

This is the draft report from the GNSO Bylaws Implementation Drafting Team (DT), responding to a GNSO Council resolution.¹ All background and work is described at the DT wiki page.²

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."

ICANN staff worked quickly to create a table of new rights and responsibilities for GNSO. (link) 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 our 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 was eager to address 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?

¹ 29-Jun-2016 GNSO Council resolution, at <https://gns0.icann.org/en/council/resolutions#20160630-2>

² GNSO Bylaws Implementation Drafting Team Home, at <https://community.icann.org/pages/viewpage.action?pageId=61608138>

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 GNSO Council was created in the Bylaws “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 there is no direct prohibition of Council assuming such duties. For example, the Bylaws state, “The procedures for selecting the Chair and any other officers are contained in the GNSO Operating Procedures”³. 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:⁴

- 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);

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

Some DT members noted that it was not sustainable for Council to continue taking positions on non-policy matters, since the ICANN Bylaws designate Council as “responsible for managing the policy development process of the GNSO”. This could imply that Council is limited to policy matters and that GNSO stakeholder groups and constituencies should handle other matters. 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.

Since this DT is focused on new bylaws powers for GNSO, the 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”

³ICANN Bylaws, Section 11.3(g)

⁴ ICANN Bylaws, Section 11.2

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

DT member Steve Metalitz 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-2016 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.

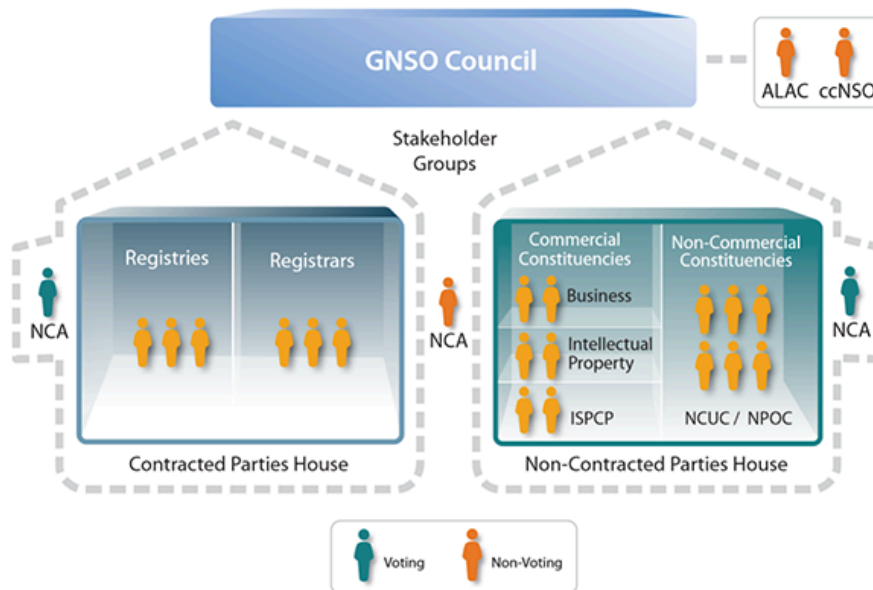
Steve Metalitz noted that each stakeholder group and constituency has an elected leadership that is accountable to its members, and those leaders could convene as needed to collectively make decisions reflecting views of the GNSO stakeholder groups and constituencies.

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. Steve Metalitz 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.** While 1/3 is a significant minority whose views could be reflected in our final report, 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 not 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 was given by Ed Morris, citing 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.

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 does not have significant support, so the DT chair moved on to discuss voting thresholds assuming some level of majority in each house of Council, as described next.

Council voting thresholds to recommend for each of the three GNSO decision categories.

The table below arrays the 3 decision types against several potential Council voting thresholds, including thresholds from current ICANN bylaws for the GNSO Council.

Alternative voting thresholds , assuming that Council speaks for GNSO, and assuming that at least a majority required in each House	GNSO Decisions per new Accountability Bylaws		
	Nominations for GNSO representatives on EC, CSC, IANA Functions Review Team, and other review teams in new Bylaws	Decisions made by GNSO to initiate or respond to Empowered Community petitions, instruct GNSO EC Rep, and initiate investigation (22.8)	Decisions made by GNSO on its own. e.g., request document inspection (Bylaws 22.7(a) and (e))
Any Constituency or Stakeholder Group			All 9 DT members support this.
Same threshold as required to initiate an Issues Report (1/4 of each House or majority of one House)			7 DT members also support allowing Council to request documents, using this threshold.
Same threshold as required to initiate PDP (1/3 of each House or 2/3 of one House)			
Simple majority of each House	4 DT members prefer this threshold. 4 DT members suggest a higher threshold for selecting the EC Rep.	5 DT members prefer this threshold.	
GNSO Supermajority (2/3 of each House, or ¾ of one House and majority of other House)		2 DT members from Contract Party House prefer this threshold.	

