

**EMPOWERED SO/AC MEMBERSHIP
& DESIGNATOR MODELS
FOR COMMUNITY EMPOWERMENT
(AND “COMMUNITY MECHANISM AS SOLE MEMBER” VARIATION)**

Description, Comparison and Legal Analysis

*Presented on July 7, 2015
and
Revised Per Comments and Requests
Received in That Discussion*

Draft Dated July 14, 2015

Overview

- To facilitate further consideration by the CCWG, this presentation describes and compares two models proposed in Buenos Aires that seek to address concerns expressed by members of the multi-stakeholder community on the Community Empowerment Mechanism described in Section 5 of CCWG's Accountability Initial Draft Proposal for Public Comment (4 May 2015) ("Initial Proposal")*
 - The **"Empowered SO/AC Membership Model"** would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood and would allow opt-in re legal status
 - The **"Empowered SO/AC Designator Model"** would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood and would allow opt-in re legal status
- This presentation also reviews legal issues associated with each model and attempts to more fully describe how the models might be implemented within the legal framework of California nonprofit law.
- As requested on the 7 July call, this revised draft also discusses a variation -- the **"Community Mechanism as Sole Member Model"** -- as an alternative that builds upon concepts in the other models and simplifies certain implementation aspects.

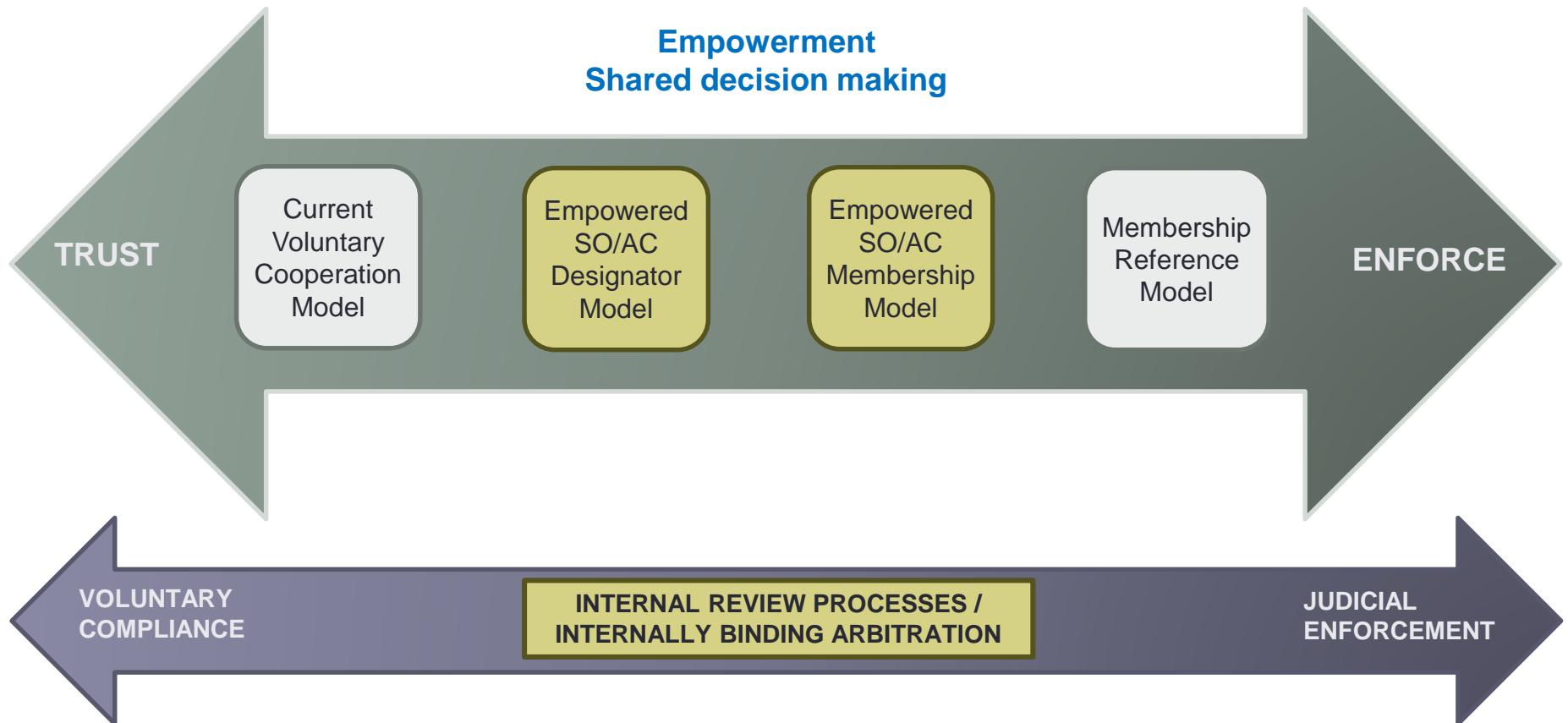
* The focus of this presentation is on the Community Empowerment Mechanism; however, as requested counsel has reviewed Sections 3 (Principles) and 4 (Appeals Mechanisms) of the Initial Draft Proposal and has not identified any specific concerns about how those matters would be affected by the models under consideration.

