

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Comparison of Current Independent Review Process (IRP), IRP in CCWG 2nd Draft Proposal under the Community Mechanism as Sole Member (CMSM) Model and ICANN Board Proposal re IRP and Multistakeholder Enforcement Mechanism (MEM)

DATE: **October 7, 2015**

Attached is our comparison of the key characteristics of ICANN's existing Independent Review Process ("Current IRP") with the review processes set forth in the following proposals:

- CCWG 2nd Draft Proposal (under the CMSM model)
- ICANN Board Proposal (IRP and MEM)

This comparison has been developed based on the descriptions of independent review processes in the following documents:

- ICANN's Bylaws
- [CCWG 2nd Draft Proposal](#) (August 7, 2015)
- ICANN Board Supplementary and Final Comments: [Board Input to CCWG-Accountability 2nd Draft Proposal Comments Matrix and Notes on Proposed Elements](#) (September 11, 2015) ; [Frequently Asked Questions Regarding Approach for Community Enforceability](#); [Memo on Proposed Approach for Community Enforceability](#)
- Jones Day Memorandum [Enforceability of Arbitration Awards Made Pursuant to Proposed Multistakeholder Enforcement Mechanism](#) (September 6, 2015)

We have provided Jones Day an opportunity to review the attached comparison and they have not provided any specific corrections. We have also conferred with Jones Day and ICANN Legal on two occasions regarding the Board Proposal, and we have relied upon those discussions in developing this matrix.

The review processes proposed by CCWG and the ICANN Board reflect significant similarities, as the attached chart indicates, and the focus on the differences should not distract from what we understand is the general agreement that accountability mechanisms must be enforceable to be meaningful.

Enforceability must be assessed in the context of the specific legal structure and the community powers to be granted. As we have discussed in prior memos, the CMSM model provides for greater powers to be reserved to the community and allows for more certainty regarding enforceability than does the Board Proposal, as we understand that proposal.

One significant difference in the review processes provided by the CMSM model versus the Board Proposal relates to the core area of community powers regarding budget, strategic and operating plans, and IANA functions / PTI separation. The MEM, by design, is limited in its ability to provide enforcement in these areas because under a non-membership structure, these powers are committed to the business judgment of the Board and therefore significant uncertainty arises regarding the degree to which such matters could be subjected to binding arbitration.

Comparison of Review Processes: Current IRP, CCWG 2nd Draft Proposal (under the CMSM Model) and ICANN Board Proposal, October 7, 2015

Current IRP	CCWG 2 nd Draft IRP Proposal	ICANN Board Proposal	
		Revised IRP Proposal	MEM Proposal
1. Functional Overview			
<p>Article IV, Section 3 of the Bylaws provides an independent review process (IRP) of</p> <p>Board actions</p> <p>alleged to be procedurally inconsistent with the Articles of Incorporation or Bylaws</p> <p>resulting in a non-binding decision, that is not enforceable in court.</p>	<p>CCWG proposes an independent review process (IRP) of</p> <p>Board and staff (actions or failure to act)</p> <p>alleged to be procedurally or substantively inconsistent with the Articles of Incorporation or Bylaws</p> <p>resulting in a binding decision,</p> <p>enforceable in US courts and in the courts of other countries that adhere to international arbitration norms.</p>	<p>Board supports CCWG proposal for an independent review process (IRP) of</p> <p>Board and staff (actions or failure to act)</p> <p>alleged to be in violation of Articles of Incorporation or Bylaws, including any violation of the bylaws resulting from action taken in response to advice/ input from any SO/AC</p> <p>resulting in a binding decision (somewhat unclear)¹</p> <p>enforceable in U.S. courts and perhaps in the courts of other countries that adhere to international arbitration norms.</p>	<p>Board recommends a separate Multistakeholder Enforcement Mechanism (MEM) for independent review of</p> <p>Board actions</p> <p>alleged to be inconsistent with or violation with Fundamental Bylaws.</p> <p>resulting in a binding decision,</p> <p>enforceable in California state and (in some circumstances) federal courts.</p>
2. Fiduciary Limitation			
<p>Non-binding; no fiduciary limitation because Board adopts only those declarations it approves.</p>	<p>CMSM can enforce specific member powers reserved to it in the Bylaws, including powers related to budget, strategy, operations and IANA functions review / PTI separation. Binding IRP matters otherwise exclude those in conflict with the</p>	<p>Binding IRP matters exclude those in conflict with the board's fiduciary responsibilities, such as some of those related to budget, strategy, operations and IANA functions review / PTI separation.</p>	<p>MEM matters exclude those in conflict with committed to Board's fiduciary discretion, such as those related to budget, strategy, operations and IANA functions review / PTI separation.</p>

