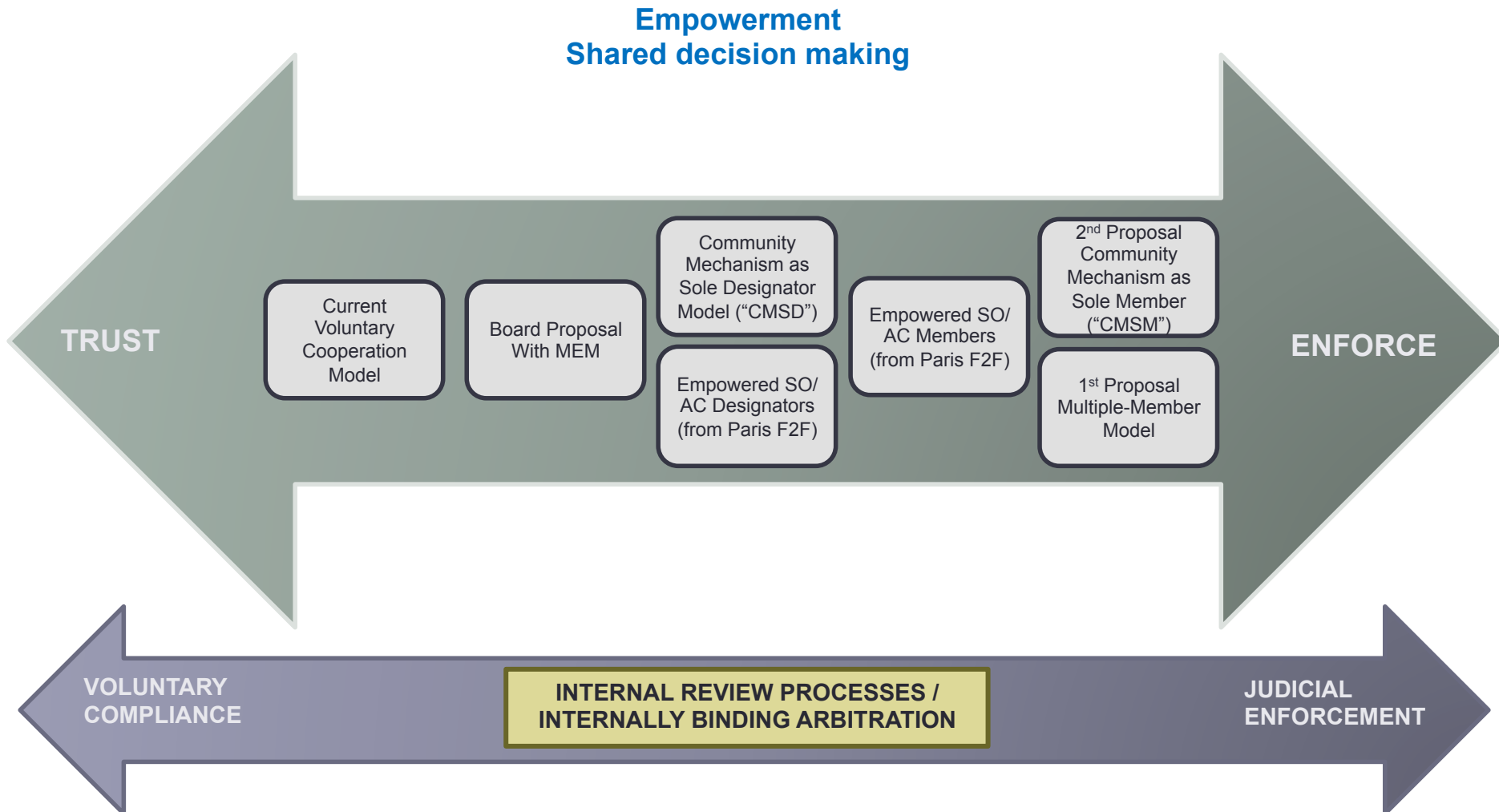


**KEY CHARACTERISTICS COMPARISON:
Community Mechanism as Sole Member Model,
Community Mechanism as Sole Designator Model,
& ICANN Board Proposal**

September 28, 2015

The Trust - Enforceability Continuum



Implementing the Community Mechanism as Sole Member Model

Same basic structure as current governance,
with *SOs/ACs participating in the Community Mechanism as the Sole Member,*
and *stronger IRP*

Bylaws Enhancements:

