

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Responses to Questions from Rafael Perez Galindo Relating to Burr-Arasteh Proposal

DATE: February 8, 2016

Questions Presented

This memorandum¹ responds to questions from Rafael Perez Galindo (set forth in italics below), which were certified to us on February 6, 2016. The questions relate to the proposal by Becky Burr and Kavouss Arasteh to carve out participation by the Governmental Advisory Committee (the “GAC”) as one of the decision-makers in the Empowered Community’s exercise of a Community Power to challenge a decision by the ICANN Board of Directors to implement GAC consensus advice (the “Carve-out Proposal”). The Carve-out Proposal does not exclude the GAC from all participation in the Empowered Community process. The GAC would still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process; the carve-out only applies to its participation as a decision-maker.

We provide the reference text of the Carve-out Proposal as circulated by ICANN staff on February 4, 2016 in the Appendix to this memo for your convenience.

Summary Conclusion

The Carve-out Proposal is viable under California law: It is lawful under California law to include in the ICANN Bylaws a limitation on the GAC’s participation in certain decisions of the Empowered Community. The Empowered Community will be formed through provisions in

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the questions posed and is tailored to the context in which they have arisen. It is provided to inform and help facilitate your consideration of the governance accountability issues under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2), and California unincorporated associations (California Corporations Code, Title 3). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

the ICANN Bylaws as an unincorporated association under California law, which allows great freedom to structure the Empowered Community's internal governance and decision-making processes in the Bylaws, including with respect to the various procedures and escalation processes contemplated in the CCWG Proposal for exercising the different Community Powers.

We note that the certified questions relate to how the carve-out process will work, which is a matter that the CCWG has flexibility to determine under California law. The questions do not raise legal issues.

Question 1: Who would decide whether the carve-out is applicable to a certain issue to be subject to a community decision?

It is for the CCWG to decide the process for determining whether the carve-out would apply to an Empowered Community decision to challenge a particular Board action that is consistent with GAC consensus advice. This process and the parties participating in the process would be reflected in the Bylaws implementing the CCWG recommendations.

The following three-step implementation process, proposed and discussed on the CCWG-Accountability ("CCWG") call held today -- February 8, 2016 -- provides the framework for a practical and straight-forward solution:

- GAC identifies consensus advice: Whenever GAC provides advice to the Board, it indicates whether the advice was approved with consensus. Consensus advice needs to be identified by the GAC because the Board may only reject such advice with a supermajority vote (60%, as currently proposed);
- Board identifies action consistent with GAC consensus advice: When the Board takes action that is consistent with the GAC consensus advice, the Board states in its resolution (included in the minutes of the meeting) that the action is consistent with the GAC consensus advice and the Board provides that information when it formally publishes its action/decision; and
- Petition to invoke Community Power identifies need to apply carve-out: Where a Board action/decision that is consistent with GAC consensus advice is challenged, the SO or AC seeking to begin the escalation process to use a Community Power indicates in the initial petition that the matter meets the requirements for the GAC to be carved-out from participating as a decision-maker in the Empowered Community with respect to that matter.
 - As described in Recommendation #2, a petition to initiate the escalation process must be brought within 21 days of publication of a Board decision.
 - Also as described in Recommendation #2, a petition must receive support from the other SOs/ACs participating as Decisional Participants in the Empowered Community to move forward. In instances where the petition raises the carve-out, the determination whether the carve-out requirement

has in fact been met can be confirmed in the initial review process by Decisional Participants excluding the GAC.

We recommend including a process along the lines described above in the ICANN Bylaws.

While there are various other options as to how these determinations would be made and by whom (for example, the full ICANN Board, the Board Governance Committee or other committee of the ICANN Board, the Board Governance Committee or other committee of the ICANN Board with input from the Ombudsman function, the Ombudsman, an independent person or group such as one or more members of an IRP panel or other independent advisor, the Chairs Council (absent the GAC), or ICANN's General Counsel), the process outlined above provides clarity and allows for the Decisional Participants in the Empowered Community to make this important determination.

