

CCWG-Accountability:

Using Stress Tests to evaluate existing & proposed accountability measures [Draft v7, 6-Mar]

An essential part of our 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.

In addition, the CCWG chairs has asked our work party to consider this yes/no question:

While this is not a gating factor, is the threat directly related to the transition of the IANA stewardship?

CCWG Work Team 4 gathered an inventory of contingencies identified in prior public comments. That document was posted to the wiki at <https://community.icann.org/display/acctcrosscomm/ST-WP+++Stress+Test+Work+Party>

In Singapore, the work party drafted several examples of using these stress tests evaluate existing and proposed accountability measures:

Stress test category I. Financial Crisis or Insolvency

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>5. Domain industry financial crisis. Consequence: significant reduction in domain sales generated revenues and significant increase in registrar and registry costs, threatening ICANN's ability to operate.</p> <p>6. General financial crisis.</p> <p>7. Litigation arising from private contract, e.g., Breach of Contract.</p> <p>8. Technology competing with DNS. Consequence: loss affecting reserves sufficient to threaten business continuity.</p>	<p>ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community.</p> <p>The Community has input in ICANN budgeting and Strat Plan.</p> <p>Registrars must approve ICANN's variable registrar fees, though Registry agreements require registry operators to cover these amounts if the registrar fees are not approved.</p> <p>ICANN's reserve fund could support continued operations in a period of reduced revenue; reserve fund subject to continued review for maintenance according to best practices.</p>	<p>One proposed measure would empower the community to veto ICANN's proposed annual budget. This measure enables blocking a proposal by ICANN to increase its revenues by adding fees on registrars, registries, and/or registrants.</p> <p>Another proposed mechanism is community challenge to a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a revenue or expenditure decision outside the annual budget process, the IRP mechanism could reverse that decision.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would be adequate, unless the revenue loss was extreme and sustained.</p>	<p>Proposed measures are helpful, but might not be adequate if revenue loss was extreme and sustained.</p>

Discussed in Singapore

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>9. Major corruption or fraud. Consequence: major impact on corporate reputation, significant litigation and loss of reserves.</p>	<p>ICANN is subject to an annual Independent Financial Audit that includes testing of internal controls to protect against corruption or fraud. The Independent Auditor is appointed through and reports to the ICANN Audit Committee, which is itself primarily comprised of independent directors. https://www.icann.org/resources/pages/charter-2012-02-25-en?routing_type=path</p> <p>ICANN maintains an Anonymous Hotline policy that allows for employees around the world to report suspected fraud (among other things) and trigger an investigation. Pursuant to the ATRT2 recommendations, ICANN is undertaking a review of its Anonymous Hotline policy to confirm that it remains at or above best practice levels.</p> <p>ICANN board can dismiss CEO and/or executives responsible.</p> <p>The community has no ability to force the Board to take such action.</p>	<p>One proposed measure is to empower the community to force ICANN's board to implement a recommendation arising from an AoC Review – namely, ATRT recommendations to avoid conflicts of interest.</p> <p>Another proposed measure would empower the community to veto ICANN's proposed annual budget or any board decision. This measure enables blocking a board proposal or decision that is tainted by corruption or fraud.</p>
<p>Conclusions: This threat is not directly</p>	<p>Existing measures would not be adequate if</p>	<p>Proposed measures are helpful, but</p>

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related to the transition of IANA stewardship	litigation costs <u>or losses</u> were extreme and sustained.	might not be adequate if litigation costs <u>and losses</u> were extreme and sustained.
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Samantha Eisner 3/10/15 3:32 PM
Comment [1]: This is a general corporate risk to any entity and likely no array of accountability mechanisms can address this. Maybe it's worth noting that?

Stress test category II. Failure to Meet Operational Expectations

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
1. Change authority for the Root Zone ceases to function, in part or in whole. also	Under the present IANA functions contract, NTIA can revoke ICANN's authority to perform IANA functions and re-assign to different entity/entities.	The CWG planning the IANA stewardship transition might design mechanisms and structures that enable separation, such that the IANA functions could be readily revoked and re-assigned.
2. Delegation authority for the Root Zone ceases to function, in part or in whole. Consequence: interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.	After NTIA relinquishes the IANA functions contract, this measure will no longer be available.	To manage the revocation of IANA functions, the CWG might also propose an emergency backup provider and procedures, pending re-assignment of the IANA functions.
Conclusions: This threat is directly related to the transition of IANA stewardship Not yet discussed.	Existing measures would be inadequate after NTIA terminates the IANA contract.	At this point, CWG's recommendations are still in development.