Accountability, Trust and Enforceability

- “The Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN attain a level of accountability to the global multi-stakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government.”
 - *From Paragraphs 2 & 24 of the Initial Proposal*
- Comments on the Initial Proposal and discussion in Buenos Aires (and earlier) highlight that the current reliance on trust and a voluntary cooperation model is highly valued but that accountability under that model is viewed as insufficient for a future in which IANA stewardship has been transitioned.
- In addition, comments and discussion to date indicate that consensus has not yet developed on the relationship of accountability to trust and enforceability.
- **CCWG’s challenge is to reconcile these points of view.**

The Trust - Enforceability Continuum

On the trust - enforceability continuum, the Empowered SO/AC Membership and Designator Models lie somewhere between the current Voluntary Cooperation Model and the Membership Reference Model set forth in the Initial Proposal



Common Goals

- All of the new models enhance accountability of the ICANN Board to the ICANN multi-stakeholder community -- while encouraging and supporting continued reliance on a highly valued commitment to trust, cooperation and consensus-building -- through:
 - Enhanced community decision rights (powers)
 - Backed by internal enforcement mechanisms with binding force supported in law
- All models rely on the current SO/AC structure:
 - No changes in SO/AC structures and procedures are required
 - Each SO/AC determines whether and if so when and how to pursue legal personhood
- All models respond to concerns raised about:
 - Lack of enforceability of current voluntary/cooperative model
 - “Avatar” concept of the reference model described in the Initial Proposal
- All models provide flexibility for the future
- All models also provide enhanced means to prevent deviations from ICANN’s Principles (Section 3 of Initial Proposal) and include ways to assure that ICANN’s Appeals Mechanisms (Section 4 of Initial Proposal) are followed

Common Elements

- Under all the models, SOs/ACs operate much as they do now, relying on one another and the ICANN Board, officers and staff to abide by Bylaws
- However, under all the new models enforceability is enhanced from the current voluntary cooperation model with respect to **all** of the expanded community powers set forth in Section 5 of the Initial Proposal:
 - 5.2 Power: Reconsider/reject budget or strategy/operating plans
 - 5.3 Power: Reconsider/reject changes to ICANN “standard” Bylaws
 - 5.4 Power: Approve changes to “Fundamental” Bylaws
 - 5.5 Power: Appoint and remove individual ICANN Directors
 - 5.6 Power: Recall the entire ICANN Board
 - 5.7* *Power: Reconsider/reject Board decisions relating to reviews of the IANA functions; including ability to trigger a separation of PTI*

For designators & non-legal persons, some powers are subject to indirect enforcement:

The Bylaws would provide the community with all of the rights; Board failure to abide by these Bylaw provisions would trigger community consideration of Board recall. The Community Mechanism as Sole Member Model provides an alternative enforcement tool.

* *Additional power related to CWG Dependencies, not listed in Section 5 (Community Empowerment) of Initial Draft Proposal*

Empowered SO/AC Membership Model

Proposed in Buenos Aires

- Relies on participation by SOs/ACs for exercise of community powers: Bylaws would provide that ICANN is a membership body **if** one or more SO/AC chooses to become a Member
 - No SO/AC would be required to become a Member; each could choose to “opt in”
 - Becoming a Member requires legal personhood; becoming an actual membership organization requires at least one Member
- Bylaws would provide for all community powers to be exercised by SOs/ACs
- Should conversion to a membership organization be triggered, community powers would be exercised by both Members (i.e., SOs/ ACs who choose to become legal persons and Members) **AND** non-member Participants (i.e., SOs/ ACs who choose *not* to become legal persons or who are legal persons but choose not to become Members)
 - Whether or not an SO/AC becomes a Member or participates as a non-member Participant, its number of votes / power / influence in exercising community powers would not change
- SOs/ACs can exercise the community powers as soon as adopted in the Bylaws; there is no formalization requirement to be a Participant
- Door remains open for SOs/ACs who are not legal persons/Members to choose at some future point in time to become legal persons/Members by evidencing intent to exercise authority and acquire legal personhood (or to appoint a legal person as representative) and then electing to become a Member

