

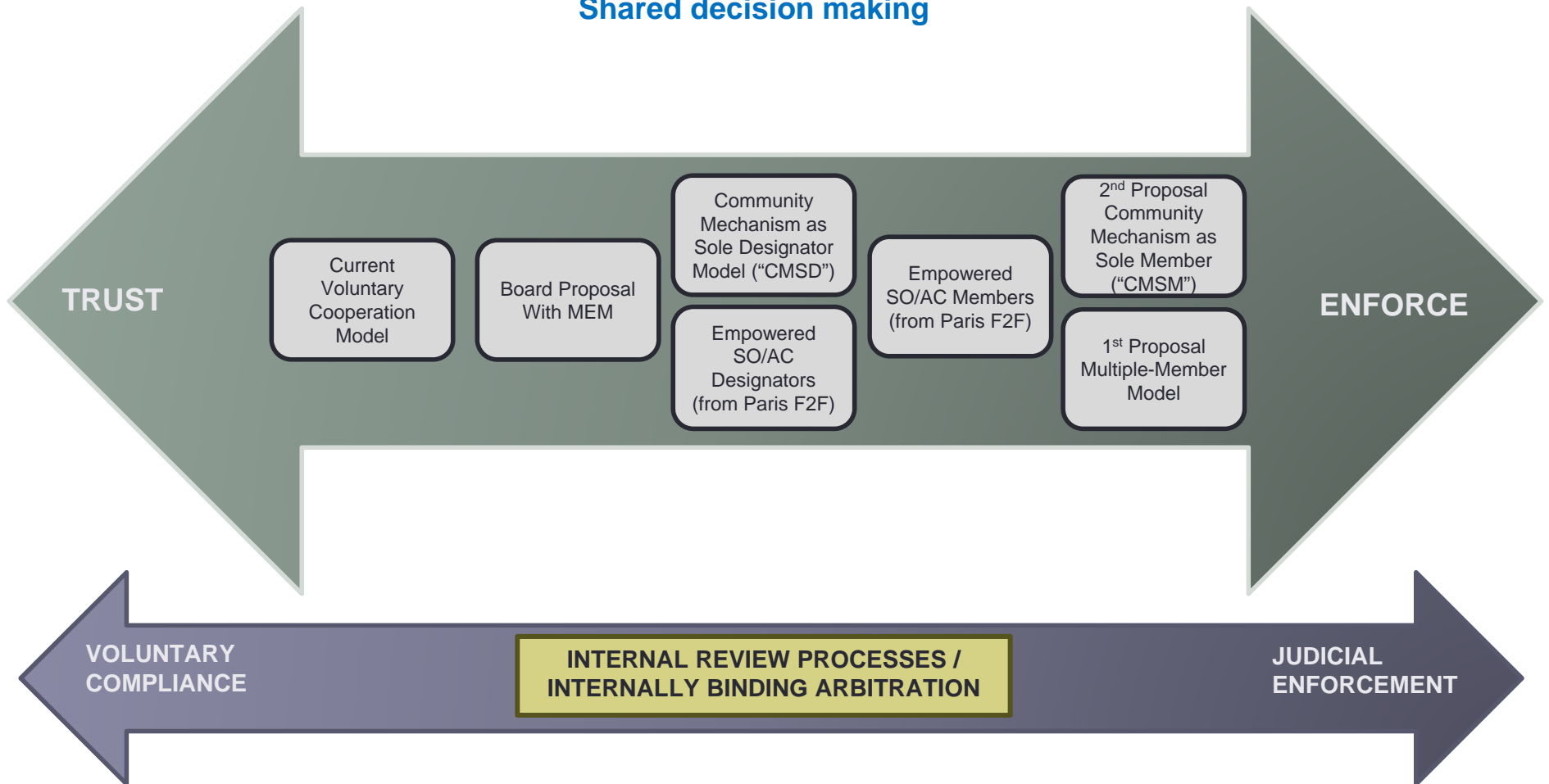


Community Powers with Opportunity for Future Governance Review

October 15, 2015

The Trust - Enforceability Continuum

Empowerment
Shared decision making



Overview

- Proposal: Empower community through governance review and recall powers to address Board failure to respect community powers
- Proposal history: Building an opportunity for future governance review suggested in a series of emails from Steve DelBianco, Kavouss Arasteh, and Jonathan Zuck
- Two-part proposal:
 - At time of transition implement one of the models under discussion
 - If a model is adopted that does not give member rights to community, the community is given post-transition powers to implement further governance changes on a single future occasion; these post-transition powers are referred to as the “Governance Review and Recall Powers”
- Intended to provide for improvements in ICANN’s accountability and governance sufficient to move the transition forward now while at the same time reserving to ICANN’s multi-stakeholder community (as represented by the current SOs and ACs) the opportunity to revisit and further reform ICANN’s accountability and governance in the future in the unlikely event the Board fails to respect community powers.

If Sole Designator model is adopted at time of transition, the Governance Review and Recall Powers discussed in next slides could be adapted to take advantage of the Sole Designator structure.

Key Elements of Governance Review and Recall Powers

Fundamental Bylaws would be adopted to:

- Provide the community with the community powers that are generally agreed upon as indicated in the comments received on the CCWG's 2nd Draft Proposal;
- Reserve to the community the ability to determine by consensus to revisit, through a "Governance Review" at a later time, the issue of a membership structure or other structural governance and accountability reforms;
- Establish process for approving any proposals resulting from the Governance Review, including Board 2/3 vote required to reject initial proposal, community consultation and reconsideration after initial rejection, and Board 3/4 vote required to reject second proposal; and
- As recourse for fundamental breach of community powers, include a mechanism for Board recall should the Board fail to support the convening of a duly-triggered Governance Review or the recommendation of a duly-convened Governance Review that had been exposed to two sets of final comments followed by a final report that was accepted as a consensus of the community.

