

High Level Response to CCWG Counsel's 29 September 2015 Slides

There appear to be several fundamental misconceptions concerning the CCWG's Proposal and the Board's Proposal, many of which can be said to derive from certain absolute statements by CCWG Counsel that at best are incomplete, and at worst are incorrect. The slides published by CCWG Counsel on 29 September 2015 highlight the root causes of this confusion. This memorandum is intended to clarify, at a high level, some of these misconceptions.

- Untested Model: Contrary to CCWG Counsel's assertion, the SMM does not have the "same basic structure as current governance." The proposed SMM is untested within ICANN and is a significant and fundamental structural change from the multistakeholder governance mechanism that currently exists. Although membership may be a common practice for some non-profit organizations in certain contexts, CCWG Counsel has not identified exemplars where organizations comparable to ICANN (e.g., with many stakeholders) have instituted and successfully operated under the proposed SMM. In fact, a membership model was considered at ICANN's inception and was rejected because it would not best serve the bottom-up, multistakeholder model. Care must be given before undertaking a widespread transformation of ICANN's governance, particularly at a time – as now – when stability of the organization is of critical importance. In addition, CCWG Counsel has given little consideration to the need to test such a transformation of ICANN's governance structure against the potential adverse effects it may have, including risks of capture, and whether this can be accomplished in the limited time available to meet a September 2016 transition.
- The Sole Member and its Participants Owe No Fiduciary Duties to ICANN – One of the CCWG's stated goals is to "propose reforms that would see ICANN attain a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government." However, proponents of the CCWG's Proposal minimize or ignore the fact that the shift to the SMM would place a significant amount of power in the hands of individuals and stakeholders that hold no fiduciary obligations to ICANN or the global stakeholder community. These individuals and stakeholders are free to act in their personal interest and are not required to make decisions based on what is best for ICANN, the ICANN community, and the global public interest. The result would be that a limited number of SOs and ACs (which could change over time) would have ultimate power over ICANN for significant matters with literally no accountability, producing exactly the opposite result that the community now seeks, *i.e.*, "power without accountability." Any shift of authority to the SOs and ACs should be accompanied by a commensurate level of accountability.
- Binding Arbitration is an Enforceable Mechanism to Ensure That ICANN Abides By The Fundamental Bylaws – CCWG Counsel asserts that there are "enforcement uncertainties" surrounding the Board's proposed use of binding arbitration as an enforcement mechanism. This is not correct. Under a binding arbitration model, a panel would declare whether the challenged decision or action of the Board did or did not comply with ICANN's Fundamental Bylaws. If the Board is found to have violated a Fundamental Bylaw, the Board is required to remedy that violation, within the Board's discretion. If

the Board fails to remedy a violation, the claimant may enforce the arbitration decision in the California courts.

- CCWG Counsel agrees that a claimant “could be organized as a legal person,” although it states this is true “depending on implementation.” To be clear, under the Board’s Proposal, there are various options for “who” might enforce the final arbitration decision. The decision could be enforced by an unincorporated association comprised of: (i) an individual participating SO/AC or some grouping of participating SOs/ACs; (ii) the members of multiple participating SOs/ACs; or (iii) chairs of multiple participating SOs/ACs. Much like the SMM, discussed in ¶ 306 (p. 49) of the CCWG’s 2nd Draft Proposal, the SO/AC claimant/plaintiff “would be a legal person created through ICANN’s Bylaws as an unincorporated association.” In the alternative, the individual (natural) people serving as chairs of the participating SOs/ACs could enforce the award in an individual capacity (and could be indemnified by ICANN to assure that they would not have any personal risk). Both unincorporated associations and individual persons possess the requisite legal personhood to enforce an arbitration decision in court.
- The binding arbitration decision is enforceable in California courts even if ICANN, for some reason, did not participate in the underlying arbitration. Specifically, if ICANN’s Bylaws allow *ex parte* arbitration proceedings, in the unlikely event that ICANN refuses to participate in the binding arbitration, the arbitration would still take place and, if the claimant is successful, ICANN would suffer the equivalent of a default judgment against it. A court could then enforce the arbitration award even if ICANN refused to participate in the arbitration proceedings (or the subsequent court proceedings).
- The binding arbitration decision can be enforced by a California court even if the Board asserts that compliance with an arbitration decision would force the Board to violate its fiduciary duties. If the Board raised such a “defense,” the court would evaluate that claim and, within its discretion, would accept or reject it. If the “fiduciary duty defense” was rejected (which, practically speaking, is likely), a court order would issue compelling ICANN to comply with the arbitration decision.
- Board Removal is the Ultimate Enforceability Mechanism – Above all, under both the CCWG Proposal and the Board Proposal, the Community can remove individual directors or recall the entire Board if a director fails – in the Community’s view – to comply with the Fundamental Bylaws.
- Sole Member’s Statutory Rights – CCWG Counsel acknowledges that a Sole Member possesses broad statutory rights, but proposes that they be “limited by institution of high voting thresholds for their exercise.” However, the Sole Member’s statutory rights are enumerated by statute, and CCWG Counsel has acknowledged that many of these rights are mandatory and cannot be restricted. CCWG Counsel asserts that the CCWG’s

Proposal makes it difficult for the Sole Member to *exercise* its rights, but this does not mean that these statutory rights can be restricted or eliminated.

- Regardless of the thresholds required for the Sole Member to exercise a statutory power, such thresholds only constrain the ability of the Sole Member to exercise the statutory power; the actual power cannot be restricted, so there remains a risk that the power will be exercised. Moreover, there is a possibility that only a limited number of SOs and ACs could participate in the SMM (and the number could decrease over time), which is made more problematic by the waiting periods on electing (or re-electing) to become a voting participant contained in the CCWG's Proposal. Thus, statutory rights exist, no matter the voting threshold necessary to exercise those rights, and with no corresponding mechanism to ensure that the SOs and ACs that direct the Sole Member are accountable to ICANN or the global public interest, the existence of such rights constitutes a significant shift in ICANN's governance.