

DelBianco's 10-Oct proposal for updated description of Stress Test 18, including rationale requested by GAC reps:

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:

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.

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.

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.

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.

The rationale for proposing this bylaws amendment in response to Stress Test 18 is two-fold.

First, CCWG wants to reserve ICANN's 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.

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.

The rationale above is meant to explain why Stress Test 18 was developed, and to explain why CCWG proposes a bylaws amendment to preserve ICANN board's obligation to seek a mutually acceptable solution when GAC advice is supported by consensus.

Stress Test 18 description from 2<sup>nd</sup> draft proposal, (pages 84-86):

- . 609 Stress Test 18 addresses ICANN's response to GAC advice in the context of NTIA's statement regarding the transition: "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution". This Stress Test was applied to existing and proposed accountability measures, as seen below:

[table]

- . 618 The CCWG-Accountability proposes a response to Stress Test 18 to amend the ICANN Bylaws such that only consensus advice would trigger the obligation to try to find a mutually acceptable solution. The proposal is to amend ICANN Bylaws, Article XI Section 2 clause j as seen below. (Addition is bold and underlined) Clause k is also shown for completeness but is not being amended.
- . 619 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.
- . 620 k: If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.
- . 621 Note that 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."
- . 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."
- . 623 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.
- . 624 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."
- . 625 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.
- . 626 It is noted that GAC Representatives are continuing to discuss the proposal.