

This document summarizes discussion of stress test 18 and the proposed bylaws change regarding ICANN deference to GAC advice, and recommends a path forward.

The CCWG charter calls for stress testing of accountability enhancements in both work stream 1 and 2. Among deliverables listed in the charter are:

- Identification of contingencies to be considered in the stress tests.
- Review of possible solutions for each Work Stream including stress tests against identified contingencies.
- The CCWG-Accountability should consider the following methodology for stress tests

- analysis of potential weaknesses and risks
- analysis existing remedies and their robustness
- definition of additional remedies or modification of existing remedies
- description how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies

CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) its results being analyzed timely before the transition.

The CCWG Stress Test Work Party documented contingencies identified in prior public comments¹. The Stress Test Work Party then prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.²

Stress Test 18 has generated interest since it addresses ICANN’s response to government advice in the context of NTIA’s statement regarding the transition: “NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution”.³ This Stress Test was applied to existing and proposed accountability measures, as seen below:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>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.</p> <p>Consequence: 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 that restricted free expression, for example.</p>	<p>Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try to find “a mutually acceptable solution.”</p> <p>This is required for any GAC advice, not just for GAC consensus advice.</p> <p>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>⁴ But the GAC may at any time change its procedures to use majority voting instead of its present consensus.</p>	<p>One proposed measure is to amend ICANN bylaws (Article XI Section 2, item 1j) to give due deference only to GAC consensus advice, and indicate the definition of consensus that the GAC uses presently.</p> <p>The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require due deference only to advice that had GAC consensus.</p> <p>GAC can still give ICANN advice at any time, with or without consensus.</p>

¹ See <https://community.icann.org/display/acctcrosscomm/ST-WP+---+Stress+Tests+Work+Party>

² Applying Stress Tests, 20-Mar-2015, at <https://community.icann.org/download/attachments/52232556/Applying%20Stress%20Tests%20%5BDraft%20v8%5D.pdf?version=1&modificationDate=1426877855000&api=v2>

³ NTIA Announces Intent to Transition Key Internet Domain Name Functions, 14-Mar-2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

⁴ ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

The CCWG proposed a response to Stress Test 18 to amend ICANN bylaws such that only consensus advice would trigger the obligation to try to find a mutually acceptable solution.

The proposal is to amend ICANN Bylaws, Article XI Section 2 clause j as seen below. (additions **bold and underlined**) Clause k is also shown for completeness but is not being amended.

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. **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.

k. 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.

On 5-March the CCWG co-chairs asked GAC representatives on the CCWG for feedback on Stress Test 18 and the proposed remedy. GAC chair Thomas Schneider replied that GAC had not taken a position, but shared his personal reaction in two emails, including these points:⁵

First of all, I - like many of my colleagues - do not really see a contingency related to the GAC as a body with regard to the CCWG's Work Stream 1 (accountability related to the IANA functions). As we do not recall the GAC having had an role in the IANA stewardship function so far and as one of the conditions put forward by the NTIA is that no other single country or intergovernmental body should take over the IANA stewardship role, it is difficult to see why the GAC's operating principles should have an effect on the IANA stewardship function at all.

However, it should be noted that - unlike the GNSO or the ccNSO - the GAC does not develop or decide about policies, but is - in its role as advisory body of the ICANN board - giving advice to the board on public policy matters. The board can either ask the GAC for advice on an issue or the GAC can advise the board on its own initiative. In both cases, according to the current bylaws, the board is only asked to take GAC advice "duly into account", but is not obliged to follow GAC advice. In case the board decides not to follow GAC advice, the board shall inform the GAC about its reasons for not doing so and will try to find a mutually acceptable solution. If no such solution is found, the board is still free to take its decision without the GAC as a committee having any means to force the board to follow its advice. It is then up to individual GAC members to act according to their "rights and obligations ... with regard to public policy issues falling within their responsibilities".

According to its operating principles, the GAC works on "the basis of seeking consensus among its membership". Where consensus is not possible, the chair shall "convey the full range of views expressed by members" to the ICANN board. So, under the current operating principles, the GAC may address advice to the board which is either informing the board about a GAC consensus or about the existence of diverse views among its membership on an issue. Again, the board should then take this advice "duly into account". In the past, there have been several examples where there has been a diversity of views among GAC members on an issue which have been communicated to the board.

⁵ Engagement request from CCWG regarding GAC decision making, Thomas Schneider to CCWG, 19-Mar-2015 and 17-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001708.html> and

In the current operating principles, it is not specified how - in the case of diverse views in the GAC on an issue - this diversity should be communicated to the board. In the attempt to enhance accountability of ICANN's processes as well as the accountability of governments to their citizens and the global community, but also to improve ICANN's checks and balances and to avoid any risk of capture by an individual or a small group of governments, it may be useful to enhance transparency about the range and spread of diversity of views among GAC members, so that - before taking a decision - the board is best informed about this diversity and also the whole community is able to see on what basis GAC advice is formulated and that it is able to assess to what extent such advice has been "duly taken into account".

On 3-March, Danish GAC rep Julia Katja Wolman wrote to CCWG:⁶

From our (DK) point of view we fully understand the need to have a stress test for such a situation, including mitigating capture, but it is our general view that any such proposal should not lower the current threshold for the obligation of the ICANN Board to duly taking into account GAC advice.

