

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

1st READING CONCLUSIONS :

Deleted: KEY DISCUSSION ITEMS

1. Clarify whether current drafting imposed mandatory voting from the Board and represents an unintended change to the current practice (see IPC detailed comment page 8 on <http://forum.icann.org/lists/comments-draft-ccwg-accountability-proposal-30nov15/pdfVVYmvrATNS.pdf>) To address this concern, add this clarification for legal counsel to consider when drafting bylaws language.

This recommendation is intended to limit the conditions under which the ICANN board and GAC must try to find a mutually acceptable solution. This recommendation shall not create any new obligations for ICANN board to consider and/or vote on GAC advice, relative to the bylaws in effect prior to the IANA transition. This recommendation shall not create any obligation that ICANN is bound to implement any advice that is not rejected by the board.

2. Confirm or discuss need for such a recommendation to change how GAC Advice is being treated by the Icann Board, in light of comments received.
3. Confirm or discuss recommendation that at least 2/3rds of the Board was required to reject GAC consensus advice to the Board.
4. Discuss request that GAC advice must be approved by general agreement in the absence of formal objection and that the definition of objection/consensus cannot be changed. Others specifically supported this provision.
5. Add the requirement that a rationale **must be provided for formal advice provided by an Advisory Committee** to the ICANN Board. The Board should determine whether the rationale is adequate.
6. To address the concern of GAC advice inconsistent with bylaws, add this clarification for legal counsel to consider when drafting bylaws language:

ICANN cannot take action - based on advice or otherwise – that is inconsistent with 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 an IRP to challenge whether any board action or inaction that is inconsistent with its bylaws, even if the board acted on GAC advice.

Lawyers' Memo

We were asked to review the current Bylaws provision addressing GAC advice and determine whether the ambiguities we identified in our review of the proposed revisions to this provision are

new or stem from ambiguities under the current Bylaws text. We have determined that there are ambiguities under the current Bylaws text, which provides as follows:

ICANN Bylaws Article XI, Section 2.1.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 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.

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The phrase “duly taken into account” is ambiguous, but reading it together with the next sentence, which requires that the Board follow a specific procedure before taking actions inconsistent with GAC advice, we believe the best interpretation of this phrase is to mean “do not act inconsistently with.” Based on this interpretation, we recommend the following clarification (underlined) to the first sentence of this Bylaws provision: “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, and ICANN shall not act inconsistently with that advice except as otherwise provided in this paragraph.”

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We also note that there is no meaningful legal distinction between voting and determining to take an action, as some commenters have suggested. The only way the Board can legally determine or decide anything under California law is by voting.

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The proposed addition to the current Bylaws text is underlined below:

ICANN Bylaws Article XI, Section 2.1.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 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 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.

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Based on our interpretation of the current Bylaws text, described above, we believe this proposed provision results in the following process:

1. If GAC provides advice (whether by a full GAC consensus or a lesser approval threshold), the ICANN Board must “duly take[] into account” that advice -- i.e., ICANN must not act inconsistently with that advice, unless #2 and/or #3 below apply.

2. If GAC provides advice (whether by a full GAC consensus or a lesser approval threshold), and the ICANN Board decides to take an action inconsistent with that advice, the ICANN Board must first give GAC notice and provide a rationale.

. In addition, if the GAC advice was by a full GAC consensus, the ICANN Board may decide to take an action inconsistent with that advice only by a vote of 2/3 of the ICANN Board. If that 2/3 threshold is reached, GAC and ICANN must then try in good faith to find a mutually acceptable solution. If the 2/3 threshold is not reached, ICANN is required to act consistently with the consensus GAC advice.

We recommend that consideration be given to further clarifying this process, and we agree with commenters who have concluded that the proposed provision does not impose an affirmative obligation upon ICANN's Board to vote on GAC consensus advice every time that advice is provided.