- Community mechanism described and defined as a legal person and the sole member of ICANN
- SOs/ACs/NomCom maintain current forms (legal person or not)
- Acting through the CMSM, SOs/ACs/NomCom continue to appoint directors; and through CMSM can remove any or all directors
- Through CMSM, SOs and ACs vote to exercise community powers
- Internally binding IRP process supports CMSM exercise of 7 powers
- All disputes relating to internal corporate affairs (alleged Bylaws violations and breaches of fiduciary duty) are expressly made subject to resolution through internally binding IRP process

Implementing the Community Mechanism as Sole Designator Model

Same basic structure as current governance, with *SOs/ACs participating in the Community Mechanism as the Sole Designator*, and *stronger IRP*

Bylaws Enhancements:

- Community Mechanism described and defined in Bylaws as a legal person with the following rights:
 - Designator rights (i) to appoint directors, (ii) to remove directors, and (iii) recall the full board (except President)
 - Rights to veto Standard Bylaws and Approve Fundamental Bylaws (with different decision thresholds for veto of Standard vs. approval of Fundamental Bylaws amendments)
 - Rights to veto Budget, Strategic and Operating Plans (with indirect enforcement described below)
 - Right to enforce if necessary binding IRP decisions in court, on its own behalf, and on behalf of non-person SO/ACs
- SOs/ACs/NomCom maintain current forms (legal person or not)
- Acting through the CMSD, SOs/ACs/NomCom continue to appoint directors as they currently do; through CMSD can also remove directors and recall full board
- Through CMSD, SOs and ACs -- after defined consultation process -- may institute a process to veto Standard Bylaws; and must approve Fundamental Bylaw amendments
- Through CMSD, SOs and ACs -- after defined consultation process -- may institute a process to veto Budget, Strategic and Operating Plans
- CMSD has no statutory rights: Rights are only as stated in the Bylaws
- Enhanced internal IRP process supports CMSD exercise of powers
- All disputes relating to alleged violations of Articles and Bylaws are subject to IRP (after reconsideration and other appropriate escalation) which will have impact of binding arbitration enforceable by CMSD (and others) in court, except to extent that dispute relates to areas that are reserved to Board fiduciary judgment. For matters where binding arbitration is not available, CMSD practical remedy is director removal and replacement

Mechanism/Exercise/Enforcement of Community Powers

Model ----- Power	Community Mechanism as Sole Member Model	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Reconsider/ Reject ICANN Budget or Strategy/ Operating Plans	<ul style="list-style-type: none"> • Sole Member given reserved power to reject Board budget up to two times, with Bylaw requiring ICANN to operate on the previous year's budget for the new fiscal year if the budget is rejected twice. • 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 Bylaw restrictions on budget; direct enforceability by Sole Member. • If Sole Member objects to Board final decision, can initiate process to remove individual directors or recall the entire Board. 	<ul style="list-style-type: none"> • Sole Designator given right to trigger Board consultation up to specified number of times, with Bylaw imposing restrictions on budget adopted by Board over Sole Designator objection, subject to override if required by Board fiduciary duties. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Sole Designator has standing to enforce consultation right; direct enforceability by Sole Designator. • If Sole Designator objects to Board final decision, can initiate process to remove individual directors or recall the entire Board. 	<ul style="list-style-type: none"> • 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 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.

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

Model ----- Power	Community Mechanism as Sole Member Model	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Reconsider/Reject Changes to ICANN "Standard Bylaws"	<ul style="list-style-type: none"> • 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 statutory standing under California corporate law to enforce this right; direct enforceability by Sole Member. • Sole Member would have statutory right under California law to initiate or adopt bylaws amendments on its own, but the exercise of this right could be practically curtailed through internal Sole Member mechanisms. 	<ul style="list-style-type: none"> • Sole Designator given right to veto proposed Standard Bylaws amendments. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Direct enforceability by Sole Designator (bylaws-as-contract theory). 	<ul style="list-style-type: none"> • 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 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	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Approve Changes to ICANN "Fundamental" Bylaws	<ul style="list-style-type: none"> • 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 statutory standing under California corporate law to enforce this right; direct enforceability by Sole Member. • Sole Member would have statutory right under California law to initiate or adopt bylaws amendments on its own, but the exercise of this right could be practically curtailed through internal Sole Member mechanisms. 	<ul style="list-style-type: none"> • Sole Designator given right to approve proposed Fundamental Bylaws amendments. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Direct enforceability by Sole Designator (bylaws-as-contract theory). 	<ul style="list-style-type: none"> • Proposed Fundamental Bylaws changes must be presented to community for approval or veto before effective. • As with Standard Bylaws process, unclear whether Board proposal anticipates giving named SOs/ACs third party approval rights. • Community may initiate process to recall Board 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.

