

**CCWG Pending Questions for Bylaws Coordination Group
to be revisited on 11 April 2016**

Mission:

1. Article 1, Section 1.1.a.i - Removing Root Zone?

The latest draft text for Article 1, Section 1.1.a.i describes ICANN's naming mission as follows: "Coordinates the allocation and assignment of names in the Domain Name System ..." This text differs from the conceptual language proposed in Annex 05 – Recommendation #5, which read as follows: "Coordinates the allocation and assignment of names **in the root zone** of the Domain Name System" The words "the root zone of" do not appear in the current ICANN Bylaws, which states that ICANN "Coordinates the allocation and assignment of [...] Domain names" (without any qualifier or limitation to "the root zone"). It is not true that ICANN coordinates assignment ONLY in the root zone, as such term is currently understood. ICANN's gTLD registry and registrar agreements and policies deal substantially and primarily with issues relating to assignment of names at the second (and in some cases lower) levels of the DNS. If in the root zone is currently intended to include the second level that should be clarified in the use of the term. For example, the UDRP, the Inter-Registrar Transfer Policy, and the Expired Registration Recovery Policy are all ICANN policies relating to second-level gTLD registrations <<https://www.icann.org/resources/pages/registrars/consensus-policies-en>>. Do we need to define the term "root zone" to include the second level or remove the words?

CCWG Original Response 5 April:

AGREED to remove the words.

CCWG Revised Response 11 April: TBD

2. Article 1, Section 1.1.d.ii

The latest draft text for Article 1, Section 1.1.d.ii provides that existing gTLD registry agreements and registrar accreditation agreements (and unsigned/future agreements on the same current forms) may not be challenged on the basis that they exceed the scope of ICANN's mission. This concept is based on the "Note to drafters" at paragraph 48 (#3) of Annex 05. The conceptual language in the Annex however proposed to restrict this protection for current agreements to last only "...until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement." This concept of allowing for challenges to agreements once they have been renewed does not appear in the current proposed draft Bylaws, based on the rationale that ICANN's current and legacy registry and registrar agreements all include clauses mandating renewal by ICANN under specified circumstances. ICANN is requesting the Bylaws Coordination Group to confirm that existing gTLD registry and registrar agreements should not be subject to challenge as outside of mission just because they have expired and have been renewed pursuant to the renewal provisions of those agreements. ICANN is also requesting the Bylaws Coordination Group to confirm that "new" form gTLD registry and registrar agreements should receive the same grandfathering treatment but only for the terms and conditions of the "new" agreements that are contained in the existing form agreements.

CCWG Original Response 5 April:

- Existing gTLD registry and registrar agreements should not be subject to challenge as outside of mission just because they have expired and have been renewed pursuant to the renewal provisions of those agreements.
 - “New” form gTLD registry and registrar agreements should receive the same grandfathering treatment but only for the terms and conditions of the “new” agreements that are contained in the existing form agreements.
- This approach appears to be the closest to the CCWG recommendation while avoiding the legal risk unveiled during the drafting phase.

CCWG Revised Response 11 April: TBD

BOARD:

6. There remains the ability for the Board to remove directors without cause, but only after a ¾ vote of the Board and consent of the EC. However, the proposal is silent on how the Board could obtain the consent of the EC. One possibility, to be agreed upon and then drafted appropriately, is: (1) Board approves the director’s removal; (2) the EC has the opportunity to oppose the removal, using the escalation process and thresholds for the standard bylaws rejection process in Annex D; (3) if the EC does not oppose, the EC must send a certification of such lack of opposition (i.e., consent to the director removal), to the Secretary.

CCWG Original Response 5 April:

The inclusion of the EC consent is required as a legal constraint due to the nature of the Designator model. To keep as close as possible to the conclusions of the CCWG Accountability Report, which did not amend the ability for the ICANN Board to remove one of its members, we recommend that the EC consent should be drafted in the Bylaws only as a matter of formality to endorse the Board decision, without any escalation or consultation process.

