

KEY CHARACTERISTICS COMPARISON: Community Mechanism As Sole Member Model & ICANN Board Proposal

September 22, 2015

Mechanism/Exercise/Enforcement of Community Powers

Model ----- Power	Community Mechanism as Sole Member Model	ICANN Board Proposal
7.1 Reconsider/Reject ICANN Budget or Strategy/Operating Plans	- Sole Member given reserved power under Bylaws to override Board decision directly, regardless of Board fiduciary duties. - Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- Bylaws would require Board to consult with community and reconsider budget/strategy/operating plan if community mechanism rejects it, and would impose restrictions on budget if implemented over community objection, within limits respecting Board fiduciary duties. - Community, through SOs/ACs, can reject Board's plan up to two times; thereafter, can initiate process to recall Board (#5.6) if it fails to make appropriate revisions in response to community rejection or fails to follow rules for consultation process. - If Board ignores Bylaws requirements (set forth in Fundamental Bylaws), SO/ACs may invoke MEM process, including forming MEM Issue Group (composed of SO/ACs) to bring action in California courts; MEM Issue Group capacity to sue unclear under Proposal or relevant law; unclear what if any legal recourse community has if Board determines that Bylaws requirements are inconsistent with Board's fiduciary duties.
7.2 Reconsider/Reject Changes to ICANN "Standard" Bylaws	- Sole Member given right to veto proposed Standard Bylaws amendments. - Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- Board proposal contemplates process to be refined for SOs and ACs to demonstrate objection without conferring veto power on any or all SOs/ACs. Each SO and AC determines whether to voice an objection; if threshold met, Bylaws preclude Board changes to Standard Bylaws. - Community threshold to demonstrate an objection to be agreed upon. - While corporate law would permit named SOs/ACs to be given right in Bylaws to veto Standard Bylaws amendments approved by Board, unclear if that is what Board Proposal contemplates, and if so, to whom the veto power would be given. If named SO/ACs are given right to veto, need mechanism to prevent single SO or AC from vetoing in spite of community support. - Possible to initiate process to recall Board (#5.6) if Board ignores community rejection of Board-approved amendment. - If Board ignores Bylaws requirements (set forth in Fundamental Bylaws), SO/ACs may invoke MEM process, including forming MEM Issue Group (composed of SO/ACs) to bring action in California courts; MEM Issue Group capacity to sue unclear under Proposal or relevant law; unless named SO/ACs with personhood are given third party veto rights, unclear what if any legal recourse community has if Board determines community rejection of Standard Bylaws is inconsistent with Board's fiduciary duties.

Mechanism/Exercise/Enforcement of Community Powers (cont'd)

Model ----- Power	Community Mechanism as Sole Member Model	ICANN Board Proposal
4.5 Approve Changes to ICANN "Fundamental" Bylaws	- Sole Member given right to approve Fundamental Bylaws amendments. - Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- Proposed Fundamental Bylaws changes must be presented to community for approval or veto before effective. - As with Standard Bylaws process (#5.3), unclear whether Board proposal anticipates giving named SOs/ACs third party approval rights. - Community may initiate process to recall Board (#5.6) if Board amends a Fundamental Bylaws without community approval. - If Board ignores Bylaws requirements (set forth in Fundamental Bylaws), SO/ACs may invoke MEM process, including forming MEM Issue Group (composed of SO/ACs) to bring action in California courts; MEM Issue Group capacity to sue unclear under Proposal or relevant law; unless named SO/ACs with personhood are given third party veto rights, unclear what if any legal recourse community has if Board determines community failure to approve Fundamental Bylaws amendment is inconsistent with Board's fiduciary duties.
7.3 Appoint and Remove Individual ICANN Directors	- Sole Member appoints and removes individual directors based on direction from applicable SO/AC/NomCom. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- Individual SO/ACs are not given right to remove directors they appointed, but can initiate removal consideration by the community. - Directors sign pre-service letters resulting in removal only for defined causes and only by the community, represented by the SO/ACs. - If an SO/AC is a legal person, should be able to enforce pre-service letters in California court. - If director refuses to vacate in violation of pre-service letter (as set forth in Fundamental Bylaws), SO/ACs may invoke MEM process, including forming MEM Issue Group (composed of SO/ACs) to bring action in California courts; MEM Issue Group capacity to sue unclear under Proposal or relevant law. - If sitting directors refuse to vacate, new directors also have standing to enforce. - If SO/ACs are designators, they will have a statutory right to remove regardless of Bylaws provisions under Board proposal.