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

Model ----- Power	Community Mechanism as Sole Member Model	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Appoint and Remove Individual ICANN Directors	<ul style="list-style-type: none"> • 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. • Also, if a sitting director refused to vacate, new director would have statutory standing to enforce. 	<ul style="list-style-type: none"> • Sole Designator appoints and removes individual directors based on direction from applicable SO/AC/NomCom. • Sole Designator has standing to enforce this right; direct enforceability by Sole Designator. • Also, if a sitting director refused to vacate, new director would have statutory standing to enforce. 	<ul style="list-style-type: none"> • 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	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Recall Entire ICANN Board of Directors	<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • Sole Designator given power to recall Board. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Sole Designator has standing to enforce this right; direct enforceability by Sole Designator. • Also, if a sitting director refused to vacate, new director would have statutory standing to enforce. 	<ul style="list-style-type: none"> • 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. Refusal to vacate may also be challenged collectively though MEM.
Reconsider/Reject Board Decisions Relating to Reviews of the IANA Functions, Including Ability to Trigger a Separation of PTI	<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • Sole Designator given right to trigger Board consultation up to specified number of times, with Bylaw restrictions subject to override if required by Board fiduciary duties. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Sole Designator has standing to enforce consultation right; direct enforceability by Sole Designator. • If Sole Designator objects to Board final decision, can initiate process to remove individual directors or recall the entire Board. 	<ul style="list-style-type: none"> • Bylaws would require Board to implement recommendations, within limits respecting Board fiduciary duties. • Community, through SO/ACs, can initiate process to recall Board 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, CMSD, & Board Proposal

Model ----- Key Characteristic	Community Mechanism as Sole Member Model	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Statutory powers	Broad statutory rights for Sole Member, but limited by institution of high voting thresholds for their exercise.	Since Sole Designator has the right under Bylaws to designate directors, Sole Designator also has the statutory right to remove these directors at any time. Also, designated directors cannot be removed without cause unless Sole Designator consents. Statute permits Articles and Bylaws to give Sole Designator the right to veto amendments. No other rights are given to designators by statute.	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 Sole Member do not need to be legal persons.	Sole Designator is an unincorporated association and legal person per ICANN bylaw provisions, SO/AC participants in Sole Designator 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	<p>Sole Member can invoke IRP, agrees to be bound by internal IRP process. Each SO/AC can invoke IRP. Sole Member would have legal capacity and standing to enforce IRP results in court.</p> <p>No single SO/AC has standing to bring derivative suits against fiduciaries.</p> <p>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.</p>	<p>Sole Designator can invoke IRP, agrees to be bound by internal IRP process. Each SO/AC can invoke IRP. Sole Designator would have legal capacity and standing to enforce IRP results in court.</p> <p>Neither the Sole Designator nor any individual SO/AC has standing to bring derivative suits against fiduciaries.</p> <p>Sole Designator would have clear rights to enforce results in California court and most other international courts. Participants in the Sole Designator unincorporated association would enforce their rights, even if not legal persons, through the Sole Designator.</p>	<p>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.</p> <p>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.</p>
Directors and officers can bring derivative suits; directors can sue to determine incumbency.			

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

Model ----- Key Characteristic	Community Mechanism as Sole Member Model	Community Mechanism as Sole Designator Model	ICANN Board Proposal
Enforcement uncertainties	Sole Member will have ability to enforce its powers. Enforceability of rights of participants in Sole Member unincorporated association is unclear, especially where some participants are not legal persons.	Sole Designator will have ability to enforce its powers. Enforceability of rights of participants in Sole Designator 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 community powers. Consequences: If Sole Member is captured, full power of member held by single stakeholder group.	Likelihood: Very low likelihood of capture of Sole Designator by single stakeholder group; Board controls ICANN in absence of Sole Designator action on its community powers, which are more limited than in CMSM model. Consequences: If Sole Designator is captured, Designator's specified powers under Articles/ Bylaws 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: - set up community mechanism as Sole Designator - provide for community powers - enhance IRP	Moderate: Need to amend Bylaws to: - enhance community (SO/AC) rights - set up community mechanism - set up MEM Arbitration - address indirect/coordinated enforcement mechanisms