Empowered SO/AC Membership Model

Proposed in Buenos Aires

LEGAL ISSUES

- *Differential rights:* Will Members have more legal power in ICANN than non-member Participants due to statutory rights of Members? Will legal persons have greater enforcement rights than non-legal persons?
- *Bylaw validity:* Will effort to provide non-member Participants with same rights as Members — including rights that statute says may only be given to Members – give rise to claim that Bylaws are invalid?
- *Capture risk:* If only one or two ACs/SOs become Members with differential statutory rights, how to protect against heightened risk of capture?
- *Revolving membership:* If Members can join and exit at will, are differential rights and capture risk subject to potential for continual change, with associated difficulties in constructing protections and protecting from other unintended /unforeseen consequences?
- *Member statutory rights:* Are there viable options to protect against Member rights to dissolve corporation and bring derivative suits?

Empowered SO/AC Designator Model

Proposed in Buenos Aires

- Relies on participation by SOs/ACs that are given specific rights in the Bylaws as third parties (Designators); i.e., does not rely on legal rights of Members
 - Bylaws would give each Designator direct power to appoint and remove certain number of individual directors (5.5)
 - Bylaws would give Designators as a group (voting in Community Mechanism) the powers to reject amendments to standard bylaws upon community petition process (5.3), to review and reject (i.e., “approve”) all amendments to fundamental bylaws (5.4), and to cause recall of entire Board (5.6)
 - Bylaws would give Designators as a group (voting in Community Mechanism) indirect (but still enforceable) powers to reject budget and strategy/operating plans (5.2) and to reject Board decisions relating to reviews of the IANA functions (5.7) by providing that ***a failure of the Board to provide the Community Mechanism opportunity to review, object and direct the Board to reconsider such decisions — and the failure of the Board to so reconsider — would trigger community consideration of Board recall.***
(This same provision could be a backstop for direct powers as well.)
- SOs/ACs can exercise the proposed community powers as soon adopted in the Bylaws; no formalization requirement
- SOs/ACs can choose at some future point in time to acquire legal personhood. This would enhance their ability to enforce their powers outside of ICANN but is not necessary to use the internally binding IRP process.
 - Whether or not an SO or AC formalizes as a legal person, the number of votes / power / influence it has in exercising community powers should not change

Empowered SO/AC Designator Model

Proposed in Buenos Aires

LEGAL ISSUES

- *Differential rights:* What potential is there for differential rights to arise as between legal and non-legal persons regarding the exercise of “Designator” rights described herein? In addition, will legal persons have greater enforcement rights than non-legal persons? (The statute is silent on whether the right to designate directors must be exercised by legal persons. However, the ability for a third party to be given rights to veto bylaws does require legal personhood.)
- *Enforceability concern:* To what extent can the community rely on the binding IRP mechanism to support its direct and indirect rights – including if SOs and ACs are not legal persons? For example, if a non-legal entity designator were to attempt to remove its director and the director refused, how could the entity enforce its rights?
- *Arbitration impact:* Would the ability of a non-legal entity to use the IRP process undermine it as a binding arbitration mechanism with respect to legal entities?

CWG DEPENDENCIES

- Would the indirect enforcement of certain designator rights satisfy the CWG dependencies?

Community Mechanism as Sole Member Model

Discussed 7 July 2015

- The Community Mechanism in which SOs/ACs participate to exercise community powers could be the Sole Member of ICANN. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member (“CMSM”).
- ICANN Bylaws would establish CMSM as the Sole Member of ICANN with legal personhood and describe the composition and powers of the CMSM
 - Composition would include the same SOs/ACs now contemplated to participate in the models described herein; No legal personhood would be required for SOs/ACs
 - The SOs/ACs and the NomCom would cause the CMSM to elect and remove the respective chosen ICANN directors each SO/AC and NomCom is entitled to select and remove (5.5)
 - SOs/ACs as a group (voting in the Community Mechanism as Sole Member with the weighted voting contemplated) would exercise powers to reject budget and strategy/operating plans (5.2), to reject amendments to standard bylaws upon community petition process (5.3), to review and reject (i.e., “approve”) all amendments to fundamental bylaws (5.4), to recall the entire Board (5.6), and to reject Board decisions relating to reviews of the IANA functions (5.7).
 - The decisions, rights and powers of the CMSM could be enforced through the internal IRP process with the force of binding arbitration, further backed if necessary through judicial proceedings.
- SOs/ACs can exercise the proposed community powers as soon adopted in the Bylaws.