Mechanism/Exercise/Enforcement of Community Powers (cont'd)

Model ----- Power	Community Mechanism as Sole Member Model	ICANN Board Proposal
7.4 Recall Entire ICANN Board of Directors	- Sole Member given power to recall Board. - Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- The Board Proposal does not provide for direct, coordinated action by community to recall entire ICANN Board. - Recall possible through simultaneous trigger of pre-service letters that compel resignation of directors upon the occurrence of certain events. - Refusal to vacate may be challenged individually as described in #5.5. Refusal to vacate may also be challenged collectively through MEM.
6.0 (para 300) Reconsider/Reject Board Decisions Relating to Reviews of the IANA Functions, Including Ability to Trigger a Separation of PTI	- Sole Member given reserved power under Bylaws to override Board decision, regardless of Board fiduciary duties. - Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. - Sole Member has standing to enforce this right; direct enforceability by Sole Member.	- Bylaws would require Board to implement recommendations, within limits respecting Board fiduciary duties. - Community, through SO/ACs, can initiate process to recall Board (#5.6) if it fails to implement recommendations. - If Board ignores Bylaws requirements (set forth in Fundamental Bylaws), SO/ACs may invoke MEM process, including forming MEM Issue Group (composed of SO/ACs) to bring action in California courts; MEM Issue Group capacity to sue unclear under Proposal or relevant law; unclear what if any legal recourse community has if Board determines that Bylaws requirements are inconsistent with Board's fiduciary duties.

Key Characteristics Summary Comparison: CMSM & Board Proposal

Model ----- Key Characteristic	Community Mechanism as Sole Member Model	ICANN Board Proposal
Statutory powers	Broad statutory rights for Sole Member, but limited by institution of high voting thresholds for their exercise.	None. SO/AC rights limited to those stated in governing documents.
Legal personhood	Sole Member is an unincorporated association and legal person per ICANN bylaw provisions, SO/AC participants in single member do not need to be legal persons.	SO/ACs that seek direct, legal enforceability of their rights would need to be legal persons; MEM Issue Group for enforcement could be organized as legal person (depending on implementation).
Enforceability of community powers; susceptibility to lawsuits regarding internal affairs	Sole Member can invoke IRP, agrees to be bound by internal IRP process. Each SO/AC can invoke IRP. CMSM would have legal capacity and standing to enforce IRP results in court. No single SO/AC has standing to bring derivative suits against fiduciaries. Sole Member would have clear rights to enforce results in California court and most other international courts. Participants in sole member unincorporated association would enforce their rights, even if not legal persons, through the sole member.	SO/AC can petition to invoke MEM Arbitration; upon reaching a certain threshold of SO/AC support a MEM Issue Group would be formed which (depending upon implementation) could have standing under Bylaws and legal capacity to initiate and enforce arbitration. Scope of permissible MEM arbitration (Fundamental Bylaw violation v. "new community power violation") unclear. SO/ACs may bring actions in CA courts seeking enforcement of MEM award, although this may require legal personhood. No single SO/AC has standing to bring derivative suits against fiduciaries. The MEM Issue Group, as a separate unincorporated association, would be part of each MEM.
	Directors and officers can bring derivative suits; directors can sue to determine incumbency.	

Key Characteristics Summary Comparison: CMSM & Board Proposal (cont'd)

Model ----- Key Characteristic	Community Mechanism as Sole Member Model	ICANN Board Proposal
Enforcement uncertainties	Sole Member will have clear right to enforce its powers. Enforceability of rights of participants in sole member unincorporated association is unclear, especially where some participants are not legal persons.	SO/AC power limited by law, including fiduciary duties, which could result in specific Bylaws provisions being invalidated rather than enforced by a court. Lack of clarity (similar to status quo) regarding whether SO/ACs are designators with rights inherent under CA law (e.g., individual director removal powers). MEM process would result in a decision that could be enforced by the MEM Issue Group (depending upon implementation) in California state court. Scope of Board ability to subject exercise of fiduciary duties to review by SOs/ACs or arbitral process uncertain.
ICANN capture by single stakeholder group	Likelihood: Very low likelihood of capture of Sole Member by single stakeholder group; Board controls ICANN in absence of Sole Member action on reserved powers. Consequences: If Sole Member is captured, full power of member held by single stakeholder group.	Likelihood: Very low likelihood of capture of MEM process by single stakeholder group; Board controls ICANN in absence of enforceable MEM arbitration decision on Fundamental Bylaws. Consequences: If MEM process captured, MEM process may be invoked by single stakeholder; possible excessive arbitration.
Changes to ICANN governing documents	Moderate: Need to amend Bylaws to: -set up community mechanism as Sole Member -provide for community powers -Enhance IRP - address membership structure with one member	Moderate: Need to amend Bylaws to: - enhance community (SO/AC) rights - set up community mechanism - set up MEM Arbitration - address indirect/coordinated enforcement mechanisms