With regard to Malcolm's suggestion below, we believe the text should not be split into two. To clarify: In practice, the example you present below where the other governments would be "indifferent" actually means that the other governments actively chose not to actively support that specific issue, for different reasons, and consequently there would be consensus on advancing that specific issue as GAC advice. We would also like to underline that reaching consensus among governments is not an easy task and is a process that requires deliberations and compromises. Therefore, we would like keep the text from the existing consensus rules in the GAC's Operating Principles.

And Spanish GAC rep Rafael Pérez Galindo wrote:⁷

While understanding the need to avoid capture, no proposal should preempt the way in which a Committee makes decisions, which is what this idea would mean in practice by compelling the GAC to stick to the consensus rule if it wants the Board to duly take into account its advice.

This proposal goes beyond the scope of this CCWG unless we engage in discussion of procedures in all relevant SOs/ACs, as well.

At any rate, such a proposal would strongly affect the GAC role and should request explicit consent from the GAC prior to its inclusion in the report.

⁶ see WP1 email archives, at <http://mm.icann.org/pipermail/wp1/2015-March/000071.html>

⁷ see WP1 email archives, at <http://mm.icann.org/pipermail/wp1/2015-March/000074.html>

In response, NTIA indicates that Stress Test 18 and the proposed bylaws change are “both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA’s current stewardship role.”

From: Suzanne Radell

Date: Thursday, March 19, 2015 at 4:16 PM

To: "Thomas.Schneider@bakom.admin.ch", Mathieu Weill, Thomas Rickert, León Felipe Sánchez Ambía

Cc: "gac@icann.org", Accountability Cross Community

Subject: Re: [CCWG-ACCT] Engagement request from CCWG regarding GAC decision making

Dear Thomas,

Thank you for sharing your thoughts, as well as those of some GAC members, on the issue of the CCWG’s proposed stress test related to GAC advice in your email message of March 16, 2015 to the CCWG co-chairs. As you suggested in your message, we would like to take this opportunity to share the views of the United States government (USG) with colleagues in the GAC and the CCWG on the issue.

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA’s current stewardship role. While the GAC may not be directly involved in the IANA functions, its role within ICANN as a source of public policy advice that is taken into account by the ICANN Board is relevant to the interrelated process of improving ICANN’s accountability. Improving ICANN’s accountability includes ensuring that ICANN is not susceptible to capture or undue influence by any one party or set of stakeholders, including governments.

The USG believes that the stress test developed by the CCWG, which recommends an amendment to ICANN’s Bylaws to make clear that only consensus advice triggers a Bylaw consultation, is compatible and otherwise in line with the first Accountability and Transparency Review Team’s (ATRT 1) recommendations pertaining to the GAC. More specifically, the U.S. considers the provision of consensus-based advice to be the GAC’s primary source of strength and credibility.

The GAC has on occasion provided the ICANN Board with “the full range of views expressed by Members”, consistent with Principle 47 of the GAC Operating Principles. In these cases, however, the ICANN Board does not and should not be expected to defer to such views as it does to consensus-based advice. The USG believes that anything less than a consensus approach to the development of GAC public policy advice would diminish the value of GAC deliberations on the development of policy within the ICANN model.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community’s expectation that anything less than consensus is not advice that triggers the Bylaw provisions. Nor do we understand the stress test as in any way interfering with the GAC’s internal working methods.

Suzanne Murray Radell, Senior Policy Advisor, NTIA/OIA

Analysis and proposed path forward:

It is appropriate for CCWG co-chairs to request feedback from GAC or from any other stakeholder group with an acute interest in proposed accountability enhancements. However, no community stakeholder representatives on the CCWG are given the power to veto a single proposed accountability mechanism.

At this stage, the CCWG is assembling a package of measures, composed of bylaws changes to ICANN's mission and core values, along with new mechanisms and structures that rely upon the bylaws changes. Only when the proposal is complete will it be considered by ICANN's Advisory Committees, Supporting Organizations, and Stakeholder Groups, and then posted for public comment.

Apparently, some members of the GAC prefer the CCWG not propose this bylaws amendment in response to stress test 18. That is not unexpected, since some GAC representatives have previously indicated dissatisfaction with the present consensus method of approving GAC advice. It is entirely plausible that the GAC could change its method of approving advice at some point, and it is entirely within their right to do so.

Note that the proposed bylaws change for stress test 18 does not interfere with the GAC's method of decision-making. If the GAC decided to adopt advice by majority voting or methods other than today's consensus, 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."

Moreover, ICANN would still have to explain why GAC 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"

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 – exactly the way GAC advice has been approved since ICANN began.

The NTIA gave specific requirements for this transition, and stress test 18 is the most direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. Unless and until there are *other* proposed measures that address this stress test, the proposed bylaws change should remain in consideration as an important part of the community's proposal.

This historic transition creates the opportunity for the broader community to obtain accountability enhancements that the ICANN board would not likely approve if those enhancements were proposed after the leverage of the IANA contract is gone. By the same token, the GAC would not likely accept this proposed bylaws change if it were proposed at some point after the IANA transition.

Therefore, this transition is the best opportunity to pursue difficult and sometimes controversial changes to ensure that ICANN is accountable to the entire community it was created to serve.