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Stress Test	Existing Accountability Measures	Proposed Accountability Measures
11. Compromise of credentials. Consequence: major impact on corporate reputation, significant loss of authentication and/or authorization capacities.	Based on limited experience of the recent security breach, it is not apparent how the community holds ICANN management accountable, or is able to force implementation of adopted security procedures.	No measures yet suggested would force ICANN management to execute its stated security procedures for employees and contractors. One proposed measure is to empower the community to force ICANN's board to implement a recommendation arising from an AoC Review – namely, <i>Security Stability and Resiliency</i> . Another possibility is to empower the community to force ICANN to respond to security recommendations from advisory committees such as SSAC.
Conclusions: This threat is not directly related to the transition of IANA stewardship	Existing measures would not be adequate.	Proposed measures would be helpful to mitigate and remedy the scenario, but not to prevent it.

Samantha Eisner 3/10/15 4:07 PM
Comment [2]: There are a couple of different types of accountability here that I think we may be discussing. Those impacted by a security breach would have tools for holding ICANN accountable (legal process, etc.). If there was a broader wish for the community to have power to hold ICANN management responsible for implementation of internal security protocols, those would be the same existing or proposed accountability measures as other operational issues. If this is addressing security and stability of DNS issues/SSAC recommendations, that's a different set of measures.

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Comment [3]: We might be better served to be a bit crisper here in what we're discussing. There are internal systems for which there could be security issues; those are not things that are necessarily tied to the security and stability of the DNS, though they are important issues of security and confidence in ICANN's internal operations. Then there are potential for security issues that do go to where SSAC may be issuing advisories. Should we break this into two parts?

Stress test category II. Failure to Meet Operational Expectations (cont'd)

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>17. ICANN attempts to add a new top-level domain in spite of security and stability concerns expressed by technical community or other stakeholder groups.</p> <p>Consequence: DNS security and stability could be undermined, and ICANN actions could impose costs and risks upon external parties.</p>	<p>In 2013-14 the community demonstrated that it could eventually prod ICANN management to attend to risks identified by SSAC (security certificates and name collisions such as .mail, .home, etc.).</p> <p>NTIA presently gives clerical approval for each delegation to indicate that ICANN has followed its processes. NTIA could delay a delegation if its finds that ICANN has not followed its processes. Not clear if that would/could have been a finding if ICANN attempted to delegate a new TLD such as .mail or .home.</p>	<p>One proposed measure is to empower the community to force ICANN's board to implement a recommendation arising from an AoC Review – namely, 9.2 Review of Security, Stability, and Resiliency.</p> <p>Another possibility is to empower the community to force ICANN to respond to recommendations from advisory committees such as SSAC.</p> <p>If the board took a decision to reject or only partially accept SSAC recommendations, the community could be empowered to challenge that board decision and/or refer to IRP.</p>
<p>Conclusions: This threat is partially related to the transition of IANA stewardship</p> <p>Discussed on 24-Feb CCWG call.</p>	<p>Existing measures were adequate to mitigate the risks of this scenario.</p>	<p>Proposed measures enhance community's power to mitigate the risks of this scenario.</p>

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Comment [4]: Another possibility is a reference to policy process, and then the accountability options for the Board following policy would come into play.

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>21. A government telecom minister instructs ICANN to revoke and re-delegate a country-code top-level domain (ccTLD), despite objections from many current registrants and user communities in the country concerned.</p> <p>Consequence: Faced with this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.</p>	<p>Under the present IANA functions contract with NTIA, ICANN certifies that processes were followed, and NTIA relies upon that certification to approve the change.</p> <p>There is presently no mechanism for the community to challenge ICANN's certification that process was followed outside of the available reconsideration process and Independent Review process, as appropriate, based upon the staff or Board nature of the decision that is being challenged. (The Board currently provides a decision that the process was followed that is available for challenge as appropriate.) The CCWG has already identified that there are weaknesses within the Reconsideration and IRP processes as they exist.</p>	<p>The CWG may recommend an Independent Appeals Process (IAP) to handle such disputes. We will evaluate CWG proposed mechanisms when they are published.</p> <p>One proposed CCWG measure would give the community standing to request Reconsideration of management's decision to certify the ccTLD change. [would require a standard of review]</p> <p>Another proposed CCWG mechanism is community challenge to a management decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to re-delegate a ccTLD, the IRP mechanism could review that decision [would require a standard of review].</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would not be adequate.</p>	<p>At this point, CWG's recommendations are still in development.</p>

Samantha Eisner 3/10/15 5:44 PM
Comment [5]: We may want to get some more info from the FOI group/ccTLD operators on how they see accountability for ICANN following the documented delegation and redelegation processes.

