

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

1. Summary

- 1 Currently, Governmental Advisory Committee (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.
- 2 Stress Test #18 considers a scenario where ICANN's GAC would amend its 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 the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters.
- 3 In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to so participate), some stakeholders believe that this could increase government influence over ICANN.
- 4 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice.

2. CCWG-Accountability Recommendations

- 5 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2 (emphasis added):
- 6 *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 60% 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.

- 7 This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must “try to find a mutually acceptable solution,” as required in ICANN’s current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.
- 8 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 ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- 9 The CCWG-Accountability recommends inserting a requirement that all ACs provide a rationale for their advice. A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN’s Bylaws.
- 10 To address concerns regarding GAC advice that is inconsistent with the ICANN Bylaws, the CCWG-Accountability recommends adding this clarification for legal counsel to consider when drafting Bylaws language:

ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.

- 11 Note: 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.

3. Detailed Explanation of Recommendations

12 Background

- 13 Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the Empowered Community (if the GAC chooses to so participate), some stakeholders believe this could inappropriately increase government influence over ICANN.
- 14 The goal of the recommendation is also to reflect the principles, derived from the [GAC Dublin Communiqué](#), and agreed upon by the CCWG-Accountability when investigating further on Stress Test #18:
- The GAC may define its own rules.
 - The GAC is committed to working by consensus.
 - The GAC will not work on the basis of a simple majority for GAC advice.
 - The Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution.
 - GAC advice needs to provide clear direction and provide a rationale.

Process and Considerations Leading Up to the Recommendation

- 15 The Second Draft Proposal 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 Bylaws change.
- 16 The CCWG-Accountability 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 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 AC ensures that the advice provided is clear and reflects the consensus view of the Committee.
- The need that each and every AC 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 (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 Country Code Names Supporting Organization and Generic Names Supporting Organization Policy Development Process recommendations."

- 17 Following the Second Public Comment Period, and the input received from the GAC Communiqué in Dublin, the CCWG-Accountability organized a specific Subgroup to:
- Assess existing options, and areas of agreement/disagreement.
 - Provide the full CCWG-Accountability with a 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 GAC could change its decision-making rule and thereby require the ICANN Board to arbitrate among sovereign governments.
- 18 Within this Subgroup, the following conclusions were agreed upon:
- The GAC may define its own rules.
 - The GAC is committed to working by consensus.
 - The GAC will not work on the basis of a simple majority for GAC advice.
 - The Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution.
 - GAC advice needs to provide clear direction and provide a rationale.

19 **Alternative options considered and rejected**

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

21 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. [...]

22 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 (emphasis added):

“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.”

- 23 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 Period about the lack of flexibility regarding GAC decision-making procedures.
- 24 As some participants remained concerned about the introduction of the 2/3 decision-making threshold for the ICANN Board, a compromise proposal was introduced as such (emphasis added):

“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”.

- 25 This compromise proposal was submitted to the CCWG-Accountability on 24 November 2015. 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.
- 26 When discussing the way forward within the CCWG-Accountability on 26 November 2015, the group took stock of the past discussions and noted the [statement by Larry Strickling of NTIA](#) from 25 November about Stress Test #18. A proposal was introduced jointly by Denmark and Keith Drazek (ICG Liaison).
- 27 After being unable to reach consensus on the two-thirds proposal, in January 2016 the CCWG-Accountability re-launched the discussions to identify a consensus position for Recommendation #11. In early February, the CCWG-Accountability concluded that the consensus position should include the clarifications made to the version of Recommendation #11 in the Third Draft Proposal (no new obligations, rationale and conformity with ICANN Bylaws) and change the 2/3 threshold to 60%. Additionally, as part of the compromise, an exception was added in

Recommendations #1 and #2 that the GAC, should it decide to be a Decisional Participant in the Empowered Community, would not be able to participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge the ICANN Board’s implementation of GAC consensus advice; however, the GAC would be able to participate in an advisory capacity in all other aspects of the escalation process.

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

29	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	
30	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
31	Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.	35 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.
32	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>	36 The proposed accountability measure recognizes that the decision not to follow GAC consensus advice would require a 60% majority of the ICANN Board.
33	The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.	37 The Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.
34	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.	38 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.

39 **Why is the CCWG-Accountability Recommending This?**

40 Stress Test #18 was among the plausible scenarios that could test how and whether the ICANN community could challenge actions taken by the ICANN Board. The rationale to develop this stress test involves two factors:

1. 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.
 2. 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 GAC advice. That level of required deference is unique to the GAC and not required for advice from other SOs and ACs. Importantly, the ICANN Board's obligation to seek a mutually acceptable solution applies to all GAC advice, even if that advice was not supported by GAC consensus or was opposed by a significant minority of GAC members.
- 41 For these reasons, the CCWG-Accountability added Stress Test #18 to the First 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.
- 42 In order to address Stress Test #18, the CCWG-Accountability proposed an amendment to the ICANN Bylaws regarding the ICANN Board's obligations with respect to GAC advice. The amendment would preserve the requirement for the ICANN Board to seek a mutually acceptable solution, but only for GAC advice that was supported by consensus among GAC members.
- 43 The GAC 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 GAC on a matter that affects the global Internet community. A negotiation between the ICANN Board and the GAC should be mandatory only for resolving differences between ICANN and governments, not to resolve differences among governments themselves.
- 44 As a corollary to the importance of consensus GAC advice, the proposal includes a requirement that the Board would need a 60% majority to decide not to follow consensus GAC advice.
- 45 To avoid any ambiguity, when transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection among GAC members.
- 46 The proposed Bylaws change is aligned with the practice presently used by the GAC, 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."

- 47 The proposed Bylaws change recognizes that the GAC 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 GNSO and ccNSO.
- 48 The proposed Bylaws change for Stress Test #18 does not interfere with the GAC's method of decision-making. 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).
- 49 If the GAC decided to adopt advice by methods other than a 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."

- 50 Moreover, ICANN would still have to explain why it chose not to follow GAC 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”.
- 51 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 among GAC members.
- 52 It is important to note that although this was the only proposal that would allow the CCWG-Accountability to achieve consensus on this topic, it was not unanimously supported. A number of dissenters amongst members and participants thought this proposal was overly restrictive and discriminatory toward the GAC, while others thought that if the GAC wanted to keep its privileged AC status, then it should not be allowed to be a Decisional Participant.

4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC “carve out”.

5. Stress Tests Related to this Recommendation

- Stress Test #18: Governments in ICANN’s GAC can 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 Proposal.

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- By ensuring that the provision of GAC advice remains a consensus-driven decision, the Proposal provides a safeguard against the possibility of a large group of governments trying to overly influence the ICANN Board.
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- At the same time, the Proposal would enable the GAC, if it ever came to a point where a single government would abuse 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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