Community Mechanism as Sole Member Model

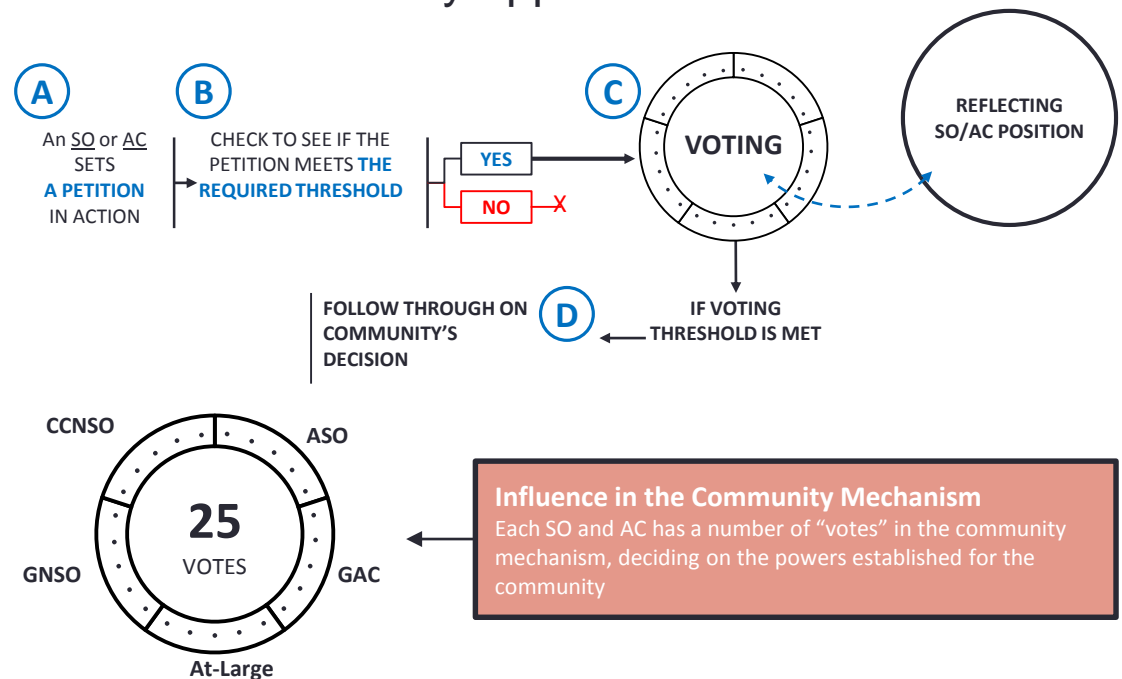
Discussed 7 July 2015

- **LEGAL ISSUES**

- *Differential rights:* The problem of differential rights with respect to statutory rights of Members is resolved since the statutory rights are only available to the CMSM – which means that the SOs and ACs will decide when and if to use such powers by voting in the Community Mechanism, and the votes of the ACs and SOs on statutory rights issues could be subject to supermajority requirements .
- There remains some risk that SOs and ACs that decide to formalize as legal persons would have greater capacity to enforce their rights to participate in the CMSM: Will legal persons have greater enforcement rights than non-legal persons?
- *Capture risk:* The issue of capture is lessened in the CMSM model, but can ACs/SOs with differential enforcement rights somehow use those rights for capture?

How do Community Powers Work?

- Under either model – and the alternative represented by the CMSM model, community powers are engaged by any SO/AC via petition and a “weighted vote” approval process (the “Community Mechanism”)
- Each power has its own threshold for community approval
- ICANN follows through with execution on community’s decision



How are Community Powers Enforceable?