Governance Review and Recall Powers: Bylaws Provisions

- Amend Bylaws to add Fundamental Bylaws (that require community approval to be changed) relating to the agreed upon community powers:
 - Reconsider/reject ICANN budget or strategy/operating plan
 - Reconsider/reject changes to ICANN “Standard” Bylaws
 - Approve changes to ICANN “Fundamental” Bylaws
 - Appoint and remove individual ICANN Directors (clarifying current designator rights)
 - Recall Entire ICANN Board of Directors
 - Reconsider/reject Board decisions relating to reviews of the IANA functions, including ability to trigger a separation of PTI
- Amend Bylaws to provide for binding review of disputes regarding community powers.
- Amend Bylaws to add Fundamental Bylaws provisions regarding Governance Review and Recall Powers discussed in later slides.
- Create a new legal entity at the outset, the “Multistakeholder Enforcement Group” or “MEG”, as the vehicle to help implement and to enforce the Governance Review and Recall Powers (see further discussion in next slide).
- Depending on model chosen for transition, if necessary to protect status quo, amend Bylaws to protect the current director selection rights of SOs and ACs and NomCom to ensure those rights cannot be altered without approval.

Bylaws Provisions on Governance Review

- Describe Governance Review process: how and when it would occur, who participates, requirement for ICANN support and funding.
- Describe community action required to trigger Governance Review (CCWG to further develop), including threshold requirements. The Governance Review would be triggered by community consensus that either:
 - The agreed community powers had proven insufficient, for example, if the Board did not abide by the terms of the powers granted to the community; or
 - For any other reason, a Governance Review was appropriate (this could require a higher consensus level).
- The Bylaws would provide that upon a petition by one or more ACs and SOs followed by a community discussion and opportunity for consensus building, if the requisite level of consensus was achieved, a Governance Review would be convened. It would be organized and funded along the same lines as the current CCWG-Accountability project, with similar terms of engagement including public comment periods.