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Stress test category III. Legal/Legislative Action

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>3. Litigation arising from existing public policy, e.g., Anti-trust and</p> <p>4. New regulations or legislation.</p> <p>For example, a government could cite anti-trust or consumer protection laws and find unlawful some rules that ICANN imposes on TLDs. That government could impose fines on ICANN, withdraw from the GAC, and/or force ISPs to use a different root, thereby fragmenting the internet.</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>ICANN management and Board might acquiesce to government demands and change policy/enforcement in order to avoid fragmented root, avoid fines, or to keep certain governments in the GAC. The community, however, could not challenge or veto that decision.</p>	<p>If ICANN management and Board acquiesced to government demands and changed policies or stopped enforcement to avoid fragmented root, avoid fines, or to keep certain governments in the GAC, the community would have several response options:</p> <p>One proposed measure would empower a supermajority of ICANN community representatives to veto a board decision.</p> <p>Another measure would give the community standing to file for Reconsideration or IRP [what would be the standard of review?]</p> <p>Still another measure would allow community to force ICANN to implement a consensus policy or recommendation of an AoC Review.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures would be an improvement but might still be inadequate.</p>

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>19. ICANN attempts to re-delegate a gTLD because the registry operator is determined to be in breach of its contract, but the registry operator challenges the action and obtains an injunction from a national court.</p> <p>Consequence: The entity charged with root zone maintenance could face the question of whether to follow ICANN re-delegation request or to follow the court order.</p>	<p>Under the present agreement with NTIA, the entity performing root zone maintenance is protected from lawsuits since it is publishing the root per contract with the USG.</p> <p>However, the IANA stewardship transition might result in root zone maintainer not operating under USG contract, so would not be protected from lawsuits.</p> <p>ICANN is bound to follow appropriate court orders from courts of competent jurisdiction.</p>	<p>While it would not protect the root zone maintainer from lawsuits, one proposed mechanism is community challenge to a management decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to re-delegate a gTLD, the IRP mechanism could reverse that decision. [would require a standard of review]</p> <p>Questions about a counterparty to replace NTIA are being considered by the CWG for IANA stewardship transition. We will evaluate CWG proposed mechanisms in this area when they are published.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship Discussed in Singapore</p>	<p>Existing measures might not be adequate.</p>	<p>At this point, CWG's recommendations are still in development.</p>

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Comment [7]: I have a fundamental problem with how this is described. If there are laws that are applicable to ICANN (assuming appropriate jurisdictional reach, etc), acting in accordance with law is not fairly described as acquiescing. It is following the law. There are important baselines here – depending on the law, violations of law could result not just in fines, but in individual criminal liability for officers and directors. Having on record an intention to act in contravention of law or in disregard to appropriate court orders could impact the organization's ability to maintain insurance, including director's and officer's insurance which could serve as a vital part of someone's decision to serve on the ICANN Board. There is clearly a tension here, but I think that getting more precise about the intended consequence that we are trying to avoid will get us further in describing the accountability mechanisms that may allow recourse.

I heard the concern on the call that ICANN may receive legal advice that places it in too risk adverse of a situation – that there may be advice that ICANN should do x or y to avoid fines or legal action, and that action would result in ICANN failing to abide by an established policy or impede on existing policy development work. When seen like this, why is this risk any different than any other situation where ICANN may act contrary to policy?

I also heard on the call that ICANN could choose to challenge legislation or a court order. But we have to be very clear that challe... [1]

Samantha Eisner 3/10/15 5:51 PM

Comment [8]:

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Comment [6]: Recommend splitting these two up – while somewhat similar, there may be enough differences that we should address separately.

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Comment [9]: Not clear if this is suggesting that the community would seek to require ICANN to take action likely to fragment the root?

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Comment [10]: I don't know if there's confirmation about this, but again, I do not know if this is the case for the RZM.

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Comment [11]: This sounds as if the community should have the opportunity to insert itself into a contractual dispute? It's not clear to me what the IRP here would be doing, and in some cases (though not all) the injunction may not be based on ICANN process or decision. What if the entity... [2]

Stress test category III. Legal/Legislative Action (cont'd)