- Directors may be removed by or at the direction of SOs and ACs.
- SOs and ACs – and/ or the CMSM -- have the ability to use the IRP process and its related internally binding arbitration to enforce community powers. All models being considered can effectively bind ICANN to follow an IRP process and to follow the IRP's decision.
 - If the ICANN Board were to ignore the provisions of the Bylaws and the outcome of internally binding arbitration, SOs/ACs and/or the CMSM could:
 - Trigger community consideration of full Board recall (accomplished by CMSM directly, or Designator or SO/AC removal actions pursuant to contract and/or springing resignations; note also that replacement directors themselves would have standing to enforce if former directors refused to vacate); this is simplified in the CMSM model
 - Seek enforcement of the internally binding IRP decision (as binding arbitration award) in court through
 - An SO or AC that qualified as a legal person (if a party to the IRP) or a Member
 - The CMSM as the Sole Member
 - A director (or officer) of ICANN asserting that failure of ICANN to abide by internally binding decision as provided in the Bylaws is a breach of the Bylaws *

*** In a dispute between the community and the Board, it is not inconceivable – it may even be even likely – that at least one director appointed by an AC or SO would be willing to stand up for the processes embedded in the Bylaws**

Implementing the Models

- The discussion that follows includes counsel's ideas on
 - how the models could be implemented and
 - how some of the concerns that have been identified could be addressed.
- These implementation ideas include greater detail than set forth in the models as proposed in Buenos Aires and include some modifications to aid in implementation.

Review of Current ICANN Structure: *VOLUNTARY QUASI-DESIGNATOR MODEL*

ICANN BOARD OF DIRECTORS

- Sole power to amend Articles/Bylaws
- May be able to remove individual directors without input from SOs/ACs (depends on whether court recognizes SOs/ACs/Nom Comm as Designators)
- Can disregard review panel decisions and community input without legal consequence

Accountability/Enforceability Issues:

- Board has full control over ICANN, subject to mission stated in Articles of Incorporation and Bylaws, and duty to act in ICANN's best interests
- Bylaws grant SOs/ACs the right to appoint directors, but not power to remove those appointed; corporate law may provide such a right, depending on interpretation of current Bylaws
- Those without legal personhood have no standing to sue in court
- Significant uncertainty exists regarding enforceability of SO/AC rights to appoint or remove directors

Quasi-Designators:

- Bylaws provide that GNSO, ccNSO, ASO, ALAC, and Nominating Committee each have rights to appoint directors ("quasi-designator rights")
- May have the right under California law to remove/replace appointed directors (if they are legally recognized as designators)
- No legal power to approve or veto Articles/Bylaws amendments
- Most are not legal persons

QUASI-DESIGNATORS

GNSO, ccNSO, ASO

ALAC

Nominating Committee

Implementing the Empowered SO/AC Models: *ENHANCED VOLUNTARY COMPLIANCE PHASE: BOTH MODELS*

Same basic structure as current governance,
with *enhanced rights for SOs/ACs*, *stronger IRP*, plus *community mechanism*



Bylaws Enhancements:

- SOs/ACs/NC continue to appoint directors as “designators” and are given the right to remove them
- SOs/ACs are given the power to veto amendments to Articles of Incorporation and Bylaws
- SOs/ACs/NC maintain current forms (legal person or not)
- SOs and ACs vote through community mechanism to exercise 7 powers (within limits respecting board fiduciary duties)
- Internally binding IRP process supports community 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
- IRP process would expressly not require legal personhood although judicial enforcement of an IRP decision would
- Community could also be given rights to inspect certain records
- As a condition to on-boarding, directors would be required to sign a “springing resignation letter” providing in advance for automatic resignation upon specified triggers
- Triggers include community mechanism no-confidence vote for failure to subordinate to 7 powers given to community in Bylaws
- Designators would be required by Bylaws (and perhaps by contract) to recall directors at community mechanism direction (supplements springing resignation letter)
- ? Adjustments to existing NC status and role may be considered

Empowered SO/AC Designator

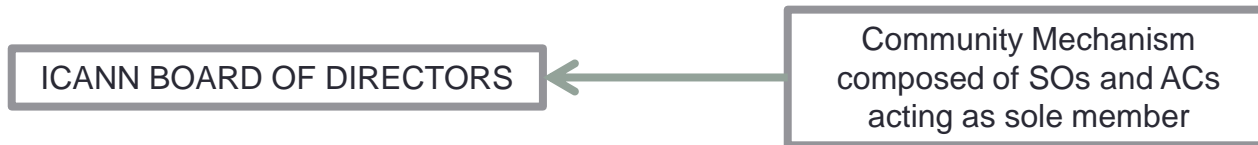
- Plus :
- SOs/ACs could opt at any time for legal personhood to enhance their ability to enforce

