Annex 02 - Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

1.   Summary

Engagement

- Today, the ICANN Board voluntarily consults with the community on a variety of decisions including the annual budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an 'engagement process.'

- The CCWG-Accountability is recommending that engagement processes for specific processes be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive 'engagement process' before taking action on any of the following:

    o   Approving ICANN's Five-Year Strategic Plan

    o   Approving ICANN's Five-Year Operating Plan

    o   Approving ICANN's Annual Operating Plan & Budget

    o   Approving The IANA Functions Budget

    o   Approving any modifications to Standard or Fundamental Bylaws

- If it is determined that there is divergence between the ICANN Board and the community during the engagement process, the community may choose to use a Community Power as an Empowered Community by way of a respective 'escalation process.'

- The community may begin an 'escalation process' to:

    o   Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or the IANA Functions Budget.

    o   Reject a change to ICANN Standard Bylaws.

    o   Approve changes to Fundamental Bylaws and/or Articles of Incorporation.

    o   Remove an individual ICANN Board Director.

    o   Recall the entire ICANN Board.

Comment [1]: The Summary of the CCWG Findings and Recommendations, and Annex 4, sometimes refer to the Articles of Incorporation as part of the to be designated "Fundamental Bylaws." The Articles occupy a higher place in the hierarchy of corporate organizational documents (the Articles are the document by which the corporation actually is created), and Annex 2 (here and in the similar list under the heading Detailed Explanation of Recommendations) correctly reflects that that Fundamental Bylaws and Articles are different.

o   Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).

o   Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.

Escalation Process

- The 'escalation process' can differ, sometimes significantly, from one Community Power to another.

- One of the most standardized versions of the escalation process is required for all Community Powers to 'reject', removing individual Nominating Committee appointed Board Directors or recalling the entire Board (Note: the Power to reject changes to Standard Bylaws does contain special features that are covered in the Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers).

  This escalation process is comprised of the following steps:

1.   An individual starts a petition in a Supporting Organization or Advisory Committee that is part of the Empowered Community (See Recommendation #1: Establishing an Empowered Community for enforcing Community Powers).

     ▪   If the petition is approval by that Supporting Organization or Advisory Committee, it seeks the approval of at least one additional Supporting Organization or Advisory Committee that is part of the Empowered Community.

         •   *If* the threshold is not met, the escalation process is terminated.

         •   *Else* if the threshold is met, an open conference call is organized to discuss the issue of the petition.

2.   ICANN hosts a conference call that is open to all of the community.

     ▪   *If* the ICANN Board and the Empowered Community can resolve their issues on the conference call, the escalation process is terminated.

     ▪   *Else* if not, the Empowered Community must decide if it wishes to hold a Community Forum to discuss the issue further.

3.   The Empowered Community decides whether to hold a Community Forum.

     ▪   *If* the threshold for holding a Community Forum is not met, the escalation process is terminated.

Comment [2]: Suggest deleting to conform text to other descriptions of the steps elsewhere in the document.

Comment [3]: Suggest deleting to conform text to other descriptions of the steps elsewhere in the document.

Comment [4]: These phases do not involve the sole designator/Empowered Community, but do involve the community. Recommend simply "community."

- *Else* if the threshold for holding a Community Forum is met, it will be organized.

4. An open 1-2 day Community Forum is organized for any interested stakeholder in the community to participate.

    - *If* the ICANN Board and the Empowered Community can resolve their issues at the Community Forum the escalation process is terminated.

    - *Else* the Empowered Community must decide if it wishes to use its Community Power.

5. The Empowered Community considers use of a Community Power

    - *If* the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.

    - *Else* if the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and asks it to comply with the decision (As outlined in the Fundamental Bylaws for this Community Power).

6. The Empowered Community advises the ICANN Board

    - *If* the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

- *If* the ICANN Board refuses or fails to comply, the Empowered Community decides whether to begin the 'enforcement process.'

Enforcement

- If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power, the Empowered Community must decide if it wishes to begin the 'enforcement process.'

- The enforcement process can proceed in two ways:

    1. Initiate mediation and community Independent Review Process procedures

    2. Initiate an escalation process to recall the entire ICANN Board

- The 'escalation process' may terminate with a resolution or proceed into an 'enforcement process'. The results of both enforcement processes are legally enforceable in court.

2. CCWG-Accountability Recommendations

- Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive 'engagement process' before taking action on any of the following:

    o   Approving ICANN's Five-Year Strategic Plan

    o   Approving ICANN's Five-Year Operating Plan

    o   Approving ICANN's Annual Operating Plan & Budget

    o   Approving The IANA Functions Budget

    o   Approving any modifications to Standard or Fundamental Bylaws

- Include the 'engagement process' and the 'enforcement process' in the Fundamental Bylaws. Note: The escalation processes for each Community Power is outlined in Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers.

3. Detailed Explanation of Recommendations

Engagement

- Today, the ICANN Board voluntarily consults with the community on a variety of decisions such as the annual budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations to gage community support and/or identify issues on the topic. These consultation mechanisms are referred to as an 'engagement process.'

- The CCWG-Accountability is recommending that this engagement process be constituted in the Fundamental Bylaws. Although the ICANN Board does voluntarily participate in this process already, this recommendation would require the ICANN Board to undertake an extensive 'engagement process' before taking action on any of the following:

    o   Approving ICANN's Five-Year Strategic Plan

    o   Approving ICANN's Five-Year Operating Plan

    o   Approving ICANN's Annual Operating Plan & Budget

    o   Approving The IANA Functions Budget

    o   Approving any modifications to Standard or Fundamental Bylaws

- If it is determined that there is divergence between the ICANN Board and the community during the engagement process, the community may choose to use a

Comment [7]: Add "or the Articles of Incorporation."

Community Power as an Empowered Community by way of a respective 'escalation process.'

- The community may begin an 'escalation process' to:

    o   Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or the IANA Functions Budget.

    o   Reject a change to ICANN Standard Bylaws.

    o   Approve changes to Fundamental Bylaws and/or Articles of Incorporation.

    o   Remove an individual ICANN Board Director.

    o   Recall the entire ICANN Board.

    o   Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).

    o   Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.
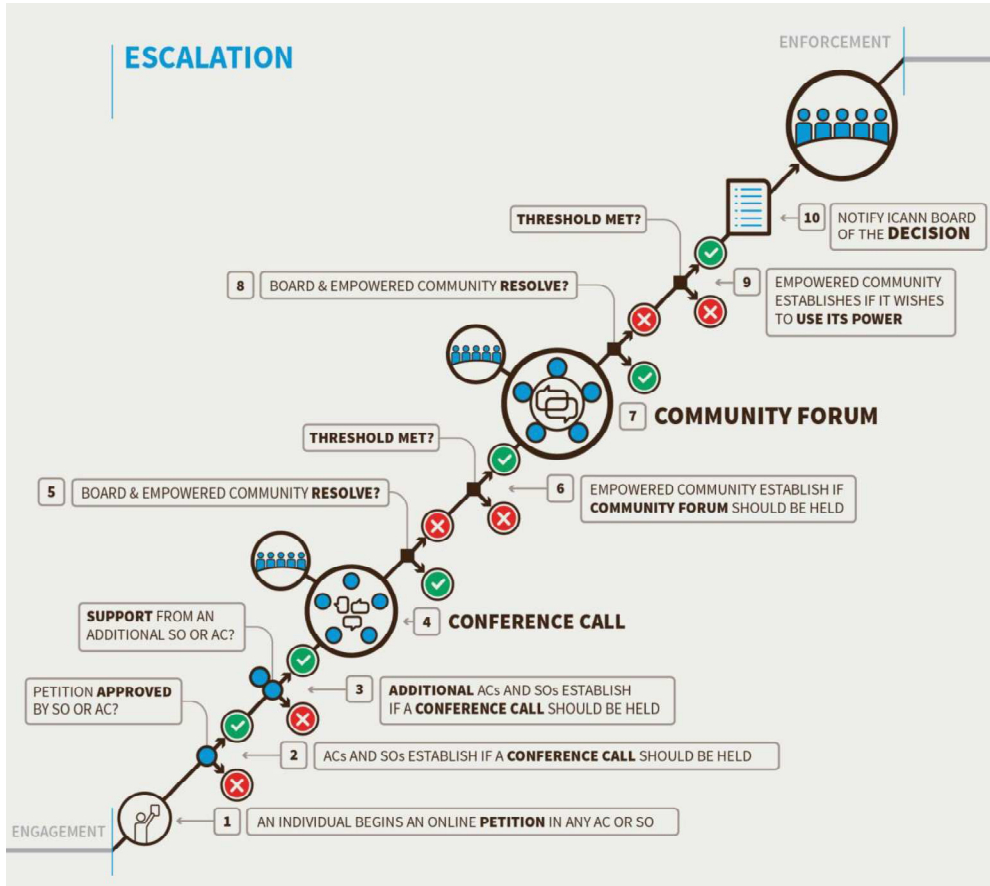
Escalation

The 'escalation process' can differ, sometimes significantly, from one Community Power to another.

One of the most standardized versions of the escalation process is required for all Community Powers to 'reject', removing individual Nominating Committee appointed Board Directors or recalling the entire Board

Note:

The Power to reject changes to Standard Bylaws *does* contain special features that are covered in the Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers.

Comment [8]: Same comment as page 1 of Annex 2.

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Step 1. Triggering Review by Community Petition (15 days) or by Board Action

- A petition begins in a Supporting Organization or Advisory Committee.

- Any individual can begin a petition as the first step to using a Community Power.

- For the petition to be accepted, the Supporting Organization or Advisory Committee, in accordance with its own mechanisms, must accept the petition.

- Decision point:

    o   If the Supporting Organization or Advisory Committee does not approve the petition within the 15 days, the escalation process terminates.

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- o   If the Supporting Organization or Advisory Committee approves the petition, it contacts the other Supporting Organizations or Advisory Committees to ask them to support the petition. At least one additional Supporting Organization and/or Advisory Committee must support the petition (for a minimum of 2) for a conference call to be organized to discuss the issue.

- Decision point:

  - o   If a minimum of two Supporting Organizations or Advisory Committees support the petition within 15-days, a conference call is organized.

  - o   If the petition fails to gather the required level of support, the escalation process terminates (except for removal of individual Director).

    - ▪   Note 1: To exercise any of the rejection powers, such rejection of a Budget, the 15-day period begins at the time the Board votes on the element to be rejected. If the petition is not successful within 15 days of the Board vote, the rejection process cannot be used.

    - ▪   Note 2: For ICANN Board resolutions on changes to Standard Bylaws, Budget, Strategic and Operating Plans, the Board would be required to automatically provide a 15-day period before the resolution takes effect to allow for the escalation to be confirmed. If the petition is supported by a minimum of 2 Supporting Organizations or Advisory Committees within the 15-day period, the Board is required to put implementation of the contested resolution on hold until the escalation and enforcement processes are completed. The purpose of this is to avoid requiring ICANN to undo things (if the rejection is approved), which could be potentially very difficult to undo.

Step 2. Conference Call (7 days to organize and hold from the date the decision is made to hold the call)

- The petitioning Supporting Organizations and/or Advisory Committees circulate written justification for exercising the community power in preparation for the conference call. Any Supporting Organization or Advisory Committee may contribute preliminary thoughts or questions in writing before the call is held via a specific archived email list set up for this specific issue.

- ICANN hosts a conference call, open to all interested participants, with ICANN services and staff. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

- Decision point:

Comment [9]: Consider combining Notes 1 and 2, as these processes appear to apply to all rejection powers/changes to Standard Bylaws, Budgets and Plans.

- o If the community and the Board can resolve the issue on the conference call, the escalation terminates.

- o If the community and the Board cannot resolve the issue, the community must decide if it wishes to hold a Community Forum.

Step 3. Decision to hold a Community Forum (7 days from the end of the conference call)

- The Supporting Organizations and/or Advisory Committees must decide if they want to hold a Community Forum. This would be a one or two day event, possibly face-to-face, where the ICANN community would explore in detail the issue between the Board and the community and the potential avenues for resolution or action.

- Decision point:

  - o If 3 or more Supporting Organizations or Advisory Committees (for the exercise of some community powers only 2) support holding a Community Forum within the 7-day period, the Community Forum will be organized.

  - o If the proposal to hold a Community Forum does not obtain the required support during the 7 days, the escalation process terminates.

Step 4. Holding a Community Forum (15 days to organize and hold the event from the date of the decision to hold it)

- The **purpose of the Community Forum** is information sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any Supporting Organization or Advisory Committee may circulate in writing their preliminary views on the exercise of this community power.

- Community Forum format:

  - o 1 to 2 days long.

  - o Open to all interested participants.

  - o Managed and moderated in a fair and neutral manner.

  - o ICANN to provide support services. ICANN support staff will collect and publish a public record of the Forum(s), including all written submissions.

  - o Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

  - o Should the relevant Supporting Organizations or Advisory Committees determine a need for further deliberation, a second and third session of the Community Forum could be held.

- o The Forum will not make decisions or seek consensus, and will not decide whether to advance the petition to the decision stage. This decision is up to the Supporting Organizations and/or Advisory Committees to determine after the Forum.

- Outcome of the Community Forum:

  - o If the Empowered Community and ICANN Board can resolve the issue in the Community Forum, the escalation process terminates.

  - o If the Empowered Community and ICANN Board cannot resolve the issue, the community must decide if it wishes to take further action.

Step 5. Decision to use a Community Power as an Empowered Community (15 days from the conclusion of the Community Forum)

- If four or more (for some powers 3) Supporting Organizations and/or Advisory Committees support and no more than one objects within the 15-day period, the Sole Designator will use its power. The community will also publish an explanation of why it has chosen to do so. The published explanation can reflect the variety of underlying reasons.

- If the proposal to instruct the Sole Designator to use its power does not meet the required thresholds during the 15-day period, the escalation process terminates.

Step 6. Advising the ICANN Board (1 day)

- If the Empowered Community has instructed the Sole Designator to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.
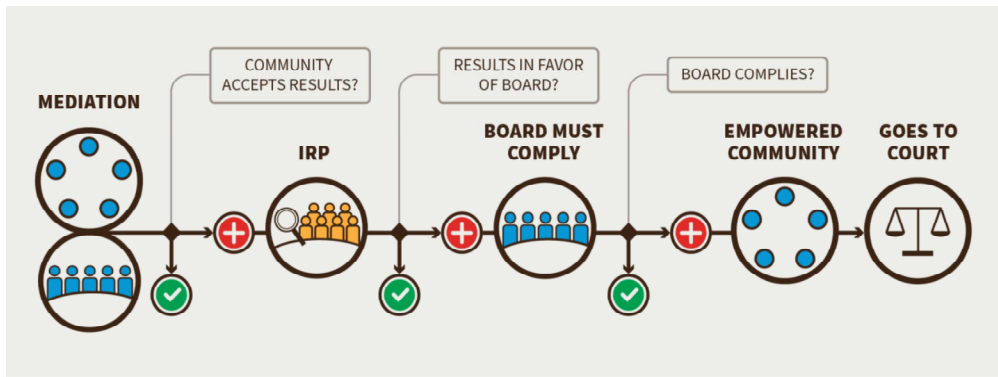
Enforcement

If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use a Community Power, the Empowered Community must decide if it wishes to begin the 'enforcement process.'

The enforcement process can proceed in two ways:

Comment [10]: Change to "Empowered Community".

Comment [11]: Change to "Empowered Community".

Comment [12]: Replace with "the community…"

Option 1: Initiate mediation and community Independent Review Process procedures.

a)   Representatives from ICANN Board and community undertake a formal mediation phase.

- If the community accepts the results from the mediation phase, the enforcement process would be terminated.

- If the community does not accept the results from the mediation phase, the community will proceed with a community Independent Review Process (that could only be initiated using the escalation process described above).

b)   Representatives from the ICANN Board and community undertake a formal and binding Independent Review Process.

- If the results of the community Independent Review Process are in favor of the ICANN Board, the enforcement process is terminated.

- If the results of the binding Independent Review Process are in favor of the community, then the ICANN Board must comply.

c)   If the ICANN Board not comply with the decision of the Independent Review Process, the Empowered Community has two options:

- The Empowered Community can legally enforce the results of the Independent Review Process in court.

- The Empowered Community can use the escalation process to use its Community Power to recall the entire ICANN Board.

Option 2: Initiate an escalation process to recall the entire ICANN Board.

- If the requisite threshold of community support is achieved, the Empowered Community removes all of the members of the ICANN Board (except the CEO) and replaces them with an Interim Board until a new Board can be seated.

Comment [13]: Clarify whether this is optional or mandatory.

Comment [14]: Change "community" to "Empowered Community". As above, the sole designator/Empowered Community acts during the enforcement phase.

Comment [15]: Consider noting the possibility of a partial Board recall.