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>20. A court order is issued to block ICANN's delegation of a new TLD, because of complaint by existing TLD operators or other aggrieved parties.</p> <p>Consequence: ICANN's decision about whether to honor such a court order could bring liability to ICANN and its contracted parties.</p>	<p>In the example of singular/plural gTLDs, the board's decision to accept independent panel rulings was not subject to community scrutiny: the community had no standing to object; and Reconsideration requests looked only at process and not at the <i>substance</i> of the decision.</p> <p>If ICANN board discarded policy in order to respond to the court order, the community would not have standing or means to challenge or veto that decision.</p> <p>ICANN is bound to follow (or appropriately challenge) orders from courts of competent jurisdiction.</p>	<p>Preventive: During policy development, the community would have standing to challenge management and board decisions about policy and implementation.</p> <p>Remedial: If consensus policy were adopted but the ICANN board discarded policy in order to respond to the court order, the community has several options:</p> <p>One proposed measure would empower a supermajority of ICANN community representatives to veto a board decision.</p> <p>Another measure would give the community standing to file for Reconsideration or IRP [what would be the standard of review?]</p> <p>Another measure would allow community to force ICANN to implement a consensus policy or recommendation of an AoC Review.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would be inadequate.</p>	<p>Proposed measures would be an improvement but might still be inadequate.</p>

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Comment [14]: See the discussion in the stress test above; while there can be a choice in whether to appeal from an order or follow it, it's not quite fair to equate complying with an order to discarding policy. This is about when a court order competes with policy, which is difficult to protect against. What if ICANN had fought and said "this decision was taken in accordance with policy" and was still ordered to act against? ICANN was in a position of upholding the policy in its defense . . . but can't avoid later sanctions by saying "but we were following policy". This cuts both ways.

Samantha Eisner 3/10/15 6:07 PM

Comment [13]: This isn't

Samantha Eisner 3/10/15 6:09 PM

Comment [12]: The consequence here doesn't parse with the rest of the discussion. Isn't this about ICANN's attempt at delegation of a TLD that the community believes is being delegated outside of policy, and how ICANN could be held accountable for that action?

Stress test category IV. Failure of Accountability

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>10. Chairman, CEO or major officer acting in a manner inconsistent with the organization’s mission. and</p> <p>24. An incoming Chief Executive institutes a “strategic review” that arrives at a new, extended mission for ICANN. Having just hired the new CEO, the Board approves the new mission / strategy without community consensus.</p> <p>Consequence: major impact on reputation; litigation. Community ceases to see ICANN as the community’s mechanism for limited technical functions, and views ICANN as an independent, sui generis entity with its own agenda, not necessarily supported by the community. Ultimately, community questions why ICANN’s original functions should remain controlled by a body that has acquired a much broader and less widely supported mission.</p>	<p>As long as NTIA controls the IANA functions contract, ICANN could risk losing IANA functions if it were to expand scope too broadly.</p> <p>The Community has some input in ICANN budgeting and Strat Plan, and could register objections to plans and spending on extending ICANN’s mission.</p> <p>California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>One proposed measure is empowering the community to veto ICANN’s proposed annual budget. This measure could block a proposal by ICANN to increase its expenditure on extending its mission beyond what the community supported.</p> <p>If the ICANN board voted to approve the CEO’s plans, one proposed measure would give the community standing to veto a board decision.</p> <p>Another proposed measure is empowering the community to challenge a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. [What would be the standard used for this review?]</p> <p>Another proposed measure is a proscriptive restriction on ICANN’s activities, as part of the bylaws or Articles of Incorporation.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>Proposed measures in combination are adequate.</p>

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>12. Capture by one or several groups of stakeholders.</p> <p>Consequence: major impact on trust in multistakeholder model, prejudice to other stakeholders.</p>	<p>Regarding capture by governments, 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>CCWG proposals for community empowerment rely upon supermajority (2/3, 3/4, or 4/5) to veto ICANN budgets or decisions, or to trigger reconsideration or IRP. A supermajority requirement is an effective prevention of capture by one or a few groups.</p> <p>To prevent capture by governments, another proposed measure would amend ICANN bylaws (Section XI 1j) to give due deference only to GAC consensus advice, and add a definition of “consensus”. 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>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would be inadequate</p>	<p>Proposed measures would be adequate.</p>

Samantha Eisner 3/10/15 6:16 PM
Comment [15]: Can there be places to protect against capture in other scenarios as well? Any new mechanism would have to be tested against this; we’ll have to see what is developed.

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>13. One or several stakeholders excessively rely on accountability mechanism to “paralyze” ICANN.</p> <p>Consequence: major impact on corporate reputation, inability to take decisions, instability of governance bodies, loss of key staff</p>	<p>Current redress mechanisms permit one stakeholder to block implementation of policies. But these mechanisms (IRP, Reconsideration, Ombudsman) are expensive and limited in scope of what can be reviewed.</p>	<p>CCWG proposals for <i>community</i> empowerment rely upon supermajority (2/3, 3/4, or 4/5) of community representatives to veto ICANN budgets or decisions, or to trigger reconsideration or IRP. A supermajority requirement is an effective prevention of paralysis by one or a few groups.</p> <p>However, some CCWG proposals may make redress mechanisms more accessible and affordable to individual stakeholders, increasing their ability to block implementation of policