

MEMORANDUM

TO: Legal Sub-team of the Cross-Community Working Group on Enhancing
ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Response to Comments of Malcolm Hutto Re: IRP Memo and WP2 Template

DATE: April 22, 2015

This memorandum responds to the recent remarks of Malcolm Hutto on the possible role and functions of the Independent Review Panel (“IRP”) within a newly-designed corporate structure for ICANN.

It seems that Mr. Hutto may have taken several sentences in our IRP memo of April 20, 2015 and on the associated template a bit out of context. We are not opposed to his view of a potentially broad jurisdiction for the IRP that would provide remedies for third parties.

Our advice on the legal viability of an enhanced IRP was given in the context of several mechanisms under intense consideration by the CCWG for the main purpose of improving internal accountability between the ICANN Board of Directors (the “Board”) and its constituent community.

It was for that purpose that we suggested that the power of the IRP, if limited to serving as an advisory body as it is now, would be supported by the member/designator’s inherent power to recall the Board if a circumstance arose in which the IRP made a decision contrary to a Board action and in favor of a member/designator position.

We did not intend to suggest that the IRP be available to resolve disputes only between the Board and its constituents. The existing IRP process set forth in the ICANN bylaws, Article IV, Section 3, already recognizes the standing of any person/entity “materially affected” by Board action, whether inside or outside of ICANN. We did not suggest reducing that scope of IRP jurisdiction; in fact, the basic idea of our effort was to describe appropriate ways to expand it and strengthen the IRP.

In response to the concepts described in the WP2 template, we are proposing ways that the IRP could function with binding impact upon the Board, ICANN itself, and perhaps even its constituents. As an arbitration panel with power granted in the bylaws and in various inter-party agreements, the IRP could serve as a forum for resolution of disputes that avoid civil court

litigation but could result in entry of a binding external order in the court system of the US or another nation.

As we say in our memo, “it may be possible to expressly recognize third party beneficiaries of the membership/designator agreements to grant standing to others in the community that may be materially affected by board, management or staff actions....” Of course, the arbitration process would necessarily need to be binding on both participants, and so the third party wishing to use the IRP would need to agree to be bound by its determination.

The goal, as we have said, is to support the integrity of ICANN both internally and externally.