¹ ICANN Board comments indicated agreement to revising IRP processes to make them binding, ““Agreed. Decisions should be binding unless there is a conflict with the Board’s fiduciary responsibilities.” Board Input to CCWG-Accountability 2nd Draft Proposal Comments Matrix and Notes on Proposed Elements at 41. Nevertheless, counsel for Board has also indicated via email that “ICANN’s board has not taken a formal position on the binding nature of the enhanced IRP. It has discussed taking on a binding IRP if the IRP process is enhanced and designed for that purpose.” Email from K. Wallace, “Re: Counsel Dialogue on CCWG Proposal,” September 22, 2015.

		ICANN Board Proposal	
Current IRP	CCWG 2 nd Draft IRP Proposal	Revised IRP Proposal	MEM Proposal
	board's fiduciary responsibilities.		
3. Who May Initiate; Harm Threshold			
Any person who has been materially affected by the Board's action or decision in violation of the Articles or Bylaws (directly and causally connected injury or harm).	Anyone who has been materially affected by ICANN's action or inaction in violation of the Articles or Bylaws.	Anyone who has been materially affected by a violation of ICANN's Articles of Incorporation or Bylaws (unclear if this is intended to be generally similar to CCWG Proposal).	MEM limited to Board action in violation of Fundamental Bylaws, and MEM petition must be initiated by an SO or AC.
4. Sources of Law; Subject Matter Jurisdiction			
Articles and Bylaws (in the context of applicable governing law)	Articles and Bylaws in the context of applicable governing law Prior IRP decisions Can reconcile conflicting decisions of process-specific "expert panels" Subject matter includes all claims involving rights of the Sole Member, which could be initiated by the Sole Member or by anyone else, including the Board itself. Exclusions for ccTLD delegation/ redelegation, numbering resources.	Articles and Bylaws (the context of applicable governing law) Prior IRP decisions ccTLD Delegation / Redelegation and disputes related to Internet numbering resources excluded. Board agrees with IAB request for exclusion for disputes relating to protocol parameters.	Fundamental Bylaws only (in the context of applicable governing law) Everything else excluded, including IAB disputes
5. Enforceability of Arbitral Award			
Not binding or enforceable.	Binding to the extent permitted by law. CSM could enforce in any court of competent jurisdiction.	Unclear whether enforceable only in the courts of California or in other courts that accept international arbitration results, and unclear who has power to enforce.	Enforceable in California courts by MEM Issues Group, or individuals associated with SO/ACs comprising the MEM Issues Group, in each case if the party has standing.

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6. Outcomes			
<p>Declaration that a Board action is procedurally inconsistent with the Articles or Bylaws.</p> <p>Board to consider the declaration.</p> <p>Board decision regarding how to respond to IRP panel declaration is final.</p>	<p>Declaration that an action/failure to act complied or did not comply with ICANN's Articles of Incorporation and/or Bylaws.</p> <p>Interim (prospective, interlocutory, injunctive, status quo preservation) relief available where a complainant can demonstrate:</p> <p>a) Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken</p> <p>b) Either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits; and</p> <p>c) A balance of hardships tipping decidedly toward the party seeking the relief.</p>	<p>Generally similar to CCWG Proposal² except:</p> <ul style="list-style-type: none"> Interim relief limited to status quo preservation. Board notes "several areas may need refinements based on CCWG discussions on IRP developments. 	<p>Generally similar to CCWG Proposal (although limited to Fundamental Bylaws) except:</p> <ul style="list-style-type: none"> Interim relief may include injunctive relief or status quo preservation. Declaration that an action/failure to act complied or did not comply with ICANN's Fundamental Bylaws.
7. Capacity to Sue for Judicial Enforcement			
<p>No binding or enforcement result.</p>	<p>The CMSM would be a legal person with capacity to sue. Any AC or SO that is a legal person could also enforce the judgment.</p>	<p>Generally similar to its MEM Proposal we assume</p>	<p>Three avenues are suggested:</p> <ul style="list-style-type: none"> an individual SO/AC or some collection of SOs/ACs could form a UA; the members of multiple SO/ACs

² "Generally similar to CCWG Proposal" indicates elements of the CCWG 2nd Draft Proposal that the ICANN Board appears to generally agree with based on our review and understanding of the "Board Input to CCWG-Accountability 2nd Draft Proposal Comments Matrix and Notes on Proposed Elements," dated 11 September 2015 and other documents submitted by the ICANN Board as part of the ICANN Board Comments on CCWG-Accountability 2nd Draft Proposal.