Empowered SO/AC Membership

- SOs/ACs could opt at any time for legal personhood to enhance their ability to enforce and under specified trigger conditions convert ICANN to membership structure

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/NC maintain current forms (legal person or not)
- Acting through the CMSM, SOs/ACs/NC 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

Empowered SO/AC Designator Model:

What happens:

- Each SO/AC may determine at any time to become a legal person and if so what type of legal entity to become
- Legal personhood gives these SOs/ACs ability to seek enforcement in court of binding IRP decisions related to claims arising post-personhood

Concerns:

- SOs and ACs that do not or cannot opt for legal personhood must rely on indirect enforcement of rights; directors they appoint could bring suit if denied recognition by the board
- SOs and ACs would not have reserved powers of members to directly cause reconsideration of board decisions on budget or strategy/operating plan, or implementing IRP recommendations, but must rely on indirect coercive power to trigger recall vote.

Empowered SO/AC Membership Model:

What happens:

- Each SO/AC determines for itself whether to become a legal person and if so when and what type of personhood to pursue (could include selection of an individual (human)?)
- If majority of SOs/ACs become legal persons and determine to become Members of ICANN, Membership conversion is triggered and ICANN becomes a membership organization
- Members may exercise statutory rights and also direct right to reverse board decision on budget or strategic plan and as legal person direct right to veto Bylaw amendments. Statutory rights include standing to bring suit to enforce Bylaws or IRP decision

Concerns:

- Bylaws must include extensive provisions for possibility of full membership, addressing admission to membership, meeting procedures, termination rights, etc.
- Members will suddenly have much greater power than non-member SOs/ACs—the full array of Member statutory rights – and concerns about capture become significant
- Members may be able to bring derivative suits beyond suits anticipated to enforce IRP, *legally untested how to limit*
- Risk that Members capture the organization (dissolve it, remove entire board, amend Bylaws, etc.)—this is a special danger if only one or two SO/ACs become Members which is why we propose majority trigger. Precluding the Members from acting unilaterally via contract is *legally untested*.

Community Mechanism as Sole Member Model:

What happens:

- Community Mechanism as Sole Member making decisions through community voting mechanism, exercises rights granted by statute or governing documents.

Concerns:

- SOs and ACs will be participants in CMSM and CMSM will have member rights in ICANN; SOs and ACs that have personhood may enforce rights given to them in Bylaws under bylaws-as-contract theory. Only CMSM has member rights.

Key Characteristics: Comparison by Model

Chart terms:

- “Indirect” means a separate mechanism is needed to effect the power where SO/AC designators or members cannot be empowered to exercise the desired power. This could take the form of contractual arrangements and/or springing resignations, for example.
- “Coordinated” means a separate mechanism is needed to either constrain the designators or members from acting individually, or to force the designators or members to act congruently.
- “Direct” refers to situations where a power can be exercised through designator or member action, where no coordination with other designators or members is needed, nor any additional mechanism.

	Empowered SO/AC Designator Model	Empowered SO/AC Membership Model	Community Mechanism as Sole Member Model
1. Mechanism for each power			
5.2 - Reconsider/reject budget or strategy/operating plan	Indirect	Coordinated (members)	Direct (CMSM)
5.3 - Reconsider/reject changes to ICANN “standard” bylaws	Coordinated (designators)	Coordinated (members)	Direct (CMSM)
5.4 - Approve changes to “fundamental” bylaws	Coordinated (designators)	Coordinated (members)	Direct (CMSM)
5.5 - Appoint & remove individual ICANN directors	Direct (individual designators)	Direct (individual member classes)	Direct (CMSM)
5.6 - Recall entire ICANN board	Coordinated (designators) or Indirect	Coordinated (members) or Indirect	Direct (CMSM)
5.7 - Reconsider/reject board decisions re: IANA reviews	Indirect	Coordinated (members)	Direct (CMSM)

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	Empowered SO/AC Designator Model	Empowered SO/AC Membership Model	Community Mechanism as Sole Member Model
2. Unintended powers	None. Designator rights limited to those stated in governing documents	Broad statutory rights for <i>each</i> member/class	Broad statutory rights for CMSM
3. Legal personhood	Only those SO/AC designators that want external legal enforceability of their rights	Each SO/AC that wants to become a member must be a legal person	CMSM must be a legal person, SO/AC participants in single member do not
4. Enforceability of community powers; susceptibility to lawsuits regarding internal affairs	Each designator can invoke IRP; each designator that is a legal person agrees to be bound by internal IRP process. No standing to bring derivative suits against fiduciaries	Each member can invoke IRP, agrees to be bound by internal IRP process, and waives right to bring derivative suits against fiduciaries	CMSM can invoke IRP, agrees to be bound by internal IRP process. Each SO/AC can invoke IRP. No single SO/AC has standing to bring derivative suits against fiduciaries
	Directors and officers can bring derivative suits; directors can sue to determine incumbency		
5. Enforcement uncertainties	Uncertain how effective indirect enforcement mechanism through board recall will be	<ul style="list-style-type: none"> - Enforceability of member agreement waiving rights to sue outside IRP is untested in nonprofit context, but supported by strong federal policy - Enforceability of member agreement that restrict statutory member rights is untested in the nonprofit context. - Scope of statutory prohibition on member voting agreements is unclear 	Enforceability of rights of participants in sole member unincorporated association is unclear, especially where some participants are not legal persons

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	Empowered SO/AC Designator Model	Empowered SO/AC Membership Model	Community Mechanism as Sole Member Model
6. ICANN capture by single stakeholder group	Likelihood: Very low	Likelihood: Depends on continual presence of multiple, robust, active SO/AC members (e.g., if only one member, could capture ICANN)	Likelihood: Very low (same as designator)
	Consequences: Very low	Consequences: Full power of members held by single stakeholder group	Consequences: Full power of member held by single stakeholder group (same as membership)
7. Changes to ICANN governing documents	Least extensive Need provisions to: <ul style="list-style-type: none"> - enhance designator rights - set up community mechanism - address indirect/coordinated enforcement mechanisms 	Most extensive Need provisions to: <ul style="list-style-type: none"> - enhance designator rights - set up community mechanism - set up springing member mechanism - address membership structure with multiple members - address indirect/coordinated enforcement mechanisms, in both phases 	Moderate Need provisions to: <ul style="list-style-type: none"> - set up community mechanism as sole member - alter director selection process so CMSM elects directors - address membership structure with one member

Exercise of Community Powers in Different Models

Model ----- Power	Enhanced “Voluntary” Phase: Pre-Enforcement	Enforcement Phase: Empowered Members	Enforcement Phase: Empowered Legal Person Designators	CMSM Model
5.2 Reconsider/reject ICANN Budget or Strategy/Operating Plans	<ul style="list-style-type: none"> Bylaws may require Board to reconsider budget/strategy/operating plan if community mechanism rejects it, within limits respecting board fiduciary duties Board failure to revise may trigger community vote on Board recall (#5.6) 	<ul style="list-style-type: none"> Members given reserved power under Bylaws to override Board decision directly, regardless of board fiduciary duties 	<ul style="list-style-type: none"> Same mechanism as voluntary phase Designators cannot be given the right to reject the budget/strategic plan themselves, but can recall Board (#5.6) if it fails to make appropriate revisions in response to community vote 	<ul style="list-style-type: none"> CMSM given reserved power under Bylaws to override Board decision directly, regardless of board fiduciary duties CMSM has standing to enforce this right
5.3 Reconsider/reject Changes to ICANN “Standard” Bylaws	<ul style="list-style-type: none"> Named SOs/ACs may be given right to veto amendments approved by Board Only to be exercised when directed by community mechanism Possible to trigger springing resignations or community vote on Board recall (#5.6) if Board ignores community rejection of Board-approved amendment 	<ul style="list-style-type: none"> Bylaws provide that designator role ceases; requirement for member approval of amendments takes effect Members contractually agree to veto amendments only if directed by community mechanism (but contract validity subject to member voting agreement prohibition) Members have standing to enforce this right 	<ul style="list-style-type: none"> Same mechanism as voluntary phase Designators contractually agree to veto Articles/Bylaws amendments only if directed by community mechanism As new legal persons, designators can enforce this right 	<ul style="list-style-type: none"> CMSM can veto proposed Bylaws amendments after required community mechanism process. CMSM has standing to enforce this right.
5.4 Approve Changes to ICANN “Fundamental” Bylaws	<ul style="list-style-type: none"> Proposed fundamental Bylaws changes must be presented to community mechanism for approval or veto Board failure to get approval may trigger community vote on Board recall (#5.6) 	<ul style="list-style-type: none"> Members can be given right to approve any Bylaws amendment; fundamental Bylaws amendments require extraordinary approval threshold Members have standing to enforce this right 	<ul style="list-style-type: none"> Same mechanism as voluntary phase Designators contractually agree to veto or approve Articles/Bylaws amendments as directed by community mechanism As new legal persons, designators can enforce this right 	<ul style="list-style-type: none"> CMSM can be given right to approve any Bylaws amendment; fundamental Bylaws amendments require extraordinary approval threshold in community mechanism as basis for CMSM approval CMSM has standing to enforce this right.