Preliminary Recommendations of this Drafting Team

On its 29-Sep call, the DT polled members to determine preliminary recommendations, pending DT approval of this report.

Note that 2 DT members (IPC and ISPCP) abstained from indicating approval of these council voting thresholds. IPC abstained because does not support council exercising any of the new powers by voting within the present House-bound structure. ISPCP abstained because there are ongoing discussions whether the council should exercise the EC power at all.

Decisions made by GNSO on its own. e.g., request document inspection (Bylaws 22.7(a) and (e))

The DT unanimously recommends that any GNSO Stakeholder Group or Constituency 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, the DT has consensus (7 members) to empower GNSO Council to request ICANN document inspection per Bylaws 22.7(a) and (e).

Nominations for GNSO representatives on EC, CSC, IANA Functions Review Team, and other review teams in new Bylaws.

The DT did not reach a consensus or majority view on the threshold for nominations to roles created in the new Bylaws. 4 DT members believe that a **majority of each House** is appropriate to approve nominations. 4 DT members said that a higher threshold should be required to approve nominations for Empowered Community roles.

If given an additional two weeks, the DT believes it could recommend specific (and higher) thresholds for some of the nominations to new positions.

Decisions made by GNSO to initiate or respond to Empowered Community petitions, instruct GNSO EC Rep, and initiate investigations (22.8)

A majority (5 of 9) of DT members believe that a **majority of each House** is the appropriate to make EC decisions. 2 DT members from Contract Party House prefer that a GNSO Supermajority threshold. Most DT members believe that higher thresholds might be appropriate for some EC decisions, and if given an additional two weeks, the DT believes it could recommend specific thresholds for some EC decisions.

[text below was added by Steve Metalitz on 26-Sep. On 29-Sep the DT chair attempted to reflect these considerations in the discussion on question 1, at page 3 above. If my proposed text at page 3 is not supported by the DT, Steve Metalitz would be invited to submit a Minority Report covering that discussion]

If GNSO stakeholders groups and constituencies were to exercise the new powers

Although, as noted above, there is no formal institutional arrangement for GNSO stakeholder groups and constituencies to act collectively, informally this has occurred on a number of occasions. As a notable example, a joint statement presented in an ICANN Public Forum on June 26, 2014 expressed “the views of the GNSO community” and of “the entire GNSO” that the proposed transition of the IANA functions needed to be accompanied by enhancements to ICANN’s accountability mechanisms.

Each stakeholder group and constituency has an elected leadership, accountable to the members of that stakeholder group or constituency; and a committee consisting of the chairs/presidents of each such entity, or alternatively of one member of each SG or C’s leadership team as designated by the SG or C in question, could be constituted relatively easily. Since the exercise of the new GNSO powers is likely to be episodic, as contrasted with the ongoing and continuous task of managing the policy development processes of the GNSO, such a committee could be convened as needed to exercise those powers.

Who Should Decide

At several points in the DT’s discussions of the issues, it was pointed out that any proposal that recommends the exercise of the new powers by any entity other than the GNSO Council, or that recommends that any GNSO council participant’s control over such exercise be less than the control such participant now exercises over policy development management matters falling within the current remit of the GNSO Council (e.g., see above for discussion re role of NCA’s), may well be viewed negatively by some sitting GNSO council members, even if it does not in any way diminish the council’s existing remit under the bylaws. Some DT members specifically cited this point in opposition to certain proposals under discussion, arguing that such a recommendation “could never be approved” by the GNSO Council. It was also argued within the DT that failure to achieve consensus on who should exercise the new powers, and how, could lead to GNSO council assuming these powers and employing the “default threshold” applicable to “other voting action” by the Council under Section 11.3(i) of the current bylaws.

Given these circumstances, and the potential that the GNSO council could be viewed as an interested party in terms of the possible expansion of its powers under the new by-laws, the Drafting Team recommends that this report be forwarded by the GNSO council to the constituencies and stakeholder groups making up the GNSO, and that these entities be asked to express, either individually or (preferably) collectively, their views and recommendations on the issues of who should speak for the GNSO with regard to the new powers, and how decisions should be arrived at.