

Annex 11 – Recommendation #11: Board Obligations with Regards to Governmental Advisory Committee Advice (Stress Test 18)

1. Summary

- Currently, Governmental Advisory Committee advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:
 - 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. 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.
- Stress test 18 considers a scenario where ICANN's Governmental Advisory Committee would amend their operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects Governmental Advisory Committee advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the Governmental Advisory Committee advice on public policy matters. In addition, if the Governmental Advisory Committee lowered its decision threshold while also participating in the new Empowered Community, some stakeholders believe that this could increase government influence over ICANN.
- In order to mitigate these concerns the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to Governmental Advisory Committee advice, as described in the following Detailed Recommendations.

2. CCWG-Accountability Recommendations

- 1 The CCCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2:
 - 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. Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee 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 of the Board, and 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.

- 2 The Governmental Advisory Committee has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the Board for which the Governmental Advisory Committee seeks to receive special consideration, the Governmental Advisory Committee has the obligation to confirm the lack of any formal objection.
- 3 Notes:
 - Insert a mention for all Advisory Committees: “The Advisory Committee will make every effort to ensure that the advice provided is clear and supported by a rationale.”
 - The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental/Standard Bylaws)

3. Detailed Explanation of Recommendations

4 Background

- 5 Stress test 18 is related to a scenario where ICANN’s Governmental Advisory Committee 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 Governmental Advisory Committee advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the Governmental Advisory Committee advice. In addition, if the Governmental Advisory Committee lowered its decision threshold while also participating in the new community mechanism, some stakeholders believe this inappropriately increase government influence over ICANN.
- 6 The goal of the recommendation is also to reflect the principles, derived from the Governmental Advisory Committee Dublin communiqué, and agreed upon by the CCWG-Accountability when investigating further on Stress Test 18:
 - The Governmental Advisory Committee may define its own rules
 - The Governmental Advisory Committee is committed to working by consensus

- The Governmental Advisory Committee will not work on the basis of simple majority for Governmental Advisory Committee advice
- The Board has the ability to disagree with Governmental Advisory Committee advice, after trying to find a mutually acceptable solution
- Governmental Advisory Committee advice needs to provide clear direction and to provide rationale

Process and Considerations Leading Up to the Recommendation

7 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 second round of public comments, other governments expressed their concerns regarding the proposed Bylaw change.

8 The CCWG-Accountability also received communication from the Governmental Advisory Committee after its Dublin meeting, as part of its communiqué, which stated:

“The discussions on Stress Test 18 have helped the Governmental Advisory Committee 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 Governmental Advisory Committee 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 Board-GAC Recommendation Implementation Working Group, as reiterated by the Accountability and Transparency Review Team 2, to set the threshold for the ICANN Board to reject Governmental Advisory Committee advice to a two-thirds majority voting, consistent with the threshold established for rejection of Country Code Names Supporting Organization and Generic Names Supporting Organization Policy Development Process recommendations.”

9 Following the 2nd public comment period, and the input received from the Governmental Advisory Committee communiqué in Dublin the CCWG-Accountability organized a specific subgroup to:

- Assess existing options, areas of agreement / disagreement
- Provide the full CCWG-Accountability with brief summary of views and options
- Report to the CCWG-Accountability so that consensus can be assessed around how to respond to Stress Test #18, which identified the risk that Governmental Advisory Committee could change its decision-making rule and thereby require ICANN Board to arbitrate among sovereign governments

10 Within this subgroup the following conclusions were agreed upon:

- The Governmental Advisory Committee may define its own rules

- Working by consensus within the Governmental Advisory Committee
- Not working on the basis of simple majority for Governmental Advisory Committee Advice
- The Board has the ability to disagree with Governmental Advisory Committee advice, after trying to find a mutually acceptable solution
- Governmental Advisory Committee advice needs to provide clear direction and to provide rationale

11 **ALTERNATIVE OPTIONS CONSIDERED AND REJECTED**

12 Within this group, several options were introduced and considered.

13 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 Governmental Advisory Committee Advice approved by a Governmental Advisory Committee 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. [...]

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

“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 Governmental Advisory Committee advice approved by a **full Governmental Advisory Committee 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 of the Board.***

Any advice approved by the Governmental Advisory Committee by consensus with objections only from a very small minority of Governmental Advisory Committee 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.”

- 15 Several stakeholders supported an amendment to this proposal to remove the words “Any advice approved by the Governmental Advisory Committee by consensus with objections only from a very small minority of Governmental Advisory Committee members, may be rejected by a majority vote of the ICANN Board.” It was met with support as well as resistance, with the argument that this would not address the concerns expressed during the second public comment about the lack of flexibility regarding Governmental Advisory Committee decision-making procedures.
- 16 As some participants remained concerns about the introduction of the two-thirds decision-making threshold for the ICANN 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”.*
- 17 This compromise 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.
- 18 When discussing the way forward within the CCWG-Accountability on November 26, the group took stock of the past discussions and noted the [statement by Larry Strickling of NTIA](#) from November 25 about ST18¹. A final proposal was introduced jointly by Denmark and Keith Drazek (ICG Liaison). The proposal was confirmed in the absence of any objection.

