

Memo on Proposed Approach for Community Enforceability

The purpose of the proposed new Multistakeholder Enforcement Mechanism (MEM) is to provide a straightforward extension to the current ICANN multistakeholder governance structure that provides the community with a way to enforce ICANN's compliance with its Fundamental Bylaws.

Through the MEM, the Supporting Organizations (SO) and Advisory Committees (AC) may:

- (i) through arbitration, challenge a decision or action of the Board that, in the consensus view of the SOs and ACs, violates the Fundamental Bylaws; and
- (ii) if successful in the arbitration, obtain a binding arbitration decision that may be enforced in California courts.

Establishment of the MEM is not intended to replace existing IRP procedures. The MEM provides a legally enforceable arbitration decision on violations of ICANN's Fundamental Bylaws.

Key characteristics of the MEM are:

Binding Enforcement: In California, final decisions may be turned into enforceable court judgments. So an arbitration decision issued following an MEM proceeding can be enforced in a court in California.

Process to Initiate MEM Arbitration:

1. Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM Arbitration.
2. The SO or AC would provide a notice of the petition to all other SOs and ACs and begin a discussion phase with all other SOs and ACs (15 days).
3. The SOs and ACs will then have 21 days to consider whether to support the petition.
4. To initiate formal MEM proceedings, the agreed number of SOs and ACs must support the petition. If there is sufficient support amongst the SOs and ACs then representatives of those supporting SOs and ACs would become the MEM Issue Group.
5. The MEM Issue Group would then submit a Request for Arbitration to the Standing Panel alleging a violation of at least one Fundamental Bylaw and including the grounds upon which that alleged violation occurred. Time frames within which Requests for Arbitration may be filed will need to be discussed and agreed.

Here is an example of the process:

1. The GNSO has reached a consensus view that a decision or action by the ICANN Board violated a Fundamental Bylaw.
2. The GNSO drafts a petition setting out the basis for the alleged violation of a Fundamental Bylaw.

3. The GNSO provides notice of the petition to all other SOs and ACs and initiates a discussion phase over the petition.
4. Following the 15-day discussion phase, each SOs and ACs will have 21 days to consider the petition and determine whether it has consensus to support pursuing MEM arbitration.
5. If enough SOs and ACs support the petition, a MEM Issue Group would be formed. This could be comprised of – as one example – the individual people serving as chairs of the participating SOs/ACs. These individuals would have legal standing to initiate arbitration and have legal standing to enforce the outcome of the arbitration in court. The MEM Issue Group, as directed by the participating SOs and ACs, would then submit a Request for Arbitration to a Standing Panel, which will be created.

A Standing Panel: A standing panel (Standing Panel) will be tasked with reviewing and deciding complaints brought through the MEM process. A three-member panel (MEM Panel) drawn from the Standing Panel would decide the dispute. Under limited circumstances it may be possible to require a dispute to be decided by the full Standing Panel.

Members of the Standing Panel should possess significant, advanced legal expertise, particularly in the fields of international law, corporate governance, and judicial systems/dispute resolution/arbitration. The Standing Panel will have diversity requirements and must be independent from ICANN, the SOs and ACs, and without conflict of interest.

Possible Outcomes of MEM Arbitration: A MEM arbitration will result in a decision declaring that the challenged Board decision or action did or did not comply with ICANN’s Fundamental Bylaws. The decision will be binding on the Board and subject to any appeal to the full Standing Panel. 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 MEM Issue Group may enforce the arbitration decision in the California courts.

Standard of Review by the MEM Panel: The standard of review will be an objective examination as to whether the complained-of Board decision violates ICANN’s Fundamental Bylaws. The decision will be based on each panelist’s assessment of the merits of the case. MEM panelists should be able to consider and rely on prior decisions of other MEM Panels addressing similar issues.

Accessibility and Cost: ICANN will bear the administrative costs of maintaining the MEM (including panelist salaries) as well as reasonable attorneys fees (with caps) to support the MEM Issue Group. MEM arbitration panels should complete their work expeditiously, generally issuing decisions within a standard time frame (6 months).

Implementation: The MEM provisions would be adopted as Fundamental Bylaws.

Review: The MEM process would be subject to periodic community review.

Escalation Path Within Current Structure: Multistakeholder Enforcement Mechanism (MEM)

The purpose of the Multistakeholder Enforcement Mechanism (MEM) is to ensure ICANN's compliance with ICANN's Fundamental Bylaws and enforceability through a binding arbitration decision resulting from the process may be enforcement in California courts under ICANN's existing governance structure.