CCWG Revised Response 11 April:

The Board always had the power to remove directors. The CCWG recommends two community powers on removing individual directors and recalling the entire Board. However, the previously existing right of the Board to remove directors was neither removed nor altered by the CCWG recommendations. The CCWG asks the lawyers to ensure that this right for the Board will remain in tact and include required language in the Bylaws.

However, concerns have been expressed that there might be issues when the community tries to seat Board members and then the Board removes those board members instantly. We kindly ask the lawyers to comment on ways, if any, to mitigate that risk without changing the substance of the recommendations.

29. On NomCom Board member removals, should the GAC Carve-out only apply if the Board member is subject to the removal process because of a vote in support of a GAC Consensus Resolution?

NOTE: Request to have Lawyers redraft question to properly map to the CCWG report and not refer to the carve out.

CCWG Original Response 5 April:

No cause is needed for the removal of any Board member, regardless whether it is a NomCom Board member or not. Only an explanation needs to be offered. Therefore, no decision by the Board member is challenged with the removal procedure. As a consequence, the GAC carve-out should not apply to NomCom Board member removals.

CCWG Revised Response 11 April: TBD

33. It is unclear from the CCWG Proposal how issues based on GAC Consensus Resolutions or PDP matters are to be handled in the mediation and community IRP process and how the relevant carveouts are to apply. Should anything be added to the Bylaws to address this?

NOTE: this question needs to be reframed for consideration by the CCWG.

Clarification from the lawyers: The Empowered Community will need to follow an escalation process to initiate mediation (Annex D, Section 4.1) or a community IRP (Annex D, Section 4.2).

- PDP: The CCWG Proposal states “no community IRP that challenges the result(s) of an SO’s PDP may be launched without the support of the SO that approved the policy recommendations from the PDP or, in the case of the result(s) of a Cross Community Working Group (CCWG) chartered by more than one SO, without the support of the SOs that approved the policy recommendations from that CCWG” (Annex 7, Paragraph 25). What is the scope of the PDP recommendations that this refers to? Is it just related to Standard Bylaw amendments as discussed in Annex 4, Paragraph 35 (reflected in the draft Bylaws at Annex D, Paragraphs 4.2(b)(i)(E), 4.2(b)(ii)(B) and Paragraph 4.2(e)(ii)) or does it apply to PDPs more broadly? The mediation discussion in the CCWG Proposal (Annex 2, Paragraph 44) does not discuss PDP recommendations at all; should these be treated the same as under the community IRP process (whatever that is determined to be)?

- GAC: The CCWG Proposal is silent as to whether the GAC carveout applies to the escalation process to initiate mediation or a community IRP (these processes are discussed in Annex D, Sections 4.1 and 4.2 and do not reference a GAC carveout; the GAC carveout is discussed in Annex 1, Paragraph 44). Specifically, if the Board fails to implement a decision of the EC that is based solely/almost solely on ICANN’s implementation of a GAC consensus Board resolution (“Board Failure”), will the GAC be counted in support or objecting to the initiation of mediation or community IRP in relation to that Board Failure?

CCWG Original Response 5 April:

The carveout should be applicable for decisions whether or not mediation or a community IRP should be initiated. Once the procedure is initiated, there is no need for exclusion of the GAC. Their voice shall be heard in both processes.

CCWG Revised Response 11 April: TBD

Additional questions from the CCWG, added after the legal teams circulated their draft on 2-Apr-2016.

1. Selection of IRP panel

The report states : [...]

3. The community would nominate a slate of proposed panel members.

4. Final selection is subject to ICANN Board confirmation.

The Draft Bylaws include:

ICANN shall, in consultation with the global Internet community, initiate a process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP. The community shall be directly involved in the selection of the Standing Panel and the designation of the Chair of the Standing Panel.

This does not seem to fully capture the importance of a community driven selection process, as well as the role of the Board, which is to confirm (or veto) Panelists. Our recommendation is to provide additional safeguards about this process in the Bylaws to ensure that the intent of the Report is carried out.

