.

>> BERNARD TURCOTTE: Thank you. Alan, in part, posted what I

was going to say. It may be that the ASO simply does not want to be indemnified and covered by this, and so the carveout could be as simple as they don't want it. And I don't think, if that's the case, that we have to go there, back to the Work Stream 1 for that. Anyone's allowed to decline insurance, if you will, in my thinking.

The second thing is all of this is, you know, a lot of hand waving right now because my understanding is the ASO is willing to talk to us. They want to talk to us. Let's invite them. Let's actually find out what their concerns are. Alan may be exactly right. Maybe if he can fix the little thing, it will answer a good part of it. And I am fairly certain the ASO folks are very direct and very clear and very level-headed, and I am confident is the word that if we have a good chat with them we'll probably come to a useful solution for everyone.

Thank you.

>> LORI SCHULMAN: Thank you, Bernie. I am of the same mind. I'd like to give them at least an airing, and then we decide how to proceed.

And in terms of Alan's recollection -- and it might have been my misunderstanding -- I thought Alan had, as we were reading, seen where he thought we could do the drafting work or the editing work, and if that had been the case, if he had gotten an opportunity to do so, that's the only clarification. We understand, I think, as a group, once we get through this exercise with the ASO, that we'll go back and re-look at everything before the final read.

Cheryl, then Alan, then Bernie. Oh, Bernie's hand is down. Cheryl.

>> CHERYL LANGDON-ORR: Thank you, Lori. Cheryl for the record. First of all, I am impressed with the interaction that's going on in the chat, and I think it's really important that when we review this we look at the chats as well.

I think we are risking slight overreaction, however. I, first of all, wanted to mention that my reaction to the terminology "carveout" is almost as visceral as Avri's. (Laughter). And my concerns would be along very similar lines that she aired. But we probably are using the wrong terminologies or terminologies that, because of the Work Stream 1 efforts, those of us who were -- as we all were -- in the trenches on that are probably sensitive to the terminology. It's -- you know, for me, as a stress physiologist, for example, to have stress test, those two words put together is sort of -- you know, I am damaged for life. And that's not actually a joke.

As an aside, if I hear stress test and the numbers 18, it has real effects. However, I digress.

But let's do the when will we do this and how will we do this and how quickly can we do this planning because I suspect just as our group has had difficulties time and time again with the full group

re-explaining and helping them to understand exactly what we are doing, until we have a quick conversation -- and I suspect it will be a quick conversation -- with the ASO representatives, they may find a few light bulb moments. Oh, I see. Yes, fine. Oh, yes, that text is fine or just needs to be tweaked one way or the other. We've had a number of misunderstandings with our whole group as to even what our mandate is and what the work is that we are focused on. So I am very concerned that the language might have crossed us up on a couple of occasions.

I think if it's possible to get this piece of interaction done -- excuse me -- you know, even before we meet in Johannesburg, that would be very good because what I don't want, either that it will have to sort of try and carve it down, what I don't want is the same visceral reaction that is certainly I and I suspect Avri had with terminologies even in our interactions mucking up the dynamic when it may not be necessary.

So how fast can we do this? How efficiently can we do this? If it means extra meetings, I am up for that. But I think we do need to sort this out as soon as possible because I actually think it's almost at the storm in the teacup level and that if we have our conversation and get the editing right, we shouldn't have too much of a difficulty. And if it is a difficulty, at least we will know about it in advance.

>> LORI SCHULMAN: Thank you. I want to interject before I recognize Alan. I guess my temperature on this is cooler. I haven't felt a tempest quite yet, but that could be because I've had other distractions in my other life. But that being said, my thoughts would be yes, let's do it quickly. Offer them a meeting at our normal time slot. Put it into our normal schedule. We have been meeting every other week, but yes, perhaps we schedule a meeting as early as next week. I can do a reach-out rather quickly.

And then the other idea that I have is perhaps, you know, I could say we've read your concerns, we get your concerns. What we would ask you to do is just, as an exercise to help get the conversation going, is which point of these guidelines do you feel you could edit that would work for you to actually ask them to red-line it, not promise them that the red lines would be adopted, but at least to get a sense of what language, if any, would work for them, and that might speed the process up.

And then Alan.

>> ALAN GREENBERG: Thank you.

The benefit or downside of speaking after a whole bunch of people is most of the things have been said. But I will briefly recount the three things I was going to say. Number one is if we carve out anything, don't call it that. Everyone, I think, has now come to that conclusion.

Ignoring the terminology, all we -- we cannot carve out that

they don't have to act in good faith if they ever act, if they want to be indemnified. This was just providing a mechanism so people understood what the words meant. So if they don't want to be indemnified, fine. If they choose never to act, then clearly they don't have to worry about how nicely they act. So that, I think, is really a no-brainer.

Much of Jason's comment -- it's now coming back to me -- was the angst over the fact that the ASO is not an SO like the other two and is not part of ICANN like the ccNSO, the GNSO, the SSAC, the ALAC, or the RSSAC, although the RSSAC is also a funny beast. They are not part of the ICANN, but they have an arm that puts on this ICANN name. It has another name in the rest of the world, but here it has the name ASO, and it acts as an SO, but it doesn't fit the model. In a more rational world, they would not have been one of the decisional participants. But they understood well that if they chose not to, the whole thing probably would have fallen apart. And so they decided to opt in, but it doesn't really fit, and much of Jason's comments are simply reflecting that.

There are, as I pointed out, a couple of things where our wording really, really doesn't fit and we can fix that easily enough. We can't change the angst. And the result, I think, will be in general they will not participate in these decisions, and that's fine.

Thank you.

>> LORI SCHULMAN: Thank you, Alan.

Bernie, is that an old hand or a new hand?

>> BERNARD TURCOTTE: A new hand.

I'm always a little concerned asking people to red-line a document who haven't participated in the process. And as much as Cheryl has -- breaks out into a cold sweat when she hears sweat tests, I've got the scars of doing specifically that.

So your staff is advising you that you may want to wait until we at least have a first meeting and get a sense of things before actually offering them the possibility to provide us a red line.

>> LORI SCHULMAN: Okay. I am going to respond to that by saying I get what you are saying, but I want to at least ask them to come in with not specifically a red line, but perhaps some high-level suggestions about where we could change the language. And we don't stick them to a draft, but it's really important. Words here are important because of the way the indemnity is written. So I agree about "carveout." I think it's politically loaded and we don't use it. But I also think because this is a legal standard about acting in good faith that as long as we draft something that indicates good faith, even to the extent -- and this might be the dreaded C word -- that we are out there having this -- the anxiety, I don't know what we do about. We just talk, explain, work it through is what I would hope. But the precise wording, the exact wording that would then extend the umbrella of indemnity to them, that's not impossible.

That's a drafting problem that, as a lawyer, we encounter every day. And I don't think that's an insurmountable problem. It may require some subsets where we need a subset and we call it a subset rather than a carveout.

But to your point, to Bernie's point and to everyone's point, this is about just making sure that when these discussions are entered into, those that move into the discussion are doing so not in an act of malice, are doing so truthfully. The first part of the guidelines are universal. It's the second part. It's about the process. And to me, you can always work around process. And it's just how we do it. So I wouldn't escalate it. I guess I am saying I wouldn't get that nervous until we actually hear what they have to say. They may be more nervous because these are technicians and they are being asked to look at legal documents and talk about indemnities in a way they probably never had to. A lot of people haven't had to in the ICANN universe until this issue came up.

So I think it's incumbent upon us, as the team that does understand what the task is, is to very calmly and patiently explain it to others.

Okay, my apologies to Avri just in case we are throwing terms around, I am neither upset nor nervous, nor do I have a temperature. Okay.

I understand. That's what I am saying, let's not escalate the language; just ask the questions.

Okay, my apologies to the group. It seems I did not estimate correctly the level of expertise that may be among the ASO constituents.

So we do have some agreement for follow-up. I am to reach out immediately to Carlos to organize this meeting. I am to offer our regular time slot. If the staff could remind me, how many slots do we have scheduled, or was this the last one and we need to start scheduling again?

I am sorry, Bernie is correcting me. Uh-huh?

>> CHERYL LANGDON-ORR: Lori, Cheryl here. Yeah, Cheryl here, Lori, just jumping in. I would really prefer to deal with this as soon as possible, so let's see who we can get -- what options are for ASAP, whether it fits into our normal schedule or not, because as I said, I am rather hopeful that this is quite literally our -- oh, I see. That's what you mean. Right. Okay. Well, if we change this, then this will work, and how do you feel about that part conversation. Rather than what some of us are concerned about.

>> LORI SCHULMAN: That's what I mean, just have a just interactive, very calm, casual, this is what we came up with, this is why we came up with it, explain the thinking, and get the reaction. And you know, perhaps we can allay some of the concerns. Or if the process just doesn't work for the ASO, then we start to talk about what will make it work. And if the conclusion is nothing, then

nothing. They are not indemnified. If the conclusion is something else, then we talk about it. And we could probably do it fairly quickly, particularly talking about people who truly understand how the ASO works. I do not.

