

Recommendation #12 : Enshrine GAC's commitment to consensus

CCWG-Accountability Recommendations (inc. objectives)

Stress test 18 is related to a scenario where ICANN's Government Advisory Committee (GAC) would amend their operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that ICANN 's board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if GAC lowered its decision threshold while also participating in the new community mechanism, some stakeholders believe this inappropriately increase government influence over ICANN.

The goal of the recommendation is also to reflect the principles, derived from the GAC Dublin communiqué, and agreed upon by the CCWG Accountability when investigating further on Stress Test 18 :

- the GAC may define its own rules
- the GAC is committed to working by consensus
- the GAC will not work on the basis of simple majority for GAC Advice
- the Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution
- GAC advice needs to provide clear direction and to provide rationale

ICANN BYLAWS

Article XI Advisory Committees

Section 1. GENERAL

Insert a mention :

“the Advisory Committee will make every effort to ensure that the advice provided is clear and is supported by a rationale”.

Section 2, Item 1. referring to the GAC

*j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **With respect to Governmental Advisory Committee advice that is supported by consensus**, the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

Why CCWG-Accountability is Recommending This (inc. CWG-Stewardship requirements as a subsection; Rationale becomes this section)

- 1 Stress Test 18 was among the plausible scenarios that could test how and whether the ICANN community could challenge actions taken by the ICANN corporation. The rationale to develop this stress test involves two factors:
- 2 First, ICANN community members were aware that some GAC members had expressed a desire to change the GAC's historical method of using consensus for its decision-making, where “consensus is understood to mean the practice of adopting decisions by general

agreement in the absence of any formal objection”. Moreover, it would take only a simple majority of GAC members to change its decision-making methods to a lesser standard, such as majority voting.

- 3 Second, the CCWG realized that ICANN’s present bylaws obligate the board to seek “a mutually acceptable solution” if it decided not to follow GAC advice. That level of required deference is unique to the GAC and not required for advice from other AC and SOs. More important, the board’s obligation to seek a mutually acceptable solution applies to all GAC advice, even if that advice were not supported by GAC consensus, and even if that advice were opposed by a significant minority of GAC members.
- 4 For these reasons, CCWG added Stress Test 18 to the draft proposal, and the stress test working party concluded that existing accountability measures were not adequate to let the community hold the ICANN board accountable for its actions if the board were obliged to seek a negotiated solution with the GAC.

5	Stress Test #18: Governments in ICANN’s Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board	
6	Consequence(s): Under current Bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve GAC advice.	
	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
7	Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for GAC advice.	10 One proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where GAC advice was supported by GAC consensus.
8	This is required for any GAC advice, not just for GAC consensus advice.	
9	Today, GAC adopts formal advice according to its Operating Principle 47: <i>“consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”</i> But the GAC may at any time change its procedures to use majority voting instead of its present consensus.	11 The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require trying to find a mutually acceptable solution only on advice that had GAC consensus.
		12 GAC can still give ICANN advice at any time, with or without consensus.

- 13 In order to address Stress Test 18, CCWG proposed an amendment to ICANN bylaws regarding the board’s obligations with respect to GAC advice. The amendment would preserve the requirement for ICANN’s board to seek a mutually acceptable solution, but only for GAC advice that was supported by consensus among GAC members.
- 14 The rationale for proposing this bylaws amendment in response to Stress Test 18 is two-fold.

- 15 First, CCWG wants to reserve ICANN Board's obligation to negotiate with the GAC for only that advice which is supported by a consensus of governments. GAC advice that is opposed by a significant minority of governments should not trigger the board's obligation to enter bi-lateral negotiations with the GAC on a matter that affects the global Internet community. A negotiation between ICANN board and GAC should be reserved for resolving differences between ICANN and governments – not to resolve differences among governments themselves.
- 16 Second, the proposed bylaws change would provide a strong incentive for the GAC to continue seeking consensus for the advice it provides to ICANN, which is the practice presently used by the GAC. While the GAC could at any time change its decision-making methods, this bylaws change would continue to elevate the influence of GAC advice that was supported by consensus of GAC members. Similar incentives for consensus policy and advice are already present in the ICANN bylaws, which require supermajority support for policy recommendations coming from GNSO and ccNSO.
- 17 The proposed Bylaws change for Stress Test 18 does not interfere with the GAC's method of decision-making. If the GAC decided to adopt advice by majority voting or methods other than today's consensus process, ICANN would still be obligated to give GAC advice due consideration: "advice shall be duly taken into account, both in the formulation and adoption of policies."
- 18 Moreover, ICANN would still have to explain why GAC advice was not followed: "In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice."
- 19 The only effect of this Bylaws change is to limit the kind of advice where ICANN is obligated to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution". That delicate and sometimes difficult consultation requirement would only apply for GAC advice that was approved by consensus.
- 20 The GAC currently uses the following consensus rule for its decisions: "consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection." The proposed bylaws change above recognizes that GAC may, at its discretion, amend its Operating Principle 47 regarding "Provision of Advice to the ICANN Board."