2. IRP rules of procedure

The Report states:

Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created

by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the

Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.

Bylaws:

Members of the global Internet community shall develop processes for the IRP that are governed by clearly understood and pre-published rules applicable to all parties ("Rules of Procedure").

The community driven nature of the establishment of the rules of procedure should be reinforced in the Bylaws

3. GAC Carve out - Annex D Section 3.3 (NOTE: possible linkage to Q29 above)

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("Board Recall Petition"). Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board and a statement, where applicable, that the Board Recall Petition is based solely [or almost solely] on ICANN's implementation of a GAC Consensus Board Resolution, citing (i) the specific GAC Consensus Board Resolution, (ii) the acts of the Board that implemented such specific GAC Consensus Board Resolution, and (iii) the IRP Panel award concluding that the Board's implementation of such GAC Consensus Advice did not comply with the Articles of Incorporation or Bylaws ("Board Recall GAC Consensus Statement"). The process set forth in this Section 3.3 of this Annex D is referred to herein as the " Board Recall Process."

Comments:

1. The manner in which the above txt is drafted may give the impression that "Board Recall Process " IS solely designed on ICANN's implementation of a GAC Consensus

Board Resolution, which would not be compliant with paragraph 77-83 of Annex 4 (Recommendation 4) of the supplemental CCWG Report.

We would request confirmation that this not the case and would welcome, if possible, any improvement in language that would alleviate this possible misinterpretation.

4. HR FoI - Section 27.3

Section 27.3 is part of article 27 Transition Article and now reads:

Section 1.1. human rights

(a) Within the scope of its Mission and Core Values, ICANN commits to respect internationally recognized human rights as required by applicable law. This commitment does not create and shall not be interpreted to create any additional obligations for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.

(b) Section 27.3(a) shall have no force or effect unless and until a framework of interpretation for human rights ("FOI-HR") is approved by (i) the CCWG-Accountability as a consensus recommendation in Work Stream 2, (ii) each of the CCWG-Accountability's chartering organizations and (iii) the Board (in the case of the Board, using the same process and criteria used by the Board to consider the Work Stream 1 Recommendations). Upon approval of the FOI-HR as contemplated in this Section, the text included within Section 27.3(a) shall be inserted into Section 1.2(b) as a Core Value

(c) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2 or the independent review process provided in Section 4.3 with respect to this Section 27.3 for any actions by ICANN or the Board occurring prior to the date that the conditions set forth in Section 27.3(b) are satisfied

Section 27.3 as a whole should be put in section 1.2 (a) as it is a commitment by ICANN and it is not really meant to be a transitional bylaw but instead a firm commitment pending full applicability to the development of the FOI as part of WS2.

5. AoC Review of new gTLDs - Section 4.6

Jeff Neuman observed that CCWG Final Report is not fully reflected in the draft bylaws text at Section 4.6 d - Competition, Consumer Trust and Consumer Choice Review (CCT). Per the Affirmation of Commitments, a CCT review team is already in process. There are also several other reviews of the latest round of new gTLDs already in progress. CCWG anticipated that the "new" bylaws reviews might conflict with the AoC reviews already underway, and added this to our final proposal:

New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules. (para 6 of Annex 9) Jeff also asks about draft bylaws text regarding when a CCT review would be required, if ICANN were to open an ongoing process for new gTLD applications -- instead of discrete batched rounds.

CCWG anticipated that new gTLDs might be a rolling application instead of discrete rounds of applications. In Annex 9 para 118 we said:

The Board shall cause a review of ICANN's execution of this commitment after any batched round of new gTLDs have been in operation for one year.

The draft bylaws text at Section 4.6 d (ii) did not retain the word "batched" and should probably include that concept to clarify if and when the 1-year trigger applies.

After any discrete New gTLD Round has been in operation for one year, the Board shall initiate a competition, consumer trust and consumer choice review as specified in this Section 4.6(d) ("CCT Review").

If ICANN moves to rolling applications for new gTLDs, then a review is required no less frequently than every 5 years (para 127).