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Power	Enhanced “Voluntary” Phase: Pre-Enforcement	Enforcement Phase: Empowered Members	Enforcement Phase: Empowered Legal Person Designators	CMSM Model
5.5 Appoint and Remove Individual ICANN Directors	<ul style="list-style-type: none"> Designator (legal persons or not) removes director on its own If sitting director refuses to vacate, new director has standing to enforce 	<ul style="list-style-type: none"> Members step in; Bylaws provide that designator role ceases Each member class has statutory power to remove its directors Members have standing to enforce this right 	<ul style="list-style-type: none"> Same mechanism as voluntary phase As new legal persons, designators could enforce this right (bylaws-as-contract theory) If sitting directors refuse to vacate, new directors also have standing to enforce 	<ul style="list-style-type: none"> CMSM appoints and removes individual directors based on direction from applicable SO/AC/NC CMSM has standing to enforce this right
5.6 Recall Entire ICANN Board of Directors	<ul style="list-style-type: none"> Community mechanism vote to approve recall triggers springing resignations; and/or Designators (legal persons or not) remove directors at request of community mechanism If sitting directors refuse to vacate, new directors have standing to enforce 	<ul style="list-style-type: none"> Members step in; Bylaws provide that designator role ceases Members contractually agree to remove their respective directors in event of community mechanism vote to recall (but contract validity subject to member voting agreement prohibition) Members have standing to enforce this right 	<ul style="list-style-type: none"> Same mechanism as voluntary phase Designators contractually agree to remove their respective directors in event of community mechanism vote to recall As legal persons, designators could enforce this right (bylaws-as-contract theory) If sitting directors refuse to vacate, new directors also have standing to enforce 	<ul style="list-style-type: none"> CMSM can recall Board after required community mechanism process. CMSM has standing to enforce this right.
5.7 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"> Bylaws may require Board to implement recommendations, within limits respecting board fiduciary duties Board failure to implement may trigger community vote on Board recall (#5.6) 	<ul style="list-style-type: none"> Members given reserved power under Bylaws to override Board decision, regardless of board fiduciary duties 	<ul style="list-style-type: none"> Same mechanism as voluntary phase Designators cannot be given the right to implement recommendations themselves, but can recall Board (#5.6) if it fails to implement recommendations 	<ul style="list-style-type: none"> CMSM given reserved power under Bylaws to override Board decision, regardless of board fiduciary duties. CMSM has standing to enforce this right

Additional Considerations

According to Paragraph 175 of the Initial Proposal:

The CCWG-Accountability is largely agreed on the following:

- 1. To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.*
- 2. To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC/SG structures (without making it impossible to change these in the future).*

Community Powers

	Empowered SO/AC MEMBERSHIP Model	Empowered SO/AC DESIGNATOR Model	Community Mechanism as SOLE MEMBER Model
5.2 Reconsider/reject budget & strategy/operating plans	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.3 Reconsider/reject changes to “standard” bylaws	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.4 Approve changes to “fundamental” bylaws	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.5 Appoint and remove individual ICANN directors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.6 Recall the entire ICANN Board	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.7 Reconsider/reject Board decisions relating to reviews of the IANA functions (including trigger of PTI separation)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Concerns

Enforceability	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Statutory Rights - Dissolution & Derivative Action	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legal Complexities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Potential for Capture	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Factors From Buenos Aires CCWG Working Session 1

	Empowered SO/AC MEMBERSHIP Model	Empowered SO/AC DESIGNATOR Model	Community Mechanism as Sole Member Model
Complexity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Watch the Watchers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Messaging	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Implementation Challenges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Unintended Consequences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Flexibility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Openness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Diversity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Participation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
CWG Contingencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No Single Point of Failure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Authority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
NTIA Criteria	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>