Background of this Drafting Team

This is the report from the GNSO Bylaws Implementation Drafting Team (DT), responding to a GNSO Council resolution.[1] Council's resolution tasked the Drafting Team to:

1. work with ICANN staff to fully identify all the new or additional rights and responsibilities that the GNSO has under the revised Bylaws, including but not limited to participation of the GNSO within the Empowered Community, and

2. develop new or modified structures and procedures (as necessary) to fully implement these new or additional rights and responsibilities.

Council's resolution ended with "The GNSO Council intends to adopt any such new, or proposed modifications to existing procedures and structures to implement the revised Bylaws for the GNSO by a GNSO supermajority vote." Changes to GNSO Operating Procedures and/or ICANN Bylaws must also be published for public comment prior to GNSO Council consideration, and proposed changes to the ICANN Bylaws must also be approved by the ICANN Board.

Recommendations of this Drafting Team

As explained in the section below ("Evolution of these recommendations"), the DT considered two major questions inherent in the charge of the Council resolution:

1. **Who** should speak for the GNSO, as a Decisional Participant of the Empowered Community – should it be GNSO Council or the GNSO Stakeholder Groups and Constituencies? and

2. **How** should the GNSO Council or Stakeholder Groups & Constituencies arrive at their decisions – voting thresholds with or without requiring majorities in each house?

Three DT members (IPC, ISPCP, and BC) do not support Council exercising any of the new powers by voting within the present House-bound structure. The recommendation that Council would speak for GNSO therefore has "**Strong support but significant opposition**". Nonetheless, all DT members contributed to "**Consensus**" recommendations for voting thresholds on the assumption that GNSO Council would approve nominations and actions created under the new ICANN Bylaws.

The details for recommended decision methods and voting thresholds are explained in an extensive table initially prepared by ICANN staff. (*See* Bylaws and GNSO Procedures Map.doc). Here is a summary of the recommendations:

1. Any GNSO Stakeholder Group or Constituency should be empowered to request ICANN document inspection per Bylaws 22.7(a) and (e). This request would be automatically communicated by the GNSO's Decisional Participant representative, and would not require action by GNSO Council. In addition, GNSO Council can request ICANN document inspection per Bylaws 22.7(a) and (e), with approval by 1/4 of each House or majority of one House.

2. A majority of each house is the appropriate threshold for nominations of GNSO representatives on Empowered Community, Customer Service Committee (CSC), IANA Functions Review Team (IFRT), and other review teams in new ICANN Bylaws.

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3. A majority of each house is the appropriate threshold to make most decisions of the Empowered Community (EC), and that a *GNSO Supermajority* is the appropriate threshold for decisions in the Bylaws identified in the following sections:

> 16.2 - Amendments to PTI Articles of Incorporation;
>
> 18.2 - Delay in convening IANA Functions Review
>
> 18.6 - Amendments to IANA Naming Function Contract, SOW, or CSC Charter
>
> 18.12 - Approve a special IANA Functions Review
>
> 19.1 - Establishing a Separation Cross-Community Working Group (SCWG)
>
> 19.4 - Approve decision by Separation Cross-Community Working Group (SCWG)
>
> 25.2 - Amendments to ICANN Fundamental Bylaws or Articles of Incorporation
>
> 26 - Sale or disposition of all or substantially all of ICANN's assets
>
> Annex D, 1.4 - Approve decision regarding: Fundamental Bylaw Amendments; Articles of Incorporation Amendments; or ICANN Asset Sales
>
> Annex D, 3.1 - Removal of Nominating Committee Director
>
> Annex D, 3.3 - Removal of all directors

4. GNSO Procedures should define how GNSO Council meets two new thresholds described in the new Bylaws in these sections:

> 17.3 – Amending the CSC charter. Bylaws require approval by a "simple majority of … GNSO Council", which is not a defined GNSO threshold in Bylaws Section 11.3(i).
>
> Annex D, 3.2(f) - Removal of a GNSO Director. Bylaws require approval by "a three-quarters majority", which is not a defined GNSO threshold in Bylaws Section 11.3(i).   Five DT members believe that voting would occur only in the House that nominated the director, while other DT members said the entire GNSO should vote on this decision.

Evolution of these recommendations, including Drafting Team deliberations

After the resolution was approved in Council, ICANN staff created a table of GNSO's new rights and responsibilities. Staff found 101 relevant instances in the new bylaws, and grouped those into three categories:

1. Obligations of the GNSO as a Decisional Participant of the Empowered Community;
2. Engagement in the new Customer Standing Committee; and
3. Processes relating to voting thresholds.

