

6.X Bylaws changes suggested by Stress Tests

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 comments . The Stress Test Work Party then prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.

The exercise of applying stress tests identified changes to ICANN bylaws that might be necessary to evaluate proposed accountability mechanisms as adequate to the challenges.

[inserting here a suggestion from Jonathan Zuck to ensure that ICANN board respond to formal advice from Advisory Committees. This is in response to several Stress Tests]

6.X.1 Forcing the board to respond to Advisory Committee formal advice

Several stress tests indicate the need for a community power to force ICANN to take a decision on previously-approved Review Team Recommendations, consensus policy, or formal advice from an Advisory Committee (SSAC, ALAC, GAC, RSSAC).

The CCWG is developing enhanced community powers to challenge a board decision, but this may not be effective in cases where the board has taken no decision on a pending matter. In those cases, the community might need to force the board to make a decision about pending AC advice in order to trigger the ability for community to challenge the decision via Reconsideration or IRP processes.

Recommendation 9 from ATRT2 may answer this need [footnote needed]:

9.1. ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:

The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.

This ATRT2 recommendation, however has not yet been reflected in ICANN bylaws, so this change should be required before the IANA transition. In addition, there is a question as to whether a board "response" would be sufficient to trigger the RR and IRP review mechanisms in this proposal. The CCWG and CWG are waiting on legal advice as to that question.

6.7.2 Require consultation and mutually acceptable solution for GAC advice that is backed by consensus

Stress Test 18 addresses ICANN's response to GAC 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". 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. 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." This is required for any GAC advice, not just for GAC consensus advice. 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>"^[1] 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. 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. GAC can still give ICANN advice at any time, with or without consensus.</p>

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

The CCWG proposes 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) 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.

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.

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.