19 **The Stress Test which encompasses this is now:**

20	Stress Test #18: Governments in ICANN’s Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board	
21	Consequence(s): Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory Committee advice.	
	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES

<p>22 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>23 Today, Governmental Advisory Committee 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></p> <p>24 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.</p> <p>25 The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.</p>	<p>26 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where Governmental Advisory Committee advice was supported by full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</p> <p>27 The proposed accountability measure recognizes that the decision not to follow consensus advice would require a 2/3 majority of the ICANN Board.</p> <p>28 Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.</p> <p>29 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the Governmental Advisory Committee could specify how objections are raised and considered.</p>
---	---

30 **Why is the CCWG-Accountability recommending this?**

- 31 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:
- 32 First, ICANN community members were aware that some Governmental Advisory Committee members had expressed a desire to change the Governmental Advisory Committee’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 Governmental Advisory Committee members to change its decision-making methods to a lesser standard.
- 33 Second, the CCWG-Accountability realized that ICANN’s present Bylaws obligate the ICANN Board to try to find “a mutually acceptable solution” if it decided not to follow Governmental Advisory Committee advice. That level of required deference is unique to the Governmental Advisory Committee and not required for advice from other Supporting Organizations and Advisory Committees. Importantly, the ICANN Board’s obligation to seek a mutually acceptable solution applies to all Governmental Advisory Committee advice, even if that advice were not supported by Governmental Advisory Committee consensus or was opposed by a significant minority of Governmental Advisory Committee members.
- 34 For these reasons, CCWG-Accountability 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 Governmental Advisory Committee.

- 35 In order to address Stress Test 18, CCWG-Accountability proposed an amendment to ICANN Bylaws regarding the ICANN Board's obligations with respect to Governmental Advisory Committee advice. The amendment would preserve the requirement for the ICANN Board to seek a mutually acceptable solution, but only for Governmental Advisory Committee advice that was supported by consensus among Governmental Advisory Committee members.
- 36 The Governmental Advisory Committee advice that is opposed by a significant minority of governments should not trigger the ICANN Board's obligation to enter bi-lateral negotiations with the Governmental Advisory Committee on a matter that affects the global Internet community. A negotiation between the ICANN Board and the Governmental Advisory Committee should be mandatory only for resolving differences between ICANN and governments – not to resolve differences among governments themselves.
- 37 As a corollary to the importance of consensus Governmental Advisory Committee advice, the proposal includes a requirement that the Board would need a two-thirds majority to decide not to follow the consensus Governmental Advisory Committee advice.
- 38 To avoid any ambiguity, when transmitting consensus advice to the ICANN Board for which the Governmental Advisory Committee seeks to receive special consideration, the Governmental Advisory Committee has the obligation to confirm the lack of any formal objection among Governmental Advisory Committee members.
- 39 The proposed Bylaws change is aligned with the practice presently used by the Governmental Advisory Committee, which 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.”
- 40 The proposed Bylaws change recognizes that the Governmental Advisory Committee may, at its discretion, amend its [Operating Principle 47](#) regarding “Provision of Advice to the ICANN Board.” Similar rules for consensus policy and advice are already present in the ICANN Bylaws, which require supermajority support for policy recommendations coming from Generic Names Supporting Organization and Country Code Names Supporting Organization.
- 41 The proposed Bylaws change for Stress Test 18 does not interfere with the Governmental Advisory Committee's method of decision-making. The Governmental Advisory Committee has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection).
- 42 If the Governmental Advisory Committee decided to adopt advice by methods other than a consensus process, ICANN would still be obligated to give Governmental Advisory Committee advice due consideration: “advice shall be duly taken into account, both in the formulation and adoption of policies.”
- 43 Moreover, ICANN would still have to explain why it chose not to follow Governmental Advisory Committee advice: “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.”
- 44 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 Governmental Advisory Committee advice that was approved by consensus among Governmental Advisory Committee members.

4. Changes from the ‘Second Draft Proposal on Work Stream 1 Recommendations’

45 Second Draft Proposal version of Stress Test 18

46 Stress Test #18: Governments in ICANN’s Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board.	
47 Consequence(s): Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice is not supported by consensus. A majority of governments, for example, could thereby approve Governmental Advisory Committee advice that restricted free expression.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>48 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>49 This is required for any Governmental Advisory Committee advice, not just for Governmental Advisory Committee consensus advice.</p> <p>50 Today, Governmental Advisory Committee adopts formal advice according to its Operating Principle 47: “consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.” But the Governmental Advisory Committee may at any time change its procedures to use majority voting instead of its present consensus.</p>	<p>51 One proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where Governmental Advisory Committee advice was supported by Governmental Advisory Committee consensus.</p> <p>52 The Governmental Advisory Committee could change its Operating Principle 47 to use majority voting for formal Governmental Advisory Committee advice, but ICANN bylaws would require trying to find a mutually acceptable solution only on advice that had Governmental Advisory Committee consensus.</p> <p>53 GAC can still give ICANN advice at any time, with or without consensus.</p>

54 Current Draft Proposal version of Stress Test 18

55 Stress Test #18: Governments in ICANN’s Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board
56 Consequence(s): Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory

Committee advice.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>57 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>58 Today, Governmental Advisory Committee 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></p> <p>59 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.</p> <p>60 The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.</p>	<p>The 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 full GAC consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</p> <p>The proposed accountability measure recognizes that the decision not to follow consensus advice would require a 2/3 majority of the ICANN Board.</p> <p>GAC can still give ICANN advice at any time, with or without full consensus.</p> <p>61 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the GAC could specify how objections are raised and considered</p>

5. Stress Tests Related to this Recommendation

- Stress Test 18: Governments in ICANN's Governmental Advisory Committee amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's Board

6. How does this meet the CWG-Stewardship Requirements?

- N/A

7. How does this address NTIA Criteria?

- 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.
-
- By ensuring that the provision of Governmental Advisory Committee 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.
-
- At the same time, the proposal would enable the Governmental Advisory Committee, 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.
-