

Summary Comparison of Enforcement Mechanisms¹

Community Powers	Current Bylaws Model	Means of Enforcement with Board's MEM	Means of Enforcement with Sole Designator	Means of Enforcement with Sole Member
<p>1. Reconsider / Reject ICANN Budget or Strategy / Operating Plans</p>	<ul style="list-style-type: none"> • Powers committed to Board fiduciary responsibility. • Non-binding arbitration available to persons materially affected by Board decision; but discretion ultimately rests with Board. 	<ul style="list-style-type: none"> • Powers committed to Board fiduciary responsibility • Bylaws require community consultation • SOs/ACs can reject Board's plan up to two times; Board can override community rejection with restrictions. • Arbitration available for violations of Fundamental Bylaws, but discretion ultimately rests with Board; likely not binding for these powers • Ultimate Community power is Board recall 	<ul style="list-style-type: none"> • Powers committed to Board fiduciary responsibility • Bylaws require community consultation • Designator can trigger enforceable consultation right and SOs/ACs can reject Board's plan up to two times • Arbitration available for violations of Bylaws, but discretion ultimately rests with Board; likely not binding for these powers • Designator can initiate process to remove individual directors or recall the entire Board. 	<ul style="list-style-type: none"> • Powers committed to Board fiduciary responsibility, subject to Member's reserved powers • Bylaws require community consultation • Member given reserved power to reject Board's plan up to two times • Binding arbitration available for violations of Bylaws • Sole Member can remove individual directors or recall the entire Board.
<p>2. Approve Changes to ICANN "Fundamental" Bylaws and Articles of Incorporation</p>	<ul style="list-style-type: none"> • No formal process for community participation; bylaws altered, amended, repealed, or new bylaws adopted upon action of two-thirds vote of all members of the Board. • No formal mechanism for community challenge. 	<ul style="list-style-type: none"> • Proposed Fundamental Bylaws changes must be presented to community for approval or veto. • Arbitration available for violations of Fundamental Bylaws, but discretion ultimately rests with Board; likely not binding for these powers • Ultimate Community power is Board recall 	<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. • Designator could invoke arbitration process and ultimately bring court action but discretion ultimately rests with Board; likely not binding for these powers • Ultimate Community power is Board recall 	<ul style="list-style-type: none"> • Sole Member reserves right to approve proposed Fundamental Bylaws amendments. • Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. • Sole Member could invoke binding arbitration process and ultimately bring court action • Ultimate Community power is Board recall • Sole Member would have statutory right under California law to initiate or adopt bylaws amendments on its own, but exercise of this right could be practically curtailed through internal Sole Member mechanisms.

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

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3. Reconsider / Reject Changes to ICANN "Standard Bylaws"	<ul style="list-style-type: none"> No formal process for community participation; bylaws altered, amended, repealed, or new bylaws adopted upon action of two-thirds vote of all members of the Board. No formal mechanism for community challenge. 	<ul style="list-style-type: none"> Proposed Standard Bylaws changes must be presented to community for approval or veto. Binding arbitration available for violations of Fundamental Bylaws Ultimate Community power is Board recall 	<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. Designator could invoke binding arbitration process and ultimately bring court action Ultimate Community power is Board recall 	<ul style="list-style-type: none"> Sole Member reserves 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 could invoke binding arbitration and ultimately bring court action. Ultimate Community power is Board recall 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.
4. Appoint and Remove Individual ICANN Directors	<ul style="list-style-type: none"> If SOs/ACs/NomCom are designators (as a matter of law), they have a statutory right to remove. SOs/ACs/NomCom, or new directors, or other directors, could enforce this statutory right in California court. 	<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. Binding arbitration process available to challenge directors who refuse to leave. New directors could sue to enforce. If SOs/ACs/NomCom are designators (as a matter of law), they have a statutory right to remove. SOs/ACs/NomCom, or new directors, or other directors, could enforce this statutory right in California court. 	<ul style="list-style-type: none"> Sole Designator appoints and removes individual directors based on direction from applicable SO/AC/NomCom. Binding arbitration process available to challenge directors who refuse to leave. New directors could sue to enforce. Statutory right to remove 	<ul style="list-style-type: none"> Sole Member appoints and removes individual directors based on direction from applicable SO/AC/NomCom. Binding arbitration process available to challenge directors who refuse to leave. New directors could sue to enforce. Statutory right to remove

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5. Recall Entire ICANN Board of Directors	<p>If SOs/ACs/NomCom are designators (as a matter of law), they have a statutory right to remove.</p> <p>SOs/ACs/NomCom, or new directors could enforce this statutory right in California court.</p>	<p>Not expressly contemplated Recall possible through simultaneous trigger of pre-service letters that compel resignation of directors upon the occurrence of certain events. Refusal to vacate can be challenged individually or collectively through MEM.</p> <p>If SOs/ACs/NomCom are designators (as a matter of law), they have a statutory right to remove. SOs/ACs/NomCom, or new directors, could enforce this statutory right in California court.</p>	<p>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. Binding arbitration process available to challenge directors who refuse to leave. New directors could sue to enforce. Statutory right to remove</p>	<p>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. Binding arbitration process available to challenge directors who refuse to leave. New directors could sue to enforce. Statutory right to remove</p>
6. Mechanism for binding IRP where a panel decision is enforceable in any court recognizing international arbitration results	<p>Nonbinding IRP review of Board's compliance with procedures specified in Bylaws. Any person materially affected by a Board decision that is asserted to be inconsistent with the Articles of Incorporation or Bylaws may submit IRP request.</p> <p>IRP decisions not binding on Board; not enforceable in court.</p>	<p>Any SO/AC can petition to invoke process leading to binding arbitration via a MEM Issue Group MEM Issue Group may bring actions in CA courts seeking enforcement of MEM award. Awards could be recognized in many jurisdictions. Board suggests venue in California only, but provisions could be broadened.</p>	<p>Each SO/AC or the sole Designator can invoke binding arbitration. Sole Designator would have clear rights to enforce results in California courts Awards enforceable in other international courts recognizing international arbitration results.</p>	<p>Each SO/AC or the Sole Member can invoke binding arbitration. Sole Member would have clear rights to enforce results in California courts Awards enforceable in other international courts recognizing international arbitration results.</p>
7. Reconsider / Reject Board Decisions Relating to Reviews of the IANA Functions, Including Ability to Trigger a Separation of PTI (or, IANA Separation Enforceability)	<p>N/A</p>	<p>Bylaws would require Board to implement recommendations, within limits respecting Board fiduciary duties.</p> <p>Arbitration likely unavailable for separation decision itself because discretion ultimately rests with Board; Ultimate Community power is Board recall</p>	<p>Sole Designator given right to trigger Board consultation up to specified number of times, with Bylaw restrictions Sole Designator has standing to direct enforce consultation right Arbitration likely unavailable for separation decision itself because discretion ultimately rests with Board; Ultimate Community power is Board recall</p>	<p>Sole Member reserves power under Bylaws to override Board decision, regardless of Board fiduciary duties. Sole Member has standing to direct enforce consultation right Sole Member would have greater latitude to invoke binding arbitration over PTI separation (although issue is not certain); Ultimate Community power is Board recall</p>