The Drafting Team (DT) held weekly calls beginning 22-Aug-2016. The DT analyzed the staff table and suggested a somewhat different categorization of GNSO rights and responsibilities, looking at three types of decisions that GNSO would need to consider:

1. **Nominations** for GNSO representatives on Empowered Community, Customer Standing Committee, IANA Functions Review Team, and other review teams that will become part of the post-transition Bylaws;

2. **Decisions** made by GNSO to initiate or respond to petitions of the Empowered Community; and

3. **Decisions** made by GNSO on its own, to initiate document inspection requests or investigations, per Bylaws Sections 22.7(a), 22.7(e) and 22.8.

The DT hoped that that it could find consensus recommendations for how GNSO should make these three types of decisions, so that the recommendation could be applied to all 101 relevant instances in the new Bylaws.   This approach was motivated by the realization that it would be difficult to discuss/debate recommendations for over 100 Bylaws instances in the 5 weeks available to deliver an implementation plan to Council. Moreover, the DT wanted to address two major questions inherent in the charge of the Council resolution:

3. **Who** should speak for the GNSO, as a Decisional Participant of the Empowered Community – should it be GNSO Council or the GNSO Stakeholder Groups and Constituencies? and

4. **How** should the GNSO Council or Stakeholder Groups and Constituencies arrive at their decisions – voting thresholds with or without requiring majorities in each house?

Below is how the DT attempted to find consensus on these two general questions.

1. **Who** should speak for the GNSO, as a Decisional Participant of the Empowered Community – should it be **GNSO Council** or the **GNSO Stakeholder Groups and Constituencies**?

Some DT members noted that the CWG and CCWG recommendations look to ICANN's Advisory Committees (ACs) and Supporting Organizations (SOs) to make decisions within the Empowered Community.   That opened the discussion of who speaks for GNSO in the Empowered Community -- GNSO Council or the component SGs and Constituencies in GNSO?

Some DT members noted that the Bylaws describe the role of GNSO Council to be "responsible for managing the policy development process of the GNSO," which does not cover the non-policy decisions related to exercise of powers of the Empowered Community.

Other DT members disagreed, noting that Council's responsibility in managing the policy development process does not directly prohibit the Council from addressing non-policy matters. For example, the Bylaws state, "The procedures for selecting the Chair and any other officers are contained in the GNSO Operating Procedures"[2]. This indicates that the Bylaws afford the GNSO and the GNSO Council the ability to act in certain situations that are not explicitly described in the Bylaws, but instead, may be included in the GNSO Operating Procedures. Some DT members find that the GNSO Council making selections for the appointment of GNSO representatives on Empowered Community, Customer Standing Committee, IANA Functions Review Team, and other review teams that will become part of the post-transition Bylaws is consistent with this article in the Bylaws.

DT members noted that ICANN Bylaws created GNSO to consist of:[3]

A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;

Four Stakeholder Groups organized within Houses as described in Section 11.5;

Two Houses within the GNSO Council as described in Section 11.3(h); and

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[2] ICANN Bylaws, Section 11.3(g)
[3] ICANN Bylaws, Section 11.2

A GNSO Council responsible for managing the policy development process of the GNSO, as described in Section 11.3.

Some DT members believe that the above description of GNSO components indicates that the GNSO exercising the powers of the Empowered Community via its Stakeholder Groups and Constituencies alone would not be representative of the entire GNSO.

DT members from the Commercial Stakeholders Group said Council should not decide non-policy matters, since ICANN Bylaws say Council is "responsible for managing the policy development process of the GNSO" and it is their position that this limits Council to policy, and that GNSO Stakeholder Groups and Constituencies should handle other matters. On the other hand, most DT members noted that there is no provision in the Bylaws for any group, be it Council or the GNSO Stakeholder Groups and Constituencies, to assume these new powers and that there is currently no procedure for GNSO Stakeholder Groups to handle these matters.

Since this DT is focused on new Bylaws powers for the GNSO, the DT chair requested ICANN staff to analyze the CWG and CCWG Final proposals and the new Bylaws to determine when "Council" or "GNSO Council" is referenced as the decisional body instead of the term "GNSO". Staff found 17 such references in the Final Proposals and newly added parts of the Bylaws: (add link to this doc on our DT wiki).