Question 2: According to what standard would that decision be taken? For instance: is it enough if Board mentions GAC Advice in its rationale as a source for its decision. Or would a substantial test be applied, i.e. checked whether the Board decision follows GAC Advice? In the latter case, would the carve-out also apply if the GAC Advice is only partially followed?

We recommend including a process along the lines described above in the ICANN Bylaws, which would address how determinations relating to the carve-out are made.

Question 3: What means of redress would be available for any party not in agreement with such a decision?

If the process described above is adopted, circumstances under which challenges would arise regarding determinations about whether the carve-out applies should be rare, but if needed, the IRP would be available.

Whether or not the three-step process is implemented, any review of the determination whether or not the carve-out applies would require review through the IRP of whether the Board's action implemented GAC consensus advice (and with the three-step process, the validity of Board and petitioner statements in steps 2 and 3).

Question 4: Would the GAC, according to this wording, be able to participate fully in the decision-making of the community mechanism on the following topics:

- (a) Any Board decision on policies or implementation of delegation and redelegation of ccTLDs, which would be taken, having regard, among others, general standing advice on the matter. There is standing Advice from the GAC on such issues (e.g. GAC principles on delegation and redelegation of ccTLDs).***
- (b) Any Board decision on policy or implementation of new gTLDs, which would also take into consideration, among others, general standing advice on the matter. There is standing Advice from the GAC on such issues (e.g. GAC principles on new gTLDs).***

Under the Carve-out Proposal as augmented by the three-step process described above, the GAC would need to identify consensus advice. To the extent that there is standing GAC consensus advice, presumably such advice should be deemed to satisfy the first step in the process. The second step of the process requires the Board to state whether its decision is consistent with GAC consensus advice (of the type that requires the Board to accept the GAC advice unless a supermajority of the Board (60% of the Board under the proposal) votes to reject it). In the event of any petition to challenge the Board's action, the petitioner would state whether the carve-out should apply. In the case of standing advice, if the standing advice is specific enough to determine the outcome of a Board decision, unless a supermajority of the Board objects, then the carve-out would apply.

If the GAC advice being implemented by Board action was not supported by consensus as defined in the Bylaws, and thus would not require a Board supermajority to reject, then the GAC carve-out would not apply.

APPENDIX

Proposed New Reference Text (as at February 4, 2016)

Proposed Revisions to Paragraph 21 in Annex 1:

Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the At-Large AC, and Governmental Advisory Committee would participate in the Empowered Community—that is, they will be listed in the Bylaws as the five Decisional Participants. The GAC may not, however, participate as a decision maker in the Empowered Community's consideration of the exercise a community power for the purpose of challenging or blocking the Board's implementation of GAC Advice. In such cases, the GAC remains free to participate in community deliberations in an advisory capacity, but its views will not count towards or against otherwise agreed thresholds needed to initiate a conference call, convene a Community Forum, or exercise a specific Community Power. This carve out preserves the ICANN Board's unique obligation to work with the GAC try to find a mutually acceptable solution to implementation of GAC Advice supported by consensus (as defined in Rec. #11) while protecting the community's power to challenge such Board decisions.

Proposed New Paragraph 51 in Annex 2:

The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional AC because the community power is proposed to be used to challenge the Board's implementation of GAC Advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects.

Proposed New Paragraph 21 in Annex 11:

[(Proposed draft text if this is accepted as a consensus position of the CCWG-Accountability) After being unable to reach consensus on the 2/3rds option in January 2016 the CCWG relaunched the discussions to identify a consensus position for Recommendation 11. In early February the CCWG concluded that the consensus position should include the clarifications made to the version of recommendation 11 in the third draft (no new obligations, rationale and conformity with ICANN Bylaws) and change 2/3rds to 60%. Additionally, an exception will be noted in Recommendation 1 and 2 that the GAC, should it decide to be a decisional participant in the Empowered Community, can only participate as an advisor on any decisions by the Empowered Community to challenge the Board's implementation of GAC advice.]