For that reason, Bylaws Section 4.6 d (iii) should avoid using the phrase "the New gTLD Round" and retain the CCWG proposal text "expansion of gTLDs", as follows:

(iii) The review team for the CCT Review ("CCT Review Team") will examine (A) the extent to which the expansion of gTLDs New gTLD Round has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD Round's application and evaluation process and safeguards put in place to mitigate issues arising from the expansion New gTLD Round.

41) MEDIATION INITIATION PROCESS: section 4.1

This section was introduced during the Bylaw drafting stage at the request of the Coordination group. Lawyers identified that the process to engage in a Mediation, if the Board fails to comply with an EC decision, was not described in the report.

The current section 4.1 describes a new escalation process, following all typical steps (petition, community forum, etc.) before initiating the Mediation. This is option (a)

An alternate possibility would be to mandate the EC Council to initiate mediation automatically, in order to streamline the process. This is option (b)

6. AoC Review Team Draft Reports - Section 4.6

Draft bylaws Section 4.6 a (vii) B states that "Each draft report of the review team shall be posted on the Website for public review and comment."

In the CCWG final proposal, we stated "The draft report of the review will be published for public comment." (para 76, Annex 9). That was in keeping with AoC review team practice.

We realize that a review team may decide to publish several iterations of its draft reports for public comment. But we do not want to imply that each every internal draft report must be posted for public comment.

We recommend this change to draft bylaws Section 4.6 a (vii) B:

(B) The review team may post its draft reports to the Website for public review and comment. ...

We note that final reports of the review team must be posted for public comment:

(C) Each final report of a review team shall be published for public comment in advance of the Board's consideration.

7. Confirm approval of the concept of the EC Council

During drafting, the concept of the EC Council was introduced. This construct was needed to allow the Bylaws to be clearly drafted (and then followed!). Our group supports the introduction of that concept.

8. PICS

Apart from the grandfathering, there was an explicit provision that PICs could be part of future agreements entered and enforced by ICANN (annex 5, para 15: ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments (“PICs”), with contracted parties in service of its Mission.)

Section 1.1 d) iv) of the draft Bylaws states:

"(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements with any party in service of its Mission."

Can the lawyers confirm that it is meeting the requirement or detail the reason why PICs are not mentioned explicitly?

CCWG Response 5 April:

“This provision meets the specification, in that it permits ICANN to include terms and conditions in contracts in service of its Mission. Public Interest Specifications (PICs) are, simply put, contractual terms. Nothing precludes the inclusion of Public Interest Commitments – by that name or any other name - in Registrar Accreditation Agreements and/or Registry Agreements so long as the are consistent with the Mission.

Additional questions from the CCWG, added 8 April

9. The draft bylaws give the IRP panel the right to change rules of procedure (Section 4.3.(n)(ii)). In this respect the panel seems unconstrained, only having to publish revisions and possibly to get a consensus (not clear of whom – the COs, the EC, the panel, other?).

As I recall, the final proposal did not give the panel this right. It seems to me that the community and Board need to retain some oversight here. Annex 07, paragraph 63, indicates that rules of procedure are to be created by the community and approved by the Board.

It is true that Annex 07, paragraph 55 says that, “Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.”

But this indirect reference to setting rules does not appear to justify displacing the community-development and Board-approval rights when it comes to rules of procedure.

10. human rights, specifically an implication in Article 27.3.(c) that HR claims might be a proper subject for RR or IRP after the FOI is developed.

This implication is not in the Annex 06 bylaw text (paragraph 23), although it appears in explanatory text (paragraph 19). But both bylaw text and explanatory text say that acceptance of the FOI will depend on the same processes followed in WS1, and bylaw text makes clear that the FOI has to be approved by the Board after it follows the same process and criteria it used in WS1.

In my opinion it is a mistake to insert this implication in “real” bylaws as the issue is important as well as complex and the WS2 FOI group should have a chance to debate the merits.

11. Carve Out

As I mentioned in the call on 5 and 7 April, a careful reading of the draft Bylaws reveals that there is an intended or unintended proliferation of "GAC CARVE-OUT" in many Articles of the main Bylaws as well as in Annex D

As you all know the so-called "GAC CARVE-OUT" «was introduced at almost last calls Irrespective of the degree of consensus on the "GAC CARVE-OUT" at CCWG, Final version of Recommendations 1 &2 including /taking into account the GAC Statements as contained in its Marrakesh Communique was agreed by Chattering Organizations and subsequently by ICANN Board on March 11

In order to avoid any misinterpretation and avoid heavy drafting and also avoiding proliferation of "GAC CARVE-OUT" in many Articles of the main Bylaws as well as in Annex D to the main draft, the most easiest and accurate course of action would be:

To cut and paste indent 3 of paragraph 08 of Recommendation 1 and paragraph 74(together with its indent) of Recommendation 2 in two specific legal text under the title of "GAC CARVE-OUT"

Delete all references to "GAC CARVE-OUT" in the draft

The above suggestion precisely captures the objectives and implementation of "GAC CARVE-OUT" concept.

It is recalled that the carve out was crafted to avoid the double Bites to an apple knowing that ccNSO has and continue to have the privilege of that double bites to apple As for the GAC CARVE-OUT, the objective was merely and solely to enable the community to challenge the Board's diction on GAC consensus advise on the claim that such decision was inconsistent with ICANN bylaws including ICANN Mission and nothing else.

During the debate it was reiterated by the author of "GAC CARVE-OUT" that its occurrence probability is too low. It is surprising and even inappropriate that for a case the probability of its occurrence is too low one need a very heavily loaded provisions addressing that very low probable circumstances.

This is a safe, wise, secure and confident approach which would totally eliminate any intentional or unintentional misapplication of the concept.

It is to be noted that, the current draft with such proliferation of "GAC CARVE-OUT" most of which based on misinterpretation and unilateral expansion is totally unacceptable.

This is a very critical and delicate issue the unnecessary and unilateral proliferation of which would be detrimental to GAC and would result in another net win for private sector similar to the net win which was stated in the testimony before the sub-committee of the House and thus would end up

That GAC be loser for the second time (in addition to that imposed to it by ST18 and initial Carve out concept.

12. Mission

I have found a discrepancy between CCWG Final Report and the implementation of the draft Bylaws in the Mission section.

The Report approved by the Chartering Organisations says:

"* Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide." (paragraph 134)

The Draft Bylaws implements this as follows:

"* ICANN shall not use its contracts with registries and registrars to impose terms and conditions that exceed the scope of ICANN's Mission on services that use the Internet's unique identifiers or the content that

such services carry or provide." (Article I Section 1.1 (c))

Firstly, this draft bylaw would pick on only one means by which ICANN might seek to regulate content (through the RA or RAA contracts), and prohibits that. There is no such limitation in the CCWG Report: our Report prohibits any attempt to regulate content by ICANN, whether through the RA/RAA contracts or by any other means.

Certainly, the RA/RAA contract is the most likely means by which ICANN might seek to regulate content and services. However, if ICANN manages to come up with some other means (including means that cannot now be imagined) then a full implementation of the CCWG Report would cover that Too.

RESPONSE PROPOSED BY BB:

Malcolm is correct that proposed text is different from the Report. In the course of drafting, the CCWG attorneys pointed out that the construct (no regulation of services etc.) could create unintended consequences related to the application of antitrust law. This was viewed as particularly problematic under the current circumstances, where the supervision of the US government (which at least arguably provides some protection for ICANN) is being withdrawn.

We attempted to eliminate this problem and discussed several approaches to doing so. This approach seemed to get at the concern that was animating the CCWG in its discussions on this point, use of the Registry Agreement and Registrar Accreditation Agreement to regulate registrant conduct.