How does this meet the CWG-Stewardship Requirements (bullet points)

This proposal is not directly related to CWG-Stewardship requirements.

How does this address NTIA Criteria (bullet points)

- 21 NTIA gave specific requirements for this transition, including advice that Stress Test 18 is a direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. The proposed Bylaws change is therefore an important part of the community's proposal.
- 22 By ensuring that the provision of GAC advice remains a consensus driven decision the proposal provides a safeguard against the possibility of a large group of Government trying to overly influence the Icann Board.

- 23 At the same time, the proposal would enable the GAC, if it ever came to a point where a single Government would abuse of its ability to formally object to veto public policy advice, to amend its operating principles to address this contingency. The principles adopted would however be required to fit with the consensus requirement stated in the Bylaws.

Changes Made Since the Second Draft Report (inc. how the revised recommendations address community concerns from draft 2, (bullet points))

The 2nd draft recommendations drew a significant number of comments, with a majority in support of the proposed bylaws change, and with objections from several Governments. After the close of the 2nd round of public comments, other Governments expressed their concerns regarding the proposed bylaw change.

The CCWG also received communication from the GAC after its Dublin meeting, as part of its communiqué, which stated :

“The discussions on Stress Test 18 have helped the GAC to have a better understanding of the different views on the issue. In assessing the different rationales presented so far related to Stress Test 18, the GAC considered:

- - *The need that each and every Advisory Committee ensures that the advice provided is clear and reflects the consensus view of the Committee;*
 - *The need that each and every Advisory Committee should preserve its own autonomy in its definition of consensus;*
 - *The value the Board attributes to receiving consensus advice;*
 - *The recommendation of the BGRI WG, as reiterated by the ATRT2, to set the threshold for the ICANN Board to reject GAC advice to a 2/3 majority voting, consistent with the threshold established for rejection of ccNSO and GNSO PDP recommendations.”*

Following the 2nd public comment period, and the input received from the GAC communiqué in Dublin¹ the CCWG Accountability organized a specific subgroup to

- Assess existing options, areas of agreement / disagreement
- Provide the full CCWG with brief summary of views and options
- Report to the CCWG so that consensus can be assessed around how to respond to ST18, which identified the risk that GAC could change its decision-making rule and thereby require ICANN board to arbitrate among sovereign governments

Within this subgroup the following conclusions were agreed upon :

- the GAC may define its own rules
- working by consensus within the GAC
- Not working on the basis of simple majority for GAC Advice
- the Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution
- GAC advice needs to provide clear direction and to provide rationale

Alternative options considered and rejected

¹ <https://www.icann.org/en/system/files/correspondence/gac-to-board-21oct15-en.pdf>

Within this group, several options were introduced and considered.

Brazil introduced a proposal with the following bylaw changes ;

- [...] Where the ICANN Board is obliged to pay due deference to advice from Advisory Committees and where that advice, if not followed, requires finding mutually agreed solutions for implementation of that advice, the Advisory Committee will make every effort to ensure that the advice provided is clear and reflects the consensus view of the committee. In this context, each Advisory Committee has the right to determine its particular definition of consensus.” [...]
- [...] Any GAC Advice approved by a GAC consensus may only be rejected by a vote of more than two-thirds (2/3) of the Board. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. [...]

After discussions within the subgroup, and concerns raised by some stakeholders that the Brazil proposal would create stronger obligations for the Ican Board while not providing enough guarantees that the GAC decision making would remain strongly focused on consensus, a proposal, based on initial drafting by Denmark, and enhanced by a group of European GAC members, was considered.

It was drafted as follows :

“ The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.

In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.

Any GAC advice approved by **a full GAC consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of two-thirds (2/3) of the Board.**

Any advice approved by the GAC by consensus with objections only from a very small minority of GAC members, may be rejected by a majority vote of the Board.

In both instances, the Governmental Advisory Committee and the ICANN Board will try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”

Several stakeholders supported an amendment to this proposal to remove the words “Any advice approved by the GAC by consensus with objections only from a very small minority of GAC members, may be rejected by a majority vote of the Board.” It was met with support as well as resistance, with the argument that this would not address the concerns expressed during the 2nd public comment about the lack of flexibility regarding GAC decision making procedures.

Finally, as some participants remained concerns about the introduction of the 2/3 decision making threshold for the Board, a compromise proposal was introduced as such :

“j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.

In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.

Governmental Advisory Committee advice **which enjoys broad support of Governmental Advisory Committee members in the absence of significant objection** may be rejected by a majority vote of the Board.

In this case, the Governmental Advisory Committee and the ICANN Board will try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution”.

This final proposal was submitted to the CCWG Accountability on November 24. After thorough discussion, while some stakeholders expressed their willingness to accept the proposal as a compromise, significant objections remained.

The co-chairs assessed that the level of support was insufficient to call rough consensus on this proposal.