So I will reach out to Jason directly. Bernie, you don't happen to have -- oh, his email would have been in the submission; correct? Can I get it that way? I see Bernie's hand is up.

>> BERNARD TURCOTTE: Yes, you can get it that way. If not, I'll dig it up for you without a problem.

>> LORI SCHULMAN: All right. Would you mind doing that? I am a bit pressed.

>> BERNARD TURCOTTE: No problem.

>> LORI SCHULMAN: That would be helpful. I will reach out immediately. I will copy Bernie. I will copy Carlos. Who else do I need to copy? Should I copy the list?

>> BERNARD TURCOTTE: Yes, you can copy the list, and I would just like to add that I agree with Cheryl. Whenever fits the ASO and your schedule, let's grab it as soon as possible, and we'll try to fit in everything else. We can advise our list of the call, and anyone that can join can join, but it's most important to have that call as soon as possible.

>> LORI SCHULMAN: So I want to just clarify. So the call would be with me, Jason, and whomever, and then we invite whoever can attend from the group as opposed to trying to reach a maximum number of group attendees. Is that what we think in terms of speed? Because my schedule is tough. I am going to be at the WSIS after next week for the whole week, then we are back, and then it's ICANN already, so it would have to be next week.

>> BERNARD TURCOTTE: Well, then even more important to work it so that it fits in your schedule and their schedule. If we can get it done next week, let's get it. I'll get you that address ASAP.

>> LORI SCHULMAN: Okay. Ideally, it would be the 7th. Right? That's our scheduled call anyway. I can offer that and see how it works. If it doesn't work, then we'll work on some other times, and whoever can join in joins in.

Alan.

>> ALAN GREENBERG: Thank you. I did volunteer in the Chat, I think, but maybe I didn't, that I will go over the document again and try to pull my thoughts together in writing. You can present that with them either when you make the proposal or as soon as it's ready after that.

I would really appreciate being on that, the meeting, though. I think I am the only person who has some idea of what the issues are.

>> LORI SCHULMAN: Okay. I understand.

>> ALAN GREENBERG: The only person in this group.

>> LORI SCHULMAN: We will make sure you are involved.

Is there anyone else who feels that it's critical that they are on the call? Just to understand who will make this a priority and who will join if they can.

>> CHERYL LANGDON-ORR: Lori, I will make it whenever, even if there is another call going on.

>> LORI SCHULMAN: I can commit to that too except for the RPMs. The RPMs, that's a call I can't miss, but other than that, I could probably push anything else aside as well.

>> ALAN GREENBERG: Cheryl said she will attend both. She is the only one I know who does that regularly and succeeds at it.

>> LORI SCHULMAN: Okay. (Laughter). My head literally starts to spin.

>> ALAN GREENBERG: That was Alan speaking unattributed.

>> LORI SCHULMAN: Avri may not be critical, but she is essential. I will add that to the transcript.

Bernie, is that an old hand or a new hand?

Okay. So we have a way forward. I will reach out immediately to Jason, copy Carlos, Bernie, and the group, and suggest next week at this time to have that conversation, or if not sooner, and we'll make it a priority. And we'll schedule next week's call regardless, because we will either have had the call or hopefully have the call. So either way it should be productive.

The following week, I will be at the WSIS, but given the time, it's 9:00 p.m. European Time, so my day will be over. If we still wanted to have the call on the 14th, we certainly could. At least my WSIS day will be over.

Okay. And it's 9:30 on the dot. I see Bernie's hand's raised.

>> BERNARD TURCOTTE: For the schedule, why don't we wait and see if we can get that ASO meeting arranged for next week, and if we can, then the results of that meeting might inform how many meetings we want or not.

>> LORI SCHULMAN: Okay. That sounds reasonable.

Does anybody else have any other business? Bernie's hand is up again. Yes.

>> BERNARD TURCOTTE: Old hand.

>> LORI SCHULMAN: Old hand. Okay.

So seeing no other business, I do need to remind people -- because I forgot to at the beginning of the call -- if there's any changes to your SOI to please let ICANN staff know. And I will report back to the group and will copy the group on my outreach email as soon as I send it. So thank you again for making the call. Happy summer. And hopefully we'll get things moving quickly very, very soon.

Thank you.

(End of call, 19:32 UTC)

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