Pending Questions for Bylaws Coordination Group
To be Revised on 12 April 2016

7. The CCWG proposal was silent on how the Interim Board is to consult with the community to make major decisions. We have included a suggestion that the Interim Board shall "(a) consult with the chairs of the Supporting Organizations and Advisory Committees before making major decisions (as if such action were a Rejection Action [as defined in Annex D]) and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section [_] of Annex D)" prior to taking the action. Are these the right processes?

CCWG Response:
Agreed with Option a)

REQUESTED FURTHER CLARIFICATION:

The Proposal, in Annex 4, Paragraph 98, provides as follows:

The ICANN Bylaws will state that, except in circumstances of where urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.

Our request for clarification was not intended to present a choice between two options, but rather to seek the CCWG's confirmation that the Interim Board's consultation with SO and AC leadership would follow the same procedures as a Rejection Action, and that, similarly, the Community Forum consultation would follow the same procedures as a Rejection Action Community Forum.

Based on the response to our original Question 7, we understand that the CCWG agrees that procedures for a Rejection Action are appropriate for Interim Board consultation with SO and AC leadership. We would like to confirm that the CCWG wishes to modify the Proposal by eliminating the Interim Board community forum consultation requirement.

29a. On NomCom Board member removals, Annex D, Section 3.1(a) of the draft Bylaws provides for the possibility that a Nominating Committee Director Removal Petition could cite a GAC Consensus Board Resolution as part of the rationale for removal. (See also 3.1(c)(i)(E) and 3.1(g)(i and ii) for implementation of the resulting GAC carve-out in that case.) After discussion with the CCWG and among counsel, we conclude that this is beyond the scope of the GAC carve-out envisioned in the Proposal. We therefore recommend that this possibility and the related implementation of the GAC carve-out be deleted, so that GAC would be entitled to fully engage as a Decisional Participant in decisions by the EC regarding NomCom Board member removals. While a rationale must be stated in the Nominating Committee Director Removal Petition and that rationale might refer to votes of the director to follow GAC consensus advice, the GAC carve-out should not apply, since removal of a single director does not constitute a challenge to the Board's implementation of GAC consensus advice. We would like the CCWG to confirm this approach.

29b. As discussed with the CCWG and provided in the Proposal, we have generally adhered to the principle in the draft Bylaws that, within the EC, the Decisional Participants who were responsible for nominating a director are also responsible for directing the EC as to that director's removal. This is true for removal of directors nominated by the ASO, the ccNSO, the GNSO, and the ALAC. We considered whether, on the same principle, since the GAC is the only Decisional Participant that does not have a voting delegate on the NomCom, it would be appropriate to exclude GAC as a Decisional Participant from decisions to remove directors nominated by the NomCom. After discussion among counsel, however, we conclude that, in lieu of the NomCom, the Proposal gives the EC the power to remove any NomCom director without reference to excluding Decisional Participants who do not hold the right to appoint voting delegates to the NomCom, and the principle cited above is insufficient to require any deviation from the Proposal on this point. We therefore recommend that all Decisional Participants in the EC participate in any EC decision to remove a NomCom-nominated director. We would like the CCWG to confirm this approach.

Additional Questions

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.

CCWG Response 12 April:

12. (Malcolm Hutty) 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.

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.

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 the 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".

CCWG Response 11 April:

- BBurr has suggested alternate options to lawyers for consideration.

14. (Andrew Sullivan) 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.

CCWG Response 12 April:

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.

CCWG Response 11 April: (from notes)

- Should use Global Multistakeholder Community consistently vs Global Internet Community.
- There is no issue with consulting the Global Multistakeholder Community in a process that is open to everyone such as a public consultation. If this is not the case those that are supposed to participate in the process should be named.