11 uses of the term "GNSO Council"; and

6 uses of the term "GNSO Supermajority", which was previously defined in the Bylaws at Section 11.3 as "(A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House."

The DT then asked staff to list all instances of "GNSO" in the newly adopted Bylaws. On 23-Sep staff produced a report showing: (add link to this doc on our DT wiki).

"GNSO" appears 209 times in the newly adopted bylaws

Of those 209 uses, 39 were in the new sections of ICANN Bylaws added for IANA transition and enhanced accountability mechanisms

It was also noted by some DT members that there is no provision in the Bylaws for any group, be it Council or the GNSO stakeholder groups and constituencies, to assume these new powers and that there currently does not exist any formal procedure or institutional arrangement for the GNSO Stakeholder Groups and Constituencies to handle these matters.

DT members in the Commercial Stakeholders Group (CSG) noted that while there is no formal arrangement for GNSO SGs and Constituencies to make collective decisions, this has occurred on occasion, such as the joint statement presented in the Jun-2014 ICANN Public Forum to express "the views of the GNSO community" and of "the entire GNSO" regarding transition of IANA functions and enhancements to ICANN's accountability mechanisms.

CSG noted that each Stakeholder Group and Constituency has an elected leadership that is accountable to its members, and those leaders could convene as needed to collectively make decisions reflecting views of the GNSO Stakeholder Groups and Constituencies.

Multiple DT members noted that a proposal that did not allow Council to exercise the new powers would not likely be approved by a supermajority of sitting GNSO council members, even if it did not diminish the Council's existing remit under the bylaws. CSG noted that GNSO council may therefore

not be the appropriate body to approve plans to exercise GNSO powers under the new by-laws, and that the GNSO Stakeholder Groups and Constituencies should directly evaluate the proposal.

DT Conclusion on Question 1: On 21-Sep the DT did a straw poll on the general question of whether Council *should* speak for GNSO on its new or additional rights and responsibilities under the revised Bylaws. **6 DT members were in favor and 3 against**. The DT chair moved on to the second general question, assuming that Council were to speak for the GNSO, as described next.

2. How should the GNSO Council arrive at their decisions – voting thresholds with or without requiring majorities in each house?

The DT first looked at existing Bylaws regarding composition of GNSO Council and voting thresholds for matters other than policy development.
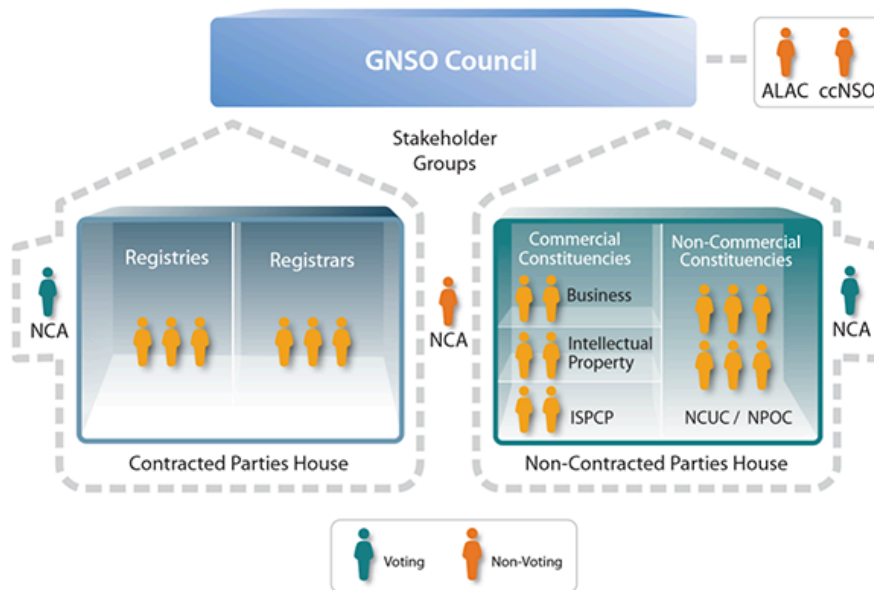
Existing ICANN Bylaws describe a "default" voting threshold, at Section 11.3:

> Except as otherwise specified in these Bylaws, Annex A, Annex A-1, or Annex A-2 hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO Council motion or other voting action requires a simple majority vote of each House.

Several DT members noted that GNSO Council has used this "default threshold" to make decisions on non-policy matters, such as nominations for review teams, approvals of cross-community charters and working group recommendations not related to GNSO policy.   For example, a majority of each house was required to approve the CWG and CCWG proposals and to approve the resolution creating this DT.