Malcolm is correct, of course, that ICANN might attempt to use some other vehicle to regulate content. But it is critical to keep in mind that the prohibition on regulation is, by nature, a "belt and suspenders" approach. Keep in mind that ICANN is prohibited from doing exceeding its Mission. See Section 1.1.(b): "ICANN shall not act outside its Mission." So no matter what other mechanism ICANN might find to attempt to regulate content, the Bylaws simply prohibit that.

We are open to other constructs, so long as they don't raise the same antitrust concerns identified by Holly and Rosemary in our discussions. At a minimum, that requires us to avoid the term "regulation" and to be as concrete as possible.

This is a clear and objective discrepancy.

Secondly, the CCWG Report expresses this limitation as an exclusion from the Mission. That was quite deliberate, and significant. We never expressed this section as a bare prohibition on some action, it was always considered to be essential that it was a Mission limitation.

RESPONSE PROPOSED BY BB:

The CCWG intended the Mission to be "enumerated" - unless authority is specifically granted as part of the Mission, ICANN does not have the authority. That is the reason the CCWG adopted the prohibition on ICANN acting outside its Mission. Everything that

is not identified as part of ICANN's Mission is specifically excluded. Perhaps this concern can be addressed by restating the prohibition as follows:

ICANN's Mission shall not include use of its contracts with registries and registrars to impose terms and conditions that exceed the scope of ICANN's Mission on services that use the Internet's unique identifiers or the content that such services carry or provide."

ALTERNATIVELY - BUT WE NEED HOLLY/ROSEMARY/ICANN LEGAL TO WEIGH IN:

ICANN's Mission shall not include the imposition of terms and conditions that exceed the scope of ICANN's Mission on services that use the Internet's unique identifiers or the content that such services carry or provide."

This aspect of the Report's proposal is not reflected in the draft bylaw at all. That is also clear discrepancy.

The significance of this is that a Mission limitation has a broader scope. Excluding regulation of content from the Mission means any action aimed at regulating content can be challenged, including actions that (if done for some legitimate purpose) would be entirely OK. By contrast, a Bylaw that merely prohibits a certain class of action is weaker, because it says it's OK for ICANN to regulate content if it can find some way of doing so within its permitted powers. That's simply not consistent with the Report approved by the Chartering Organisations. Finally, in the future there may arise some disagreement as to whether a specific activity constitutes "regulation", in particular in marginal cases. Before we adopted the Report, our lawyers advised us not to seek to tightly define this in every particular, but to allow precedent to develop as cases arise. We accepted that advice. The implementation team should therefore avoid seeking to resolve that deliberate ambiguity in favour of the narrowest possible definition of regulation: again, that's not consistent with the Report.

I therefore propose we transmit the following request to the implementation team.

"Article I Section 1.1(c) implements paragraph 134 of the CCWG Report (prohibition of regulation of content) as a prohibition use of its contracts with registries and registrars to regulate content. This does not fully implement our Report. Please ensure that ICANN is prohibited from regulating content through any mechanism, not only through registry and registrar contracts. Furthermore, please exclude express this as an exclusion from the Mission, not merely a bare prohibition on certain actions, so that activities that would otherwise be permitted to ICANN can be challenged if they are designed to achieve this prohibited purpose."

I hesitate to offer alternative wording: the lawyers may wish to come up with their own, and we should let them. But I will offer these observations and a brief suggestion.

1. I understand that the lawyers wished to avoid use of the word regulation. Fine.
2. When moving away from the word regulation, they also moved away from describing a class of activity (regulation) to a specific action (using

X contract in Y way). I think this is where they went wrong. This in itself limits the scope of the restriction.

3. Sticking as closely as possible to the text of the Report that Chartering Organisations have approved would seem advisable. So if they want to avoid the word regulation, look for some synonym.

Thus compare our Report:

"Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide."

with the implementation team's draft bylaw

"ICANN shall not use its contracts with registries and registrars to impose terms and conditions that exceed the scope of ICANN's Mission on services that use the Internet's unique identifiers or the content that such services carry or provide."

and my alternative suggestion for this Bylaw

"ICANN's Mission does not include seeking to constrain or impose requirements upon the services that use the Domain Name System, nor seeking to constrain the content that those services carry or provide".

