CWG-Stewardship Questions and Comments on Sidley Memo
Compiled on 9 April 2015

CWG-Stewardship members and participants who submitted comments:

- Greg Shatan
- Chuck Gomes
- Paul Kane
- Seun Ojedeji
- Milton Mueller
- Andrew Sullivan
- Avri Doria
- Elise Lindeberg

Emails are copied below with line breaks to differentiate between the emails. The full discussion thread is available on the mailing list archive: http://mm.icann.org/pipermail/cwg-stewardship/.

Questions Received

Questions on specific sections of the memo

1. In I.A, particularly in numbers 4 and 6, I can't tell whether the assumption is that there are new agreements between PTI and the RIRs, and PTI and IETF. I think the fact that PTI is a new legal entity means that new agreements would be required. Is that correct?

2. By way of comparison, in II.B, does using Functional Separation permit ICANN to continue working under its existing MoUs? I'd assume yes, because AFAIK none of the existing agreements specify the internal arrangements of how ICANN delivers the service.

3. III.C talks about CSC. In the case of a full legal separation with independent governance, would the CSC be needed at all? Presumably the arrangements between PRI and their customers would be a contractual one, and as such the management of such contractual disputes ought to be via those contracts, and not through an extra body. Or is the point that the way such a contractual arrangement would solve such disputes ought to be along the lines of the CSC?

4. In III.D.2 there is a question about "ultimate accountability over ICANN's stewardship". I'm not entirely sure which cases this applies to. If there is a legal separation, how is this question relevant for CWG? Under the legal separation described, PTI becomes the new IANA functions operator. If there's full independent governance of PTI, for instance, isn't ICANN's stewardship

completely gone -- it has only responsibility for policy, and not for IANA operation at all, right? Is that part of the point of this question?

5. Page 11, Section III.D.4: You state that "if the SOs and ACs would themselves be ... designators of ICANN, they would need to form a legally cognizable entity." However, the SOs and ACs currently act as designators of the ICANN Board, and are not legally cognizable entities, to the best of my knowledge. Am I missing something?

6. Page 12, Section III.F.3: You raise a question about the "fiduciary obligations" of the "person/body doing the compelling." Based on the prior sentence, this "person/body" would appear to be an independent arbitrator. I'm no expert on arbitration, but I would think that the duties (fiduciary or otherwise) of arbitrators are fairly well settled. Am I missing something?

7. On III.I, I'm not sure what the difference is between CSC and IRP. Why are both things needed?

8. Page 14, Section IV.A.2: You state that "[a]n accountability mechanism for reviewing ICANN's policy-making decisions related to the IANA functions" is an area "of dependency and need for integration between CWG and CCWG. It's unclear whether you expect/think/recommend that this mechanism to be created by the CCWG (in which case it is likely to be a general purpose mechanism and not one specifically designed for IANA-related purposes) or the CWG. If it is the latter, we don't have any real work done to create such a mechanism. If it's the former, I'm not sure how much further ahead the CCWG is on such a mechanism, and I don't know whether a general purpose mechanism will be "fit for purpose" when it comes to reviewing IANA-related decisions. What do you think the path forward here is?

General questions

9. I would like to specifically ask Sidley to give formal advise on how best to ensure an affiliate company (as part of ICANN Community) can be the custodian for the Stewardship role currently undertaken by NTIA. Specifically, a limited scope multi-stakeholder company with a CSC style body that in the event of ICANN's IANA staff being unable to perform to the prescribed SLE, or ICANN corporate deciding that they no longer wish to deliver the IANA service that triggers the affiliated company to:
    - publish an objective service orientated RFP;
    - invite interested parties to deliver IANA service(s) and respond to the RFP;
    - to select and contract with the operator best able to serve IANA’s customers.

10. If the PTI is an affiliate of ICANN and is created by means of a transfer of the assets of the existing IANA department to the PTI affiliate, why couldn't ICANN's IANA department's existing contracts go along with it? Corporations with contracts change ownership all the time, and divest entities all the time; I suspect that this does not require them to re-negotiate every contract they have.

11. Are there any legal issues that the CWG should be concerned with if it considered proposing a functional separation model for the initial transition and a legal separation model if needed at a later date?

Email exchanges

Here are my initial comments on the document:

Grace Abuhamad 4/9/2015 5:40 AM
Comment [1]: This email was written by Greg Shatan. Chuck Gomes added comments in line.

Page 5, Section I.A.4: The CWG needs to develop accountability mechanisms directly related to contract management and ICANN's behavior as a party. We can't shift this specific, tailored accountability responsibility to the CCWG. With ICANN (rather than "Contract Co.") entering into the contract, there is a danger of "the fox guarding the chicken coop" that needs to be controlled for.

Page 6, Section 1.C.7(b): IRP should be defined the first time it occurs.

Page 6, Section 1.D.2: The document states that "in the first instance, customers would seek to resolve issues directly with PTI and, only if unresolved, take the matter up to the CSC." This would be true of issues that individual customers were experiencing. However in the event of systemic issues (i.e., issues affecting many or all customers), I would expect that the CSC would be used to try and resolve issues in the first instance.
[Chuck Gomes] It might be helpful to review the recommendations to be

proposed by DT-M. A final version should be available this coming Friday.

Grace Abuhamad 4/9/2015 5:37 AM
Comment [2]: I will send the DT-M document to the CWG-Client list once finalized.

Page 6, Section 1.D.3: I did not expect that the CSC would be the "escalating party" for stakeholders at each level of escalation. Rather, I expected/thought that at some level, a multistakeholder body would step into the escalation process. One of the reasons the multistakeholder model works, in my opinion, is that different stakeholder groups, each representing the interests of their stakeholders, tend to balance each other out and bring about the need for compromise and consensus. The corollary of this is that each "uni-stakeholder" group tends to act like an "interested party" and act as an advocacy group (because it needs to do so and because it was created to do so). The danger is that in creating a "uni-stakeholder" group with operational responsibilities, like the CSC, it may still tend to act like an advocate for its constituents, rather than acting in the greater good. In other words, the CSC runs the risk of being "captured" at birth, by the "customers." Given the likely makeup of the CSC, oversight over the CSC, as a uni-stakeholder body without internal checks and balances, is critically important.

[Chuck Gomes] Again I suggest looking at the recommendations to be proposed by DT-M. On a different note, I don't think I share your concerns about the makeup of the CSC especially considering the limited decisions they would make.

Page 7, Section E.1: The powers discussed here do not directly relate to oversight of the IANA Function. Instead, they focus entirely on oversight of the ICANN Board, which is not often directly involved in IANA matters. It's unclear how this "Multi-Stakeholder

Community Organization" relates to our remit to deal with accountability for the IANA functions (but not general ICANN accountability). It's also unclear if this MSCO is the same as the "empowered Member Group" being created by the CCWG, or is a variation on or affiliate or subset of such empowered Member Group. Further, it is unclear whether this is the same thing as "statutory" members of ICANN or something different.

Page 7-8, Section II,B & C: I think you should create a list of advantages and disadvantages of the Legal Separation Variant to parallel this list of advantages/disadvantages. It creates an odd imbalance to have this analysis of the Functional Separation Variant, but none for the Legal Separation Variant.

Page 8, Section III.A.1(a): You state that an LLC "would not be a formally incorporated entity, but is a legally cognizable entity." While this is technically true, it may give the wrong impression. Specifically, although an LLC is not "formally incorporated," it is formally brought into being by filing formative documents with the state (very similar to a corporation). Thus the difference between "incorporation" and "formation."

Page 9, Section III.A.2: In the "chapeau text," "alterative" should be "alternative."

Page 11, Section III.D.4: You state that "if the SOs and ACs would themselves be ... designators of ICANN, they would need to form a legally cognizable entity." However, the SOs and ACs currently act as

designators of the ICANN Board, and are not legally cognizable entities, to the best of my knowledge. Am I missing something?

Page 11, Section III.E.1: These consequences of failure all seem fairly dramatic, and are some version of "firing" the offending party. Here, as elsewhere, I expect that actions short of firing would be more common. I would think that it is more likely that the consequence of most functional failures would be and agreed-to remedial action taken by PTI/IANA, likely with heightened oversight by ICANN/CSC/some multistakeholder thing.

Page 12, Section III.F.3: You raise a question about the "fiduciary obligations" of the "person/body doing the compelling." Based on the prior sentence, this "person/body" would appear to be an independent arbitrator. I'm no expert on arbitration, but I would think that the duties (fiduciary or otherwise) of arbitrators are fairly well settled. Am I missing something?

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and I don't know whether a general purpose mechanism will be "fit for purpose" when it comes to reviewing IANA-related decisions. What do you think the path forward here is?

I appreciate the opinion given by Sidley with respect to the functional separation and I see that it may not deliver the required safeguards.

Grace Abuhamad 4/9/2015 5:42 AM
Comment [3]: Email from Paul Kane

Yes we want better functional separation, a dedicated budget and improvements to the reporting given to the community .... yes we all want ICANN's current IANA staff to deliver service but things change, especially when people/performance change..... hence.....

I would like to specifically ask Sidley to give formal advise on how best to ensure an affiliate company (as part of ICANN Community) can be the custodian for the Stewardship role currently undertaken by NTIA.

Specifically, a limited scope multi-stakeholder company with a CSC style body that in the event of ICANN's IANA staff being unable to perform to the prescribed SLE, or ICANN corporate deciding that they no longer wish to deliver the IANA service that triggers the affiliated company to:

- publish an objective service orientated RFP;
- invite interested parties to deliver IANA service(s) and respond to the RFP;
- to select and contract with the operator best able to serve IANA's customers.

A quick observation; the legal separation option does not seem to include advantages/disadvantages like the functional separation.

Grace Abuhamad 4/9/2015 5:43 AM
Comment [4]: Email from Seun Ojedeji with comments from Milton Mueller in line

MM: Actually it does. The discussion draft makes it clear that the legal separation is used as the benchmark, and then compared to functional separation. Thus, the "advantages" of functional separation are the "disadvantages" of legal separation, and the "disadvantages" of functional separation are the "advantages" of legal separation.

After reviewing these pros and cons, I think the only substantive advantage of functional separation is this one:
"Avoids the need to create another layer of governance and accountability at the IANA level and associated complexity; the focus can be on ICANN governance and accountability."

But this alleged advantage is a mirage. It would be nice to avoid governance problems. But of course, the easiest way to avoid complexity and governance would be to have no accountability at all.

This 'disadvantage' of legal separation is really its chief advantage. The reforms of ICANN governance and accountability that come from the CCWG will be reforms oriented to its policy making process, not IANA operations. ICANN is dominated by the policy making process for domain names and the administration of its contracts with registries and registrars – it accounts for 95% of its budget. IANA is a tiny part of ICANN's overall enterprise. Internal reforms of ICANN governance and accountability are going to be focused on making sure that the policies passed by the board reflect the preferences of its stakeholder groups. Unless there are governance and accountability reforms _*specifically targeting IANA operations*_ the general ICANN CCWG process will do nothing for IANA. And if those specific governance and accountability reforms for IANA are put into place in an internal solution – voila – you have the same additional "complexity" and additional layers of governance that you have in the legal separation. So there is really no gain in simplicity from an internal option.

Let's bite the bullet and do it right. Legal separation is a requirement.

Thanks for this. I've read it. I have some questions. Questions for Sidley are listed, and then some observations for our own discussion (which needn't take up Sidley's time) follow when appropriate in square brackets.

In I.A, particularly in numbers 4 and 6, I can't tell whether the assumption is that there are new agreements between PTI and the RIRs,

Grace Abuhamad 4/9/2015 5:44 AM
Comment [5]: Email from Andrew Sullivan

and PTI and IETF. I think the fact that PTI is a new legal entity means that new agreements would be required. Is that correct? [The reason I ask this is because there is a possible risk of things coming apart if the other operational communities need to be engaged in a new negotiation. If PTI just takes the existing agreements and does a global search and replace for ICANN with PTI, that's nice, but it doesn't solve everything. For instance, the IETF would have to publish a new version of RFC 2860. It's worth remembering that every grievance everyone has with an existing document comes into play once the document is opened for editing.]

By way of comparison, in II.B, does using Functional Separation permit ICANN to continue working under its existing MoUs? I'd assume yes, because AFAIK none of the existing agreements specify the internal arrangements of how ICANN delivers the service. [Notwithstanding Milton's point about getting it "right", given the timeline there is a significant advantage to not having to negotiate, I think, no?]

III.C talks about CSC. In the case of a full legal separation with independent governance, would the CSC be needed at all? Presumably the arrangements between PRI and their customers would be a contractual one, and as such the management of such contractual disputes ought to be via those contracts, and not through an extra body. Or is the point that the way such a contractual arrangement would solve such disputes ought to be along the lines of the CSC?

In III.D.2 there is a question about "ultimate accountability over ICANN's stewardship". I'm not entirely sure which cases this applies to. If there is a legal separation, how is this question relevant for CWG? Under the legal separation described, PTI becomes the new IANA functions operator. If there's full independent governance of PTI, for instance, isn't ICANN's stewardship completely gone -- it has only responsibility for policy, and not for IANA operation at all, right? Is that part of the point of this question?

On III.I, I'm not sure what the difference is between CSC and IRP. Why are both things needed?

I think that's not necessarily correct, but agree that this is a question worth resolving. If the PTI is an affiliate of ICANN and is created by means of a transfer of the assets of the existing IANA department to the PTI affiliate, why couldn't ICANN's IANA department's existing contracts go along with it? Corporations with contracts change ownership all the time, and divest entities all the

Grace Abuhamad 4/9/2015 5:50 AM
Comment [6]: Email from Milton Mueller

time; I suspect that this does not require them to re-negotiate every contract they have. But let's let the lawyers answer that.

