

**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 1<sup>st</sup> 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 2<sup>nd</sup> draft report retained the initial proposed bylaws change to address ST18.

The 2<sup>nd</sup> 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 2<sup>nd</sup> 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 3<sup>rd</sup> 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	1 <sup>st</sup> and 2 <sup>nd</sup> CCWG report	Brazil proposal	<del>Amended Brazil proposal</del> Denmark proposal
<p>ICANN BYLAWS</p> <p>Article XI Advisory Committees Section 2, Item 1. GAC</p> <p>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.</p>	<p>ICANN BYLAWS</p> <p>Article XI Advisory Committees Section 2, Item 1. GAC</p> <p>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. <b><u>With respect to Governmental Advisory Committee advice that is supported by consensus</u></b>, 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.</p> <p>Explanation in 2<sup>nd</sup> draft proposal:</p> <p>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.”</p>	<p>ICANN BYLAWS</p> <p>Article XI Advisory Committees Section 1. GENERAL</p> <p>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.</p> <p><b><u>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.”</u></b></p> <p>Section 2. SPECIFIC ADVISORY COMMITTEES</p> <p>1.j The advice of the Governmental</p>	<p>ICANN BYLAWS Article XI Advisory Committees</p> <p><u>[Section 1. GENERAL</u></p> <p><u>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.</u></p> <p><b><u>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.” ]</u></b></p> <p><b><u>[ For purposes of this section, GAC “consensus” does not include reaching a decision based on majority voting whereby disagreements with or objections by a minority of GAC representatives may be overridden. It is also understood that “consensus” does not necessarily mean “unanimity” or a broad measure of</u></b></p>

		<p>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. <b><u>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.</u></b> 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.</p>	<p><del>agreement that would allow a GAC member or a very small minority of GAC members to block the determination of consensus.]</del></p> <p><del>[no edits to Section 1 are proposed]</del></p> <p>Section 2, Item 1, relating only to the GAC</p> <p>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. <b><u>GAC advice approved by a GAC consensus may only be rejected by a vote of at least two-thirds (2/3) of the Board, after which the GAC</u></b> and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.</p> <p><del>[For purposes of this section, GAC “consensus” does not include reaching a decision based on majority voting whereby disagreements with or objections by a minority of GAC representatives may be overridden. It is also understood that “consensus” does not necessarily mean “unanimity” or a broad measure of agreement that would allow a GAC member or a very small minority of GAC members to block the determination of consensus.]</del></p>
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**Commentaire [w1]:** Jorge and others reminded that GAC Dublin input mentioned “*The need that each and every Advisory Committee should preserve its own autonomy in its definition of consensus;*”

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### 3. Requirements and areas of disagreement

A review of debates and public comments related to ST18, as well as the Dublin GAC input<sup>1</sup>, 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 Other considerations discussed 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?
- Should the rules be the same for all advisory committees, when their advice requires finding a mutually acceptable solution ?
- Should there be different levels of Board support required to reject GAC advice depending on the level of consensus ?

Other views expressed :

- GAC should have to give up its privileged advisory authority if it wanted to participate in the Empowered Community.
- the GAC, which has insisted that it be treated the same as the other SOs and ACs, be treated the same as the other non-designating ACs (SSAC and RSSAC) and not have a privileged advisory power.

#### <sup>1</sup> 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:

- - 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.

**Commentaire [w2]:** Paul R consideration : Under current practice GAC consensus advice is provided without formal objection and the Board may be rejected by majority vote. The possibility of government "capture" of the process is therefore dependent on unanimity among governments and 51% of the Board. Under Julia's proposal that will be reduced -- the government position now would be advanced by a near full consensus (almost all) but will be protected by a 1/3rd vote of the Board. No colorable argument can be made that this is not an increase in government influence and that, in turn, is contrary to the broad principles laid out by NTIA Supported by Phil C and Brett S

**Commentaire [w3]:** Rafael (Spain) expressed as "thin line between" imposition of unanimity (that could yield to capture) and possibility of majority rule (that should not be permitted)." Echoed by Jorge

**Commentaire [w4]:** Brett suggestion is "I also suggested a compromise where true consensus GAC advice could only be rejected by more than two-thirds of the Board, but lesser consensus advice would remain at the majority threshold. "

**Mis en forme :** Police :10 pt, Anglais (États Unis)

**Mis en forme :** Paragraphe de liste, Avec puces + Niveau : 1 + Alignement : 1,24 cm + Retrait : 1,88 cm

**Mis en forme :** Police :10 pt

- there are other safeguards being introduced, including a narrow Mission Statement and a commitment for consensus in the Bylaws. This proposal also underlines the Board's commitment to take AC advice duly into account.
- In practice the Board has rejected GAC consensus advice on the basis of consensus and as such the 2/3 requirement would "allow" that the Board could reject a consensus advice based on a 2/3 majority decision and not consensus with "the blessing" of the GAC as the GAC itself was among those that proposed this threshold.
- how long does the Board have to vote on the GAC consensus advice? If it is unlimited then the Board could defeat the intent of the proposed Bylaws change by simply never bringing the matter up for a vote. But if it is time limited then the GAC advice would automatically take effect at a time certain unless the Board has mustered 2/3 opposition.

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#### 4. Mapping of proposals with key requirements

Requirement	Current Bylaws	CCWG 1 <sup>st</sup> and 2 <sup>nd</sup> draft proposals	Brazil proposal	<del>Amended Brazil proposal</del> Denmark proposal
the GAC should define its own rules	ok	Ok	Ok	<u>Ok</u>
working by consensus within the GAC for GAC Advice	Current practice ok Not mentioned at bylaw level	Ok	Ok	<u>Ok</u>
Not working on the basis of simple majority for GAC Advice	Current practice ok Could be envisaged if operating principles were changed	Ok	Ok	<u>Ok</u>
GAC advice need to provide clear rationale	Ok	Ok	Ok	<u>Ok</u>
the Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution	Ok	Ok	Ok	<u>Ok</u>
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	<u>Clarification of appropriate consensus levels is provided (that "consensus" does not necessarily mean "unanimity" or a broad measure of agreement that would allow an AC member or a very small minority of AC members to block consensus advice.)</u>
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	<u>Definition provides flexibility to that definition</u>
Should the ICANN board require a 2/3 majority to reject GAC advice, regardless of the level of consensus reached in	Not required (simple majority)	Not required (simple majority)	Requires 2/3 majority to reject GAC advice	<u>Requires 2/3 majority to reject GAC advice (if the relevant consensus level is reached)</u>

Mis en forme : Gauche, Espace Avant : 0 pt, Après : 0 pt, Interligne : simple

Mis en forme : Police :9 pt, Italique

Mis en forme : Police :Calibri, 11 pt, Italique, Couleur de police : Noir

Tableau mis en forme

the GAC?				
- <u>Should the rules be the same for all advisory committees, when their advice requires finding a mutually acceptable solution ?</u>	<u>Specific to GAC</u>	<u>Specific to GAC</u>	<u>Applicable to all ACs provided that the Board is required to find a mutually acceptable solution</u>	<u>Applicable to all ACs provided that the Board is required to find a mutually acceptable solution</u>