Examining the "except as specified" sections, we found no instructions or requirements for how Council should explicitly address non-policy decisions.   Staff noted that last year a "GNSO Guidance Process" was added to Section 11.3 of Bylaws, without indicating it was for policy matters:

(xvi) Initiation of a GNSO Guidance Process ("GGP"): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO Supermajority.

Staff confirmed that the GGP has not yet been used. The DT noted that Council requires a GNSO Supermajority to approve GGP recommendations.

Next, the DT considered whether requiring majority (or supermajority) of each house was the appropriate way for GNSO to exercise its rights and responsibilities in the Empowered Community. Advocates for an alternate voting threshold for EC decisions noted that this would not alter the present structure of GNSO Council and would not change the voting thresholds for policy development matters

The DT used the table below to compare the current split-house voting arrangement with an alternative that did not require majorities of each house.

The DT chair suggested that an alternative voting threshold based on a majority of Councilors – regardless of house majorities—would need to maintain balance between Councilors in the Contract Party House (CPH) and the Non-Contract Party House (NCPH). That is reflected in the table with 2x weighting for Councilors in the CPH, giving each house the same number of Council votes.

	Today	Weight	Weighted	Test A	Test B	Test C	Test D	Test E
CPH:								
RySG 1	1	2	2	2				2
RySG 2	1	2	2	2				2
RySG 3	1	2	2	2				2
RrSG 1	1	2	2	2		2	2	
RrSG 1	1	2	2	2		2	2	
RrSG 1	1	2	2	2		2	2	
CPH NCA	1	0	0					
Total CPH	7		12	12	0	6	6	6
NCPH:								
CSG:								
BC 1	1	1	1		1			
BC 2	1	1	1		1			
IPC 1	1	1	1		1			1
IPC 2	1	1	1		1			1
ISPCP 1	1	1	1		1		1	1
ISPCP 2	1	1	1		1		1	1
NCSG:								
NCSG 1	1	1	1		1	1	1	1
NCSG 2	1	1	1		1	1	1	1
NCSG 3	1	1	1		1	1	1	1
NCSG 4	1	1	1		1	1	1	1
NCSG 5	1	1	1		1	1	1	1
NCSG 6	1	1	1		1	1	1	1
NCPH NCA	1	0	0					
Total NCPH	13		12	0	12	6	8	10
Total "yes" Votes				12	12	12	14	16
				50.0%	50.0%	50.0%	58.3%	66.7%
Total Votes	20		24	24	24	24	24	24

The table above shows several Test columns where a majority of Council votes would be achieved, without reaching a majority of each house. In Test E, a supermajority (2/3) of Council votes is shown, without reaching a majority of each house. Test E generated interest from some DT members, since it demonstrated where the "default threshold" would block a supermajority vote of Councilors.

The discussion also considered whether the two voting Nominating Committee Appointees (NCA) should vote on Empowered Community decisions. (The table above assumes that NCA representatives do <u>not</u> vote in the alternative method).

> The argument against NCA voting was that NCAs are not selected by or accountable to any of the defined components of the GNSO. Also, some DT members noted that NCAs were given votes when the Council was restructured in 2009, in order to break ties within a House.

> The argument in favor of NCA voting cited ICANN Bylaws Section 11.3(a)(v) where NCA representatives are "entitled to participate on equal footing with other members of the GNSO Council…" Some DT members noted the inclusion of a nonvoting NCA on Council indicates that the addition of NCA's on Council indicated a broader purpose for the NCAs than merely breaking tie votes. Furthermore, the GNSO is described in the bylaws to consist of Constituencies, Stakeholder Groups, two Houses and the GNSO Council. One of the three

NCAs (the non-voting NCA) is a part of the GNSO Council alone, while the other two (the voting NCAs) are part of both the Houses and the GNSO Council.

On 21-Sep the DT discussed and did a straw poll on this alternative voting method, which did not require majorities in each house and did not count votes by NCA reps. One DT member favored it; 2 abstained since they believe Council should not speak for GNSO; 5 voted No; and 1 said they were open to the idea but not conclusive either way at this point.   That straw poll suggests the alternative voting method did not have significant support, so the DT chair moved on to discuss voting thresholds assuming some level of majority in each house of Council.

The voting thresholds are included in an extensive table initially prepared by ICANN staff. *See* Bylaws and GNSO Procedures Map.doc