

Annex 11 - Recommendation #11: Enshrine the Governmental Advisory Committee's Commitment to Consensus (Stress Test 18)

1. Summary

- Currently GAC 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 Government Advisory Committee (GAC) 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 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 on public policy matters. In addition, if the GAC 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 CWG-Accountability is recommending changes be made to the ICANN Bylaws relating to the GAC as described in the following Detailed Recommendations.

2. CCWG-Accountability Recommendations

- 1 The CCWG-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 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, 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 GAC 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 GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- 3 Notes:
 - Insert the mention: “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 Government 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 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 Government Advisory Committee advice. In addition, if the Government 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 Government Advisory Committee Dublin communiqué, and agreed upon by the CCWG-Accountability when investigating further on Stress Test 18:
 - The Government Advisory Committee may define its own rules
 - The Government Advisory Committee is committed to working by consensus
 - The Government Advisory Committee will not work on the basis of simple majority for GAC Advice
 - The Board has the ability to disagree with Government Advisory Committee advice, after trying to find a mutually acceptable solution

- Government 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 2nd round of public comments, other Governments expressed their concerns regarding the proposed bylaw change.
- 8 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.”
- 9 Following the 2nd public comment period, and the input received from the Government 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 Government 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 Government Advisory Committee may define its own rules
 - Working by consensus within the Government Advisory Committee
 - Not working on the basis of simple majority for Government Advisory Committee Advice
 - The Board has the ability to disagree with Government Advisory Committee advice, after trying to find a mutually acceptable solution
 - Government 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 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. [...]

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 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.

15 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.”

16 Several stakeholders supported an amendment to this proposal to remove the words “Any advice approved by the Government Advisory Committee 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 Government Advisory Committee decision-making procedures.

- 17 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”.

- 18 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.
- 19 When discussing the way forward within the CCWG on November 26, the group took stock of the past discussions and noted the NTIA statement 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.

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

21	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	
22	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
23	Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable	27 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item

¹ <http://mm.icann.org/pipermail/accountability-cross-community/2015-November/008502.html>

<p>solution for GAC advice.</p> <p>24 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></p> <p>25 The GAC may at any time change its procedures instead of its present consensus rule.</p> <p>26 The requirement to find a mutually acceptable solution in the current Bylaws would then apply, not just for GAC consensus advice.</p>	<p>1j) to require trying to find a mutually acceptable solution only where GAC advice was supported by GAC consensus.</p> <p>28 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>29 GAC can still give ICANN advice at any time, with or without consensus, and the Board would have to decide whether to engage into a similar process or not.</p> <p>30 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 (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection).</p>
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31 **Why is the CCWG-Accountability recommending this?**

- 32 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:
- 33 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.
- 34 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 Government Advisory Committee consensus, and even if that advice were opposed by a significant minority of Government Advisory Committee members.
- 35 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 Government Advisory Committee.
- 36 In order to address Stress Test 18, CCWG proposed an amendment to ICANN Bylaws regarding the board’s obligations with respect to Government Advisory Committee advice. The amendment would preserve the requirement for ICANN’s board to seek a mutually acceptable solution, but only for Government Advisory Committee advice that was supported by consensus among Government Advisory Committee members.
- 37 The rationale for proposing this bylaws amendment in response to Stress Test 18 is twofold.

- 38 First, CCWG wants to reserve ICANN Board's obligation to negotiate with the Government Advisory Committee for only that advice which is supported by a consensus of governments. Government Advisory Committee advice that is opposed by a significant minority of governments should not trigger the board's obligation to enter bi-lateral negotiations with the Government Advisory Committee on a matter that affects the global Internet community. A negotiation between ICANN Board and Government Advisory Committee should be reserved for resolving differences between ICANN and governments – not to resolve differences among governments themselves.
- 39 As a corollary to the importance of consensus advice, the proposal includes a requirement that the Board decision that would decide not to follow the consensus advice be supported by a supermajority of 2/3 in the ICANN Board.
- 40 To avoid any ambiguity, when transmitting consensus advice to the Board for which the Government Advisory Committee seeks to receive special consideration, the Government Advisory Committee has the obligation to confirm the lack of any formal objection.
- 41 The proposed bylaws change is aligned with the practice presently used by the Government Advisory Committee. Similar rules for consensus policy and advice are already present in the ICANN Bylaws, which require supermajority support for policy recommendations coming from GNSO and ccNSO.
- 42 The proposed Bylaws change for Stress Test 18 does not interfere with the Government Advisory Committee's method of decision-making. The Government 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).
- 43 In addition, if the Government Advisory Committee decided to adopt advice by methods other than a consensus process, ICANN would still be obligated to give Government Advisory Committee advice due consideration: "advice shall be duly taken into account, both in the formulation and adoption of policies."
- 44 Moreover, ICANN would still have to explain why Government Advisory Committee 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."
- 45 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 Government Advisory Committee advice that was approved by consensus.
- 46 The Government Advisory Committee 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 Government Advisory Committee may, at its discretion, amend its Operating Principle 47 regarding "Provision of Advice to the ICANN Board."

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

- 47 Second draft proposal version of Stress Test 18:

48	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.
49	Consequence(s): Under current Bylaws, ICANN must consider and respond to GAC advice, even if that advice is not supported by consensus. A majority of governments, for example, could thereby approve GAC advice that restricted free expression.
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
50	53
Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for GAC advice.	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.
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This is required for any GAC advice, not just for GAC consensus advice.	
52	54
Today, GAC 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 GAC may at any time change its procedures to use majority voting instead of its present consensus.	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.
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	GAC can still give ICANN advice at any time, with or without consensus.

56 Third Draft Proposal version of Stress Test 18:

57	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
58	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
59	63
Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for GAC advice.	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 GAC consensus.
60	64
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</i>	The proposed accountability measure recognizes that the decision not to follow consensus advice would require a 2/3

<p><i>objection.”</i></p> <p>61 The GAC may at any time change its procedures instead of its present consensus rule.</p> <p>62 The requirement to find a mutually acceptable solution in the current Bylaws would then apply, not just for GAC consensus advice.</p>	<p>majority of the ICANN Board.</p> <p>65 GAC can still give ICANN advice at any time, with or without consensus, and the Board would have to decide whether to engage into a similar process or not.</p> <p>66 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 (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection).</p>
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5. Stress Tests Related to this Recommendation

- Stress Test 18: Governments in ICANN's Government 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.
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- By ensuring that the provision of Government 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.
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- At the same time, the proposal would enable the Government 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.
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