That would follow the Report as closely as possible, preserve the restriction as a limit on ICANN's Mission as intended, and still achieve the lawyers' goal of avoiding the word "regulate".

13. 1.1(a): the "root zone" of the DNS is missing compared to the CCWG recommendation. I think this is a mistake.

I understand the reasoning for this is that ICANN has involvement in the policies in other than the root zone. I contend that this does not mean that ICANN is co-ordinating allocation or assignment in those other zones.

ICANN actually does determine, according to its own policies, what goes into the root zone.

ICANN does not determine what goes into other registries. Instead, it sometimes has agreements with others (all contracted TLDs and some ccTLDs) that specify rules for those registries. Effectively, these are conditions on ICANN's willingness to delegate from the root zone. It's true that ICANN does that using its processes, but it does not do that for all zones. It doesn't even do it for all TLDs, since ccTLDs are not subject to such policies. Therefore, it just isn't true that ICANN 'Coordinates the allocation and assignment of names in the Domain Name System ("DNS").'

I've heard an argument that claims that, since the previous versions of the bylaws did not have the limitation to the root zone, therefore this was not a limitation on ICANN. But the effort in this Mission work is exactly to arrange the Mission bylaw in accordance with ICANN's actual responsibilities. If ICANN's responsibility is only to allocate and assign names in the DNS root, then that's what ought to be in the bylaw. I do not believe that ICANN has ever actually been directly allocating or assigning names outside the DNS root, and if the claim is that ICANN does that I think we have a fairly serious disagreement.

Nothing about this Mission would prevent ICANN's role in co-ordinating

policies for those names delegated from the root, because those policies follow directly from ICANN's policy control over the root zone and its ability to extract contractual terms from operators of TLD registries in return for delegation from the root. I do not see how the text as contemplated in the CCWG's report would undermine that ability. But I do see how the text as proposed in these draft bylaws extends ICANN's responsibilities quite a lot more widely than ICANN's actual responsibilities. Therefore, I believe that the draft is not in accordance with the community consensus, and the "root zone" constraint ought to be reintroduced into the bylaw text.

BB Proposed Answer:

You are correct that the phrase "root zone" was removed to avoid disputes about whether or not ICANN is permitted to impose rules for TLDs that have an impact on second level registrations, so long as those rules are within the scope of ICANN's Mission, including the Picket Fence. We will ask the drafting attorneys to consider whether this language can be reinserted, particularly in light of the fact that the naming Mission now specifically references the Picket Fence, which, in turn, establishes that policies may include policies for allocation of registered names in a TLD, reservation of names at the second level, etc.

14. 1.1(d) is apparently the section that got added in order to deal with the CCWG worry that the various agreements already in place might not be in conformance with the clarified Mission.

I. Is it ok to have the references to external agreements in the Mission? They can change under (F). It seems strange that the terms of the Mission could effectively be modified by these external agreements. I note that the same reasoning led external agreements to be excluded from the text in earlier negotiations.

II. I have a lot of doubts about this section because some of the documents to which it refers aren't finished or else aren't yet written. It's especially not clear what to do about the possibility that the documents could end up inconsistent with one another, in which case there'll be a serious problem (which will be hard to correct, since this is a fundamental bylaw).

III. The section seems quite a lot broader than the CCWG proposal Annex 5 (at line 48) contemplated in its instructions. I am particularly worried that the strategic plan and operating plan are both explicitly included here. Especially given the clause F, which explicitly permits renewals, including the plans as permitted means that anything at all can be allowed under this section. I think this is a fatal flaw in the proposed text and in my opinion it must be fixed. Otherwise, the whole point of having the clear, narrow Mission would be vitiated by this text.

15 4.2(c)(iii)

Why is this restricted to "the resources for protocol parameters"? Why isn't it just "disputes relating to protocol parameters"? I'm quite sure the second is what's intended. No dispute of any kind involving protocol parameters is to be subject to this reconsideration process, because the IETF already has a reconsideration process for them.