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Current IRP	CCWG 2 nd Draft IRP Proposal	Revised IRP Proposal	MEM Proposal
			<p>could form one UA; or</p> <ul style="list-style-type: none"> the chairs of multiple SO/ACs could form a UA.
8. Community Standing			
None specifically provided, although “any person” could include an SO or AC that presented itself as a legal person.	Community, AC and SOs would have standing with the IRP. ICANN will bear the costs, subject to recommendations to reduce abuse.	<p>Board supports ability for the Community to seek an independent review of Board actions for claims that ICANN exceeded the scope of its limited technical Mission or otherwise failed to comply with its Articles of Incorporation and Bylaws.</p> <p>Board notes that “any person / group / entity” materially affected should have standing. ACs and SOs that are not legal persons may still fall within any “person / group / entity.” Board recommends separate MEM process to meet needs for the Community (through ACs and SOs) to review and enforce claims that Board is not abiding by community powers.</p>	MEM Issue Group could be a subset of or include entire Community should the Community (presumably ACs and SOs) reach consensus to form an MEM Issue Group).
9. Appeal			
None	Decisions of a three-member decisional panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard.	Generally similar to CCWG Proposal in theory. Agreed with CCWG proposal; however, details remain unclear, noting “several areas may need refinement based on CCWG-Accountability discussions on IRP developments.” Standard of appellate review unclear.	Generally similar to CCWG Proposal; standard of review to be used by full MEM Panel reviewing an award from a three-member decisional panel unclear. Specifies that appeals available for certain decisions including those where it is necessary to ensure that the arbitral decision does not infringe on the Board’s statutory

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			obligations or fiduciary duties.
10. Enforceability of Right to Arbitrate			
Not enforceable	CMSM could file suit in court to compel arbitration as could any legal person with standing. CMSM is a legal person and will have standing to seek enforcement of Community powers.	Not addressed.	Not addressed.
11. Size of Panels			
6-9 member standing panel with staggered terms. 1 or 3 member decisional panels.	Standing panel of at least 7. 3-member decisional panels.	Generally similar to CCWG Proposal; however, Board recommends no Standing Panel be empanelled until scope of IRP clarified.	Standing Panel, although no Standing Panel would be empanelled until scope of MEM arbitration clarified. Unclear whether some panelists could be on both IRP and MEM panels. 3-member decisional panels.
12. Standard of Review			
Procedural examination of whether the Board complied with its Articles and Bylaws, focused on whether the Board acted without conflict of interest, exercised due diligence and reasonable care, and exercised independent judgment it believed to be in the best interests of ICANN.	Substantive examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles or Bylaws. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.	Board agrees that the standard of review requires modification. As an initial step, the Board recommends rolling back the standard of review to the standard that was in place pre-April 2013, stating: "Requests for such independent review shall be referred to an Independent Review Panel (IRP) which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of	An "objective examination" comparing contested actions of the Board to the Fundamental Bylaws and declaring whether the Board has acted consistently with the provisions of those Fundamental Bylaws.

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		<p>Incorporation and Bylaws.”</p> <p>The Board proposes continuing consideration of the standard of review in the IRP enhancement work that will be ongoing.</p>	
13. Panelists			
Bylaws require that panelists have variety of expertise.	<p>Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration. Panelists should also possess expertise, developed over time, about the DNS and ICANN's policies, practices, and procedures. At a minimum, panelists should receive training on the workings and management of the domain name system. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.</p>	<p>Generally similar to CCWG Proposal; however, Board recommends no Standing Panel be empanelled until scope of IRP clarified.</p>	<p>Generally similar to CCWG Proposal; however, Board recommends no Standing Panel be empanelled until scope of MEM arbitration clarified.</p>

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14. Panelist Diversity			
Diversity of skills required.	English as primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal tradition diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).	Generally similar to CCWG Proposal.	Generally similar to CCWG Proposal.
15. Decisional Panel Selection			
Determined by IRP Provider.	In each case, a 3-member panel will be drawn from the Standing Panel. Each party will select one panelist, and the will select the third.	Generally similar to CCWG Proposal.	Unclear; no known differences.
16. Recall \ Tenure			
Set terms	Appointments made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the IRP Sub Group.	Generally similar to CCWG Proposal; the ICANN Board supports 5-year terms and agrees that a recall process should be developed to ensure accountability.	Generally similar to CCWG Proposal.
17. Panel Independence, Conflicts, and Composition			
Adherence to conflicts-of-interest policy. Panelists cannot hold an official position or office within the ICANN structure.	IRP Panel members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified	Generally similar to CCWG Proposal.	Generally similar to CCWG Proposal.