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- The Empowered Community may legally enforce the power to recall the entire Board in court.

Table: Required thresholds for the various escalation and enforcement processes:

Required Community Powers	Should a conference call be held?	Should a Community Forum be convened?	Is there consensus support to exercise a Community Power?
1. Reject a proposed Operating Plan/Strategic Plan/Budget	2 AC/SOs support blocking	3 AC/SOs support blocking	4 support rejection, and no more than 1 objection
2. Approve changes to Fundamental Bylaws and Articles of Incorporation	2 AC/SOs support approval	3 AC/SOs support approval	4 support approval, and no more than 1 objection
3. Reject changes to regular bylaws	2 AC/SOs support blocking	2 AC/SOs support blocking	3 support rejection, and no more than 1 objection
4a. Remove an individual Board Director appointed by a Supporting Organization or Advisory Committee	Majority within the appointing AC/SO	Majority within appointing AC/SO	Invite and consider comments from all SO/ACs. 75% majority within the appointing AC/SO to remove their director
4b. Remove an individual Board Director appointed by the Nominating Committee	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection
5. Recall the entire board of directors	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection[1]
6. Initiate a binding Independent Review Process where a panel decision is enforceable in any court recognizing international arbitration results	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection. Require mediation before IRP begins
7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection

Comment [16]: Recommend clarifying that it is the Empowered Community that exercises the Powers.

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[1] A minority of CCWG-Accountability participants prefer to require 5 SOs and ACs, or allow 1 objection to block consensus.

4. Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations'

In the **Second Draft Proposal**, a voting-based three-step process (petition, discussion, decision) was proposed. However, there was no agreement on how to allocate and count votes for the model proposed in the Second Draft Proposal. The changes made in the Third Draft Proposal respond to expressions of concern received during the second public comment period about the potential for unintended concentrations of power in the voting-based model.

Overview of differences:

- The new decision-making model of "Engage, Escalate, Enforce", encourages community disputes with Board decisions to be solved through ongoing dialogue at all stages of the process rather than seeing enactment of enforcement powers as the goal of the process.

- The voting process has been replaced by consensus decision-making. Consensus is deemed to have been achieved according to slightly different thresholds of "support"/"don't support" depending on the community power that is using the decision-making model.

5. Stress Tests Related to this Recommendation

6. How does this meet the CWG-Stewardship Requirements?

The CWG-Stewardship required Community Empowerment Mechanisms that would ensure the multistakeholder community would have the following rights with respect to the ICANN Board, the exercise of which should be ensured by the related creation of a stakeholder community/member group:

- The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board.

- The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA functions) by reviewing and approving (i) ICANN Board decisions with respect to recommendations resulting from an IFR or Special IFR and (ii) the ICANN budget.

- The ability to approve amendments to ICANN's "Fundamental Bylaws."

The defined escalation and decision-making mechanism recommended by the CCWGAccountability provides the process needed to meets these requirements.

> **Comment [17]:** Should this be replaced with "if necessary, rejecting"?

7. How does this address NTIA Criteria?

Support and enhance the multistakeholder model
- Decentralizing power within ICANN through an "empowered" community
- Solidifying consultation processes between the ICANN Board and community into the ICANN Bylaws
- Establishing a public Community Forum to ensure that all voices and perspectives are heard before execution of a community power
- Retaining a decision-making based on consensus rather than voting

Maintain the security, stability, and resiliency of the Internet DNS
- Proposing a series of procedures that ensure both sides have had the chance to completely and thoroughly discuss any disagreements and have multiple opportunities to resolve any such issues without having to resort to the powers of the Sole Designator for accountability or enforceability
- Embedding thresholds into procedures to eliminate any risks of capture.

Meet the needs and expectation of the global customers and partners of the IANA services
- Including limited timeframes, transparent processes and associated thresholds to maintain operational viability

Maintain the openness of the Internet
- Establishing a public Community Forum to ensure that all voices and perspectives are heard
- Preserving policies of open participation in ICANN's Supporting Organizations and Advisory Committees

NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution
- Retaining a decision-making based on consensus rather than voting
- Maintaining the advisory role of governments in the Supporting Organization and Advisory Committee structure include the Governmental Advisory Committee
- All interested stakeholders can join consultations through SOs and ACs or through the Community Forum