Note: There's approximately the same issue in 4.3.c(iv).

16. Use of Global Internet Community

Throughout, in several places, there are references to the "global Internet community". It appears that this was to identify a class of interests that need to be represented (and it appears in older bylaws in that use). But in the current proposals, there are several places where the global Internet community needs to be consulted, to develop a process, and so on. There's even a reference [in 4.3(n)(i), for instance] to the "members" of the global Internet community; it's extremely hard to know how one would determine such membership. If this term (or some other) is to be used, I think it needs to be defined. Alternatively, where action is needed, the parties that are to act ought to be identified.

17. Section 4.2(a) Reconsideration

4.2(a) "ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff (i.e., employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors) ("Requestor")" is slightly ambiguous. The "i.e." is presumably attempting to clarify what is "Staff", but could possibly be misread to restrict the reconsideration requestors to the class under "i.e.". Perhaps, "where 'staff' means 'employees and individual."

18. Section 4.3 IRP

4.3(o)(vii) Should it also (or instead) refer to the cost shifting in (r)?

19. 22.4(b)(ii) IANA Budget

22.4(b)(ii) It isn't clear to me why this distinguishes between the IETF and IAB. The IAB is the conduit for consultations with the IETF from outside organizations. I don't really care about this (I think the duplication is harmless), but it's a little untidy. I think in the liaison language, the appointment comes from the IETF. (Which is true -- the IAB appoints the liaison, because IETF liaisons are appointed by the IAB.) You could probably drop either IAB or IETF. The former is easier to consult with, because the latter could need a consensus call to answer you. (In general, liaison appointments from

the IETF are made by the IAB.)

20. Article 4 ACCOUNTABILITY AND REVIEW

Article 4 and Appendix D Article 4 do not specify if, after a Requestor or the EC requests review or reconsideration, the decision is suspended pending resolution. This would seem to be necessary to prevent irreversible harm.

21. Article 4.3(x)(ii)(B) IRP

Article 4.3(x)(ii)(B) says “If the Board rejects an IRP decision, the EC Chairs Council may convene as soon as possible following such rejection and consider whether to authorize commencement of action in a court with jurisdiction over ICANN to enforce the IRP decision.” I had thought that anyone could commence a court action to enforce an IRP decision if the Board rejects it. However, I did not see this stated explicitly elsewhere. I believe this should be made clear in the appropriate place.

22. Article 8 – Recalling nomcom Directors

Article 8, as discussed in the chat, I do not believe that the GAC should have an EC vote on the decision to recall a NOMCOM Director because they do not vote for them in the first place. This would mirror the authority of the appointing SO/ACs to dismiss their appointed Directors.

23. Section 25.2 – Fundamental Bylaws

Section 25.2, it seems odd that the existence and composition of the ASO, ccNSO, gNSO, and ACs (Articles 9-12) should not be fundamental bylaws. I don't recall this being specifically discussed, but should the dissolution or rearrangement of the SO/ACs be a regular bylaw change?

Section 25.2(e) and (f) on page 126 of the tracked document appears to be an inadvertent paste and in need of editing. The section deals with fundamental bylaws, but the text refers to standard bylaws.

24. Annex D

Annex D Section 1.1 (b) refers to Section [] and Section 25.3(b). There are no such sections.

Annex D, Section 1.4(b)(ii) refers to the incorrect interpretation of the GAC carve-out that I sent to you on Tuesday. The threshold should not be lowered from 3 to 2 on an approval action for a Board decision based on consensus GAC advice because this would merely institutionalize the GAC's presumed supporting vote. The threshold should remain at 3 in these cases. I appreciate that this has been corrected.

Annex D, Article 3, Section 3.1(g) the GAC should not have an EC vote in removing NOMCOM directors as discussed in the chat and above in bullet 4.

Annex D, Article 4, the GAC-carve out should apply throughout the IRP and reconsideration request process if it involves a Board decision based on consensus GAC advice.