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	<p>cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP.</p>		
18. Standing Panel Selection and Appointment			
Determined by IRP Provider.	<p>The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for IRP, beginning by consulting the community on a draft tender document. ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; conduct an initial review and vetting of applications; and work with ICANN and the community to develop operational rules for IRP. The community would nominate a slate of proposed panel members. Final selection is subject to ICANN Board</p>	Generally similar to CCWG Proposal.	Generally similar to CCWG Proposal.

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	confirmation.		
19. Settlement Efforts			
Period of cooperative engagement with ICANN encouraged but not required.	Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case. Mediators may be used. Either party can terminate informal dispute resolution efforts if, after specified period, that party concludes in good faith that further efforts are unlikely to produce agreement.	Generally similar to CCWG Proposal. Board notes further detail is needed on how mediation would fit into timeline and other process points, but that “details can be worked through.”	Generally similar to CCWG Proposal.
20. Procedural Rule			
Right to submit 25 pages of argument along with evidence and expert support.	To be developed.	Not addressed (to be developed).	To be developed.
21. Decision Timing			
Strive to issue decisions within 6 months.	The Panel should complete work expeditiously; issuing an early scheduling order and decisions within 6 months, although updated completion schedule is possible as required.	Generally similar to CCWG Proposal.	Generally similar to CCWG Proposal.
22. Accessibility and Cost			
Losing party pays fees of panel. Other costs may be shifted. Fees shifted to challenger if cooperative engagement and	ICANN would bear all the administrative costs of maintaining the system (including Panelist salaries), while each party should	Generally similar to IRP cost-shifting process.	ICANN will fund the costs of MEM binding arbitration, including legal fees when a final award is issued.

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conciliation process not followed.	bear the costs of their own legal advice. The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. IRP Sub Group may recommend filing fees to prevent abuse of the process. Access to pro bono representation for complainants that would otherwise be excluded from the process.		
23. Bylaw Implementation			
Already existing in Bylaws, Article IV, § 3.	Revised IRP provisions to be adopted as Fundamental Bylaws.	Revised IRP provisions to be adopted as Fundamental Bylaws, but Community should consider whether to delay incorporating until additional process improvements are developed.	MEM provisions to be adopted as Fundamental Bylaws.
24. Timing to Initiate			
Within 30 days after posting of relevant Board minutes.	To be developed.	Would continue 30 day period until new period agreed.	Period in which to file a petition not addressed. Once petition is initiated by any SO/AC, 15 day discussion period followed by 21 day consideration period before MEM Issue Group may be formed.
25. Process to Initiate			
Party submits complaint.	Aggrieved party would file complaint that a specific action or inaction violated the Articles or Bylaws. CMSM could be a party to the proceeding along with the other relevant aggrieved party. Other	Unspecified, support for “refining existing IRP process.”	Any SO/AC would submit a petition after developing an unspecified level of consensus; an unspecified number of SOs/ACs supporting the petition may form a MEM Issue Group, who submits

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	parties may join proceeding based on not-yet-developed rules for intervention. For CMSM to participate, SOs/ACs could develop an unspecified level of consensus and direct the CMSM to act, or the CMSM could be a party in all actions.		a request for arbitration.
26. Secretariat Administration			
International dispute resolution provider.	Unspecified.	Unspecified; agreed with CCWG.	Unspecified.
27. Periodic Review			
Could be conducted.	IRP process subject to periodic review.	Generally similar to CCWG Proposal.	Generally similar to CCWG Proposal.
28. Exhaustion of Remedies			
No requirement to use IRP before filing lawsuit in civil court to seek redress.	Specifics of any requirement to use IRP, rather than immediately filing a lawsuit, to be determined. Cal. Corp. Code § 5710 requires certain exhaustion steps before filing a derivative action.	Unspecified.	The MEM process would be the only mechanism for the community to address a violation of Fundamental Bylaws by the Board, after which the MEM Issues Group could obtain court enforcement if necessary.