

MEMORANDUM

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

FROM: Sidley Austin LLP and Adler & Colvin

RE: Responses to CCWG GAC Questions

DATE: June 8, 2015

Overview

This memorandum responds to the list of questions from the Governmental Advisory Committee (GAC) provided to us on June 5, 2015. Please find below questions and answers, provided on a general level in keeping with the level of the questions. Please note that we make the same qualifications as in prior memoranda distributed to the Legal Sub-team. As a general comment, we recognize that significant variations in the laws relevant to the various GAC members may make changes to the GAC particularly complex and may require obtaining various executive or legislative authorizations that could be burdensome to obtain and which are beyond our knowledge as U.S. attorneys. Accordingly, in our responses below we discuss options that may make agreement to the proposal less complex for some GAC members.

GAC Unincorporated Association (UA) and Associated Powers

Question 1: Can a legal person created and acting on behalf of the GAC become a member of ICANN, even though the GAC does not appoint Board members?

Response: Yes—a legal person created and acting on behalf of the GAC can become a Member of ICANN and participate in other activities of the Membership without having any right to elect directors. The Membership can be created with different classes of Members having different rights, and not all Members need to have the right to elect directors.

Question 2: If the GAC decided not to create a legal person (such as a UA) to become a member of ICANN, would that prevent the GAC from participating to the exercise of the 6 community powers? In such a case which of these powers would be prevented?

Response: If GAC decided not to create an unincorporated association, it could choose in the alternative to have an individual (such as the GAC chair) serve as its Member in the ICANN corporate context. (This option may help to resolve concerns among GAC participants about the need to obtain authorizations to associate in a UA.)

If GAC did not want a voting corporate Member presence in ICANN at all (i.e., neither a UA nor an alternative such as an individual), the GAC could continue to provide non-binding but influential advice as it currently does to ICANN and extend that advisory role to the new ICANN Membership as well. The GAC could also be invited to observe and participate in meetings of the Membership.

For example, the GAC, through one or more authorized representatives, could take part in a community panel vote to send the budget back to the ICANN Board. To give effect to this community decision, however, there will need to be a further contract among the corporate Members of ICANN would then be obligated by contract to put into effect this community panel decision by taking the requisite corporate action inside ICANN. If the community panel is 100% Members, then its decisions would be effective as Member actions under the bylaws, without the need for a separate contract.

Question 3: If GAC does not wish to become a member, how could it still be associated to the exercise of the 6 powers?

Response: See the answer to question 2 above.

Question 4: Participation in foreign associations requires a number of legal steps by each and every national authority, which may vary in its degree of complexity or be even next to impossible in some jurisdictions. This may entail that some Governments may be part of the UA, while others may not or may only be so after a long period of time. What are the consequences of an asymmetrical composition between the GAC and the UA in the meantime?

Response: Regardless of whether governments are able to serve as members of the GAC, there is no legal requirement for every member of GAC to become an associate in the UA. However, at least two persons (e.g., individual government representatives sent to GAC) must become associates of the GAC's UA.

If the chair of the GAC were to serve *ex officio* as the GAC's Member in the ICANN Membership, there would not be any need for governments to associate in any UA.

Question 5: As to the operation of the UA, while nowadays the infringement or differing interpretation of GAC rules of procedure (e.g. operating principles) have no legal consequence, this would change in case these rules would be applied to an existing legal person (the UA)? What would be the consequences of conflicts of interpretation between members of the GAC-UA and/or of external stakeholders affected by decisions of the GAC-UA? What legislation would they apply? What would be the responsibilities of GAC-UA officers and/or members affected by such a conflict? How would they specifically protected from liability? To what extent?

Response: The UA that would be created for GAC—the GAC's Member avatar, if you will—would be organized solely to take actions as a Member of ICANN as directed by GAC itself. Outside of this context, the UA has no purpose or activity, and GAC would continue to function as it now does.

Under the option of the GAC forming a UA, the GAC itself will determine under its existing rules (or rules that GAC may modify later) who will be listed in the UA's articles of association as being authorized to cause the UA to exercise any Member rights for GAC at the ICANN corporate level. Those persons will be obligated to follow GAC directives as to how those Member rights will be exercised, in the same manner as GAC's other directives are currently implemented.

Under the option of the chair serving as the Member *ex officio*, the GAC will have the responsibility to instruct and control its chair, who would be obligated to follow the GAC's direction or the GAC could replace the individual as chair, and appoint someone else.

As we have answered previously in the Revised Memo on Unincorporated Associations dated May 3, 2015 ([Link](#)), and in the memorandum answering questions posed by Samantha Eisner and Pedro Ivo Ferraz da Silva dated May 4, 2015 ([Link](#)), participants in the UA would have no personal liability for UA actions.

Liability

Question 6: It is still unclear where the limits are crossed as to the liability of members of future “community empowered structures” or as was initially formulated: “the more power you give to actors different to the board, the more it is likely that they become liable in some fashion - this should be further investigated.”

Response: As we have advised in our May 4 response to the third question from Mr. Ferraz da Silva, we are confident that the powers the CCWG has requested counsel to consider for ICANN Members will not cause the Members to assume any fiduciary duties to ICANN due to usurpation of the Board's role. Neither the UA or *ex officio* alternatives raise liability concerns. Members owe no duties to the organization and can take actions that they believe are in the interests of themselves or a particular constituency. So long as the Members do not usurp the powers of the Board of ICANN—and none of the powers under consideration for the Membership as presently contemplated cause us concern—the Members should not face liability for their actions as Members.

Question 7: What does it mean for a Government from a liability point of view to be a member of such an unincorporated association? In detail?

Response: Associates in an unincorporated association have a layer of protection from liability that they do not have as individual actors simply working in concert. One of the advantages of creating an unincorporated association is this protection from liability for the participants as detailed in our Revised Memo on Unincorporated Associations dated May 3, 2015 ([Link](#)).

In addition, as explained above in answer to question 6, Members in the ICANN corporate Membership would owe no fiduciary duties and therefore would not be subject to liability for breach of duty for the actions they take. Fiduciary obligations rest with the board of directors, and in this instance, the Board of ICANN will continue to be the body with legal responsibility for the actions of ICANN.

Furthermore, governments enjoy sovereign immunity when acting in their governmental capacity.

The immunities that apply to foreign sovereigns in the courts of the United States would remain available. It has long been established under U.S. law that “as a matter of comity, members of the international community [have] implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases” *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (citing *The Schooner Exchange*, 7 Cranch 116, at 136, 137 (1812)). The rule of *The Schooner Exchange* has evolved in a complex manner that we could explain in more detail if that would be helpful, but the rule includes robust restrictions on mandatory judicial process against foreign sovereigns. Most directly, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604, expressly recognizes the immunity of foreign sovereigns before U.S. courts (outside of certain, generally commercial, contexts, such as if a foreign government contracts to buy goods).

Question 8: What are the legal implications on rights, obligations and liabilities (whether covered or not and how) of an informal group (as is nowadays the GAC) creating an UA and taking decisions as such UA, from substantial (like exercising the community powers) to clerical (appointing its board, deciding on its financing...) and whether there are implications when the members of such an UA are Governments.

Response: Currently, as a general matter, the actions of the GAC would be unlikely to result in legal liabilities given that it is an advisory committee and the legally significant decisions are being made by the ICANN Board and/or ICANN officers who bear legal responsibility for those decisions.

In the highly unlikely event that an action of the GAC itself, as an advisory committee, were to result in legal liability, this liability would flow through the GAC to its members themselves (of course subject to the protections of sovereign immunities). One of the benefits of having GAC take Member actions through a UA is that the associates in a UA have limited liability, unlike the members of an advisory committee.

The UA would add a layer of protection in this regard, since associates in the UA would have limited liability for the UA’s actions. In addition, the UA would have minimal assets, and so would be an unlikely target of litigation.

Of course, as explained above, ICANN corporate Members acting in their Member capacity are not liable for the actions of ICANN the corporation and owe no duties vis-à-vis how they carry out their Membership activities. Therefore, participation as a Member—or as a Designator—should pose very little risk of liability in any case, whether the Member is a GAC-created UA or an individual such as the GAC chair serving as the GAC’s ICANN Member.

In sum, neither participation in the Member structure being proposed nor participation in an unincorporated association create any perceptible increase in liability risk.

Sovereignty

Question 9: Are there any sovereignty issues associated to membership of a California-based UA for Governments?

Response: There are no additional sovereignty issues that we are aware of that arise or are associated with participating as an associate in an unincorporated association. As explained

above, the full scope of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604, would remain in place, recognizing the immunities of foreign sovereignties before the courts of the United States.

Question 10: Would a Government becoming a member of a GAC UA be in contradiction with the principle that States are subjects of international law only (see France public comment)¹?

Response: We do not see any contradiction. Governments would remain subject to international law and would enjoy their customary immunities under international law, as recognized under the Foreign Sovereign Immunities Act. The UA, however, would not be a nation state, and so it would be subject to the laws of the jurisdiction of its formation and operation, which in this case are proposed to be California and the United States.

IRP

Question 11: Would the establishment of the IRP prevent Governments or other stakeholders to challenge decisions in front of local jurisdictions? (Some Governments like France express concerns because such use of arbitration is regulated by law.)

Response: No. The agreement of a Member of ICANN (either the UA or the chair *ex officio*) would bind only the actual Member. Nation states would still have their full abilities, as they do now, to seek redress in their own courts or the courts of the United States.

Question 12: Would the IRP be recognized as an international arbitration court?

Response: We advise that the IRP be structured so that its judgments would be accepted as the outcome of an international arbitration. The recognition of such judgments is robust under the U.S. Federal Arbitration Act and the laws of most other nations.

Question 13: Would Governments have standing in front of the IRP? (see Spain comment)

Response: Yes, governments could be given standing before the IRP.

The GAC, whether informally or through its Member (whether its UA or chair), could invoke the IRP process, although the GAC itself could not enforce an IRP decision through the judgment of the court without having a legal person in place. If the chair of the GAC were acting *ex officio*, that individual would be the named party in any IRP process and in theory could sue to enforce an IRP result.

The IRP process would be open to any entity that agrees to be bound by the result. Nation states could agree to invoke the IRP, although doing so would involve their voluntary submission to the jurisdiction of the IRP for the purposes of that dispute.

¹ [Link](#) to public comments referenced in this memorandum.