I think that any of the following are legally possible:

Grace Abuhamad 4/9/2015 5:51 AM
Comment [7]: Email from Greg Shatan

1. ICANN retains the contracts with the RIRs and IETF, with a minor amendment allowing ICANN to offer the service, but have the service fulfilled by its wholly-controlled affiliate (or wholly-owned subsidiary) PTI.
2. ICANN enters into an "assignment and assumption" agreement whereby PTI takes over ICANN's position in the agreements.
3, ICANN and the RIRs/IETF terminate the current agreements, and IANA enters into new agreements with the RIRs and IETF.

The first option fits the principle of "change as little as possible (and explain any change you make".
The second option fits the principle of "make PTI as easily separable from ICANN as possible."
The third option fits the principle of "let's make everything messy and complicated."

One of my comments for the Sidley report is this assumption that the contracts would move to IANA.

Grace Abuhamad 4/9/2015 5:51 AM
Comment [8]: Email from Avri Doria

I see no reason for this to happen unless the IETF/IAB & RIRs/CRISP want them to. It seems to me that the contracts could remain with ICANN and that ICANN would use the affiliate to do the work.

Let me reiterate an important detail that many seem to be overlooking.

Grace Abuhamad 4/9/2015 5:52 AM
Comment [9]: Email from Milton Mueller

The RIRs CRISP team proposed the following:

“The Internet Number Community proposes that a new contract be established between the IANA Numbering Services Operator and the five

RIRs. The following is a proposal to replace the current NTIA IANA agreement with a new contract that more directly reflects and enforces the IANA Numbering Services Operator's accountability to the Internet Number Community…. It is expected that the RIRs, as the contractual party of this agreement, will draft the specific language of this agreement."

New. Contract. Therefore it would not be difficult at all for the RIRs to develop this new contract in a way that named PTI, rather than ICANN Inc., as the contractor. Since the proposed PTI is the same unit as the current ICANN IANA department, and they are happy with that service, I see no reason why the RIRs would have a problem with this.

The IETF, however, is in a different boat, as it doesn't think it needs such an agreement, so that is a cost of some forms of the legal separation that are not present for other forms. I made this argument about some of the different hybrid-model proposals before, and it still seems to me to be a factor worth considering. To some extent, a proposal has to present both low risk to transition and low risk to the long-term goals. Balancing this is a delicate act, I think.

Grace Abuhamad 4/9/2015 5:46 AM
Comment [10]: Email from Andrew Sullivan

Are there any legal issues that the CWG should be concerned with if it considered proposing a functional separation model for the initial transition and a legal separation model if needed at a later date?

Grace Abuhamad 4/9/2015 5:45 AM
Comment [11]: Email from Chuck Gomes

Some brief comments on the SIDLEY paper.

Grace Abuhamad 4/9/2015 9:46 AM
Comment [12]: Email from Elise Lindeberg

In regards of roles of CSC and MRT/"members group"

I think it is crucial to have a very clear understanding and description of what we define as escalation, and that this is not only used as a term relating to the role of the CSC. In our CWG discussions Escalation has been referring to the Multistakeholder component of the oversight function, - what used to be called the MRT. In the current structure the MRT function has been merged with the work of the CCWG - referred

to as «members group" with legal personhood. It might look like necessary detailing, but I think we should keep the wording clear and underline that the escalation happens when it is sent over to MRT/"members group"/Multi-Stakeholder community Organisation.

H. Fundamental bylaws

What will these be?- While this is primarily an issue for CCWG, considerations should be given by CWG to whether there are any bylaws matters upon the model is conditioned.

YES, - any model based on sort of "golden bylaw" arrangements as the last sort of action towards IANA function operator (PRI) must be based on the CWG giving clear conditions on bylaws and how they should work in regards of decisions in the ICANN community and inside the ICANN company. We can`t push this bylaws arrangements to be solved by the CCWG - even if the link between the CWG and the CCWG is strong, and the communications between the chairs are very good, we are working in parallel and aim to finish at the same time, - so CCWG haven't got the time or detailed knowledge to design specific bylaws that will fit a new company structure for the IANA function and the oversight/stewardship of IANA.

Regarding the question from Andrew Sullivan

III.C talks about CSC. In the case of a full legal separation with independent governance, would the CSC be needed at all? Presumably the arrangements between PRI and their customers would be a contractual one, and as such the management of such contractual disputes ought to be via those contracts, and not through an extra body. Or is the point that the way such a contractual arrangement would solve such disputes ought to be along the lines of the CSC ?

Do you mean PTI ? It’s fundamental from a governmental perspective (and also for the ccTLDs I think..) that we don’t create a model with requirements for establishing a contractual relationship between the IANA functions operator (PTI) and the ccTLDs. This is an absolute no go.