CCWG ACCOUNTABILITY - STRESS TEST 18
State of play and options
16 November 2015

1. Context

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.

Stress test 18 (ST18) was introduced in the stress test identification exercise, with a proposal "to amend ICANN bylaws to give due deference only to GAC consensus advice, and add a definition of "consensus". (Feb-2015). On 23-Mar-2015 NTIA indicated that addressing ST18 was essential to meet their requirements for the IANA Stewardship transition. ST18 was revised after the Istanbul meeting (24-Mar-2015) to omit proposing a definition for GAC consensus, allowing the GAC to determine its own definition.

A proposed Bylaws change to address ST18 was included in the 1st draft report published in May. There were substantial but inconclusive debates during the Paris meeting, where NTIA repeated its statement that addressing ST18 was essential to meet their requirements for the IANA Stewardship transition. The CCWG's 2nd draft report retained the initial proposed bylaws change to address ST18.

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.

In Dublin, the CCWG presented modified rationale for the ST18 bylaws change, as requested by GAC members. CCWG agreed to postpone discussions on ST18 until the GAC discussed and arrived at a consensus view. The GAC's Dublin Communiqué included a consensus GAC view on considerations relevant to ST18, including a new request "*to set the threshold for the ICANN Board to reject GAC advice to a 2/3 majority voting.*"

At the IGF in Joao Pessoa, Brazil introduced a proposal to the CCWG list for bylaws change to implement the GAC's Dublin Communiqué. This was debated on the list and at the IGF. The gap is not yet bridged.

As the CCWG finalizes its 3rd and hopefully final report, it is essential to come to closure on this issue. This will be looked at very closely by NTIA, by the US Congress, and by all national governments.

The ST18 subgroup, convened by the co-chairs, is mandated to:
- Assess existing options, areas of agreement / disagreement
- Provide the full CCWG with short, clear summary of views and options
- Report to the CCWG so that consensus can be assessed around the ST18 proposal

2. Proposed changes to ICANN Bylaws in response to Stress Test 18

Current Bylaws	1st and 2nd CCWG report	Brazil proposal	Amended Brazil proposal
ICANN BYLAWS Article XI Advisory Committees Section 2, Item 1. 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. 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.	ICANN BYLAWS Article XI Advisory Committees Section 2, Item 1. 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 The advice of the Governmental Advisory Committee on publiwith 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. Explanation in 2nd draft proposal: 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."	ICANN BYLAWS Article XI Advisory Committees Section 1. GENERAL The Board may create one or more Advisory Committees in addition to those set forth in this Article. […] Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board. **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."** Section 2. SPECIFIC ADVISORY COMMITTEES 1.j The advice of the Governmental Advisory Committee on public policy	ICANN BYLAWS Article XI Advisory Committees Section 1. GENERAL The Board may create one or more Advisory Committees in addition to those set forth in this Article. […] Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board. **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."** Section 2. SPECIFIC ADVISORY COMMITTEES 1.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

		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 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.	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 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. **For advice of the Governmental Advisory Committee that is approved using its present (Nov-2015) definition of consensus, the Board must achieve two-thirds majority to reject that advice. If such advice were rejected, t**he 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. 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.

3. Requirements and areas of disagreement

A review of debates and public comments related to ST18, as well as the Dublin GAC input[1], shows that the requirements below are shared by all, or almost all, parties.

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

Areas of disagreement are the following :
- Should the bylaws explicitly indicate that GAC may determine its own definition of consensus?
- Should the ICANN board require a 2/3 majority to reject GAC advice, regardless of the level of consensus reached in the GAC?
- Should the absence of any formal objection to GAC advice be required to trigger the ICANN board obligation to seek a mutually acceptable solution?

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[1] **GAC INPUT DUBLIN**

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:

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  - o *The need that each and every Advisory Committee ensures that the advice provided is clear and reflects the consensus view of the Committee;*
  - o *The need that each and every Advisory Committee should preserve its own autonomy in its definition of consensus;*
  - o *The value the Board attributes to receiving consensus advice;*
  - o *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.*

4. Mapping of proposals with key requirements

Requirement	Current Bylaws	CCWG 1st and 2nd draft proposals	Brazil proposal	Amended Brazil proposal
the GAC should define its own rules	ok	Ok	Ok	Ok
working by consensus within the GAC for GAC Advice	Current practice ok Not mentioned at bylaw level	Ok	Ok	Ok
Not working on the basis of simple majority for GAC Advice	Current practice ok Could be envisaged if operating principles were changed	Ok	Ok	Ok
GAC advice need to provide clear rationale	Ok	Ok	Ok	Ok
the Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution	Ok	Ok	Ok	Ok
Should the bylaws explicitly indicate that GAC may determine its own definition of consensus?	Not mentioned in Bylaws GAC Operating principles define consensus as absence of any formal objection	Not mentioned in Bylaws, but report acknowledges that the GAC could define its level of consensus	Not mentioned in Bylaws	Not mentioned in Bylaws
Should the absence of any formal objection to GAC advice be required to trigger the ICANN board obligation to seek a mutually acceptable solution?	No mention (see above)	No requirement that GAC must retain its current decision-making process	No mention	Explicit mention
Should the ICANN board require a 2/3 majority to reject GAC advice, regardless of the level of consensus reached in the GAC?	Not required (simple majority)	Not required (simple majority)	Requires 2/3 majority to reject GAC advice	Requires 2/3 majority to reject GAC advice