Bylaws Provisions on Goal of Governance Review

The goal of a Governance Review would be for the community to consider, develop and -- if, after broad community consultation, an appropriate level of community consensus is met -- implement an amended governance and accountability model (which could include transition to a membership model) (the “New Model”). (Any proposal emerging from the Governance Review would include assurances that ACs and SOs are representative of global internet users and protected from capture.)

Bylaws Provisions Regarding Adopting New Model Coming Out of Governance Review

- Current ICANN Bylaws Requirement to Amend the Bylaws:
Only upon 2/3 vote of all members of the Board
- Minimum Requirement for Bylaw Amendment, California Nonprofit Corporate Law:
(i) Approval by a majority (51%) of the directors present (ii) at a Board meeting at which a quorum (currently set at a majority of directors then in office) is present
- Recommendation from CCWG legal counsel: For any Bylaws amendments required for adoption of New Model, lower to minimum required by law.

Bylaws Provisions Regarding Governance Proposal Review Cycles

- Round One: First New Model proposal from Governance Review submitted to Board
 - If rejected by 2/3 or greater Board vote:
 - Goes to community consultation for second proposal
 - If Board rejection vote is less than 2/3:
 - First proposal must be adopted by majority vote of Board
 - If Board fails to do so, recourse is removal of directors
- Round Two: Second New Model proposal from Governance review submitted to Board
 - If rejected by 3/4 or greater Board vote:
 - Recourse is removal of directors
 - If Board rejection vote is less than 3/4:
 - Second proposal must be adopted by majority vote of Board
 - If Board fails to do so, recourse is removal of directors
- Benefit to Board: MEG must go through this process BEFORE recourse to removing directors.

Bylaw Provisions on Recourse: Recall of the Board

- Recourse: The Bylaws would provide a mechanism for Board recall should the Board fail to support:
 - The convening (including financial support) of a duly-triggered Governance Review;
or
 - The implementation of a duly-convened Governance Review.

Recall: Springing Resignations

- Each person selected to serve on the Board (except for the President) must sign in advance, in order to be formally selected and seated, an irrevocable resignation letter that provides that if they are notified by the MEG that a consensus exists in the community to recall the Board in accordance with Governance Review and Recall Powers, they have thereby resigned. All current directors will need to sign such letters as well, as a condition to this plan moving forward.
- As a back up mechanism, SOs/ACs/NomCom could use their existing designator rights to remove the directors they selected.
- Letters must be carefully crafted to specify the conditions under which the MEG may trigger resignations, in accordance with Bylaws.

Bylaws Provisions on Multistakeholder Enforcement Group (MEG)

As a vehicle to consider whether Governance Review, internal dispute resolution or Board recall should be triggered at points where such a decision is required or permitted under the Governance Review and Recall Powers, amend Bylaws to create MEG as an unincorporated association, participants and decision-making process to be determined by CCWG, with limited powers to be exercised, if warranted, on a single future occasion:

- Will have right to consent to any amendment to Governance Review Bylaws provisions
- Enters into a contract with ICANN (see next slide)
- Where the Governance Review and Recall Powers permit or require such a decision, decides whether to trigger Board recall, and notifies directors that resignation has been triggered
- Has power to go to binding arbitration or court to seek enforcement of contract and of relevant Fundamental Bylaws, may represent community in bringing claim

Contract between MEG and ICANN

To strengthen enforceability, MEG and ICANN would at the outset enter into contract that:

- Binds ICANN to support (financially and administratively) the Governance Review process (this is in addition to Bylaw commitment)
- Binds ICANN to support (financially) the MEG's access to counsel in the event of arbitration or other enforcement activity
- Provides for dispute resolution
- Is enforceable by the MEG under contract law
- Designates individual SOs and ACs as third-party beneficiaries who are also entitled to enforce the contract against the ICANN corporation, if they have personhood