We note that additional Bylaws language is being proposed to clarify that, in any case, the Board needs to act in compliance with the ICANN Bylaws. Thus, if the Board were to determine that following GAC advice would result in non-compliance with the Bylaws, the Board should be able to reject the advice (with a majority or two-thirds vote, depending on whether the GAC advice was consensus advice) and explain its position to GAC.

NB: Focus on chartering organization feedback:

- GNSO : Strong opposition to rec as written in Third Draft Proposal. No support (most SG/Cs) to raise threshold for a Board vote to reject GAC advice. Serious concern over lack of specificity in relation of requirements for GAC advice (such as provision of rationale) and possibility that this recommendation, if adopted, could unduly change nature of Board-GAC relationship and/or position of GAC vis-à-vis other SO/ACs. Several SG/Cs believe any recommendation should retain current flexibility in Bylaws where Board is not required to undertake a formal vote in order to reject GAC advice.

- ccNSO : no specific comment

- ASO: In general we find the current text acceptable. Additionally we would like to make the following remarks: We would support a text that clarifies today's practices and does not substantially change the GAC's role and how its advice is treated by the Board or substantially strengthen obligations for the Board to consider the GAC advice. We would not support a text that cannot be acceptable by the NTIA.

- GAC : There is no consensus within the GAC so far to support or object to the text contained in Recommendation 11 of the 3rd Draft Proposal.

- ALAC : support the recommendation

- SSAC : no specific comment

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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 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 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. 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.
- 3 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice, as described in the following Detailed Recommendations.

2. CCWG-Accountability Recommendations

- 4 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 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 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.*

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- 5 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.
- 6 Notes:
 - Insert a mention for all ACs: "The AC will make every effort to ensure that the advice provided is clear and supported by a rationale."

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- 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

7 Background

- 8 Stress Test 18 is related to a scenario where ICANN's 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 the ICANN 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 new community mechanism, some stakeholders believe this could inappropriately increase government influence over ICANN.
- 9 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 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 to provide rationale.

Process and Considerations Leading Up to the Recommendation

- 10 The Second Draft Report 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.
- 11 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 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 (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.”
- 12 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 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 ICANN Board to arbitrate among sovereign governments.
- 13 Within this Subgroup, the following conclusions were agreed upon:
- The GAC may define its own rules.
 - Working by consensus within the GAC.
 - Not working on the basis of 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 to provide rationale.
- 14 **Alternative options considered and rejected**
- 15 Within this group, several options were introduced and considered.
- 16 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. [...]

- 17 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:

“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.”

- 18 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.

- 19 As some participants remained concerns about the introduction of the 2/3 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”.

- 20 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.

21 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 18¹. A final proposal was introduced jointly by Denmark and Keith Drazek (ICG Liaison). The proposal was confirmed in the absence of any objection.

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

23 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	
24 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
25 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.	29 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.
26 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>	30 The proposed accountability measure recognizes that the decision not to follow consensus advice would require a 2/3 majority of the ICANN Board.
27 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.	31 Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.
28 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.	32 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.

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

- 34 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:
- 35 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.
- 36 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 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.
- 37 For these reasons, the 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 GAC.
- 38 In order to address Stress Test 18, the CCWG-Accountability proposed an amendment to 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.
- 39 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.
- 40 As a corollary to the importance of consensus GAC advice, the proposal includes a requirement that the Board would need a 2/3 majority to decide not to follow the consensus GAC advice.
- 41 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.
- 42 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."*
- 43 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.

- 44 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).
- 45 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."
- 46 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."
- 47 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.

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

48 Second Draft Proposal Version of Stress Test 18

49	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.								
50	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.								
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<p>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>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>56 GAC can still give ICANN advice at any time, with or without consensus.</p>
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57 **Current Draft Proposal version of Stress Test 18**

<p>58 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</p>	
<p>59 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.</p>	
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<p>60 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>61 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>62 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.</p> <p>63 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>64 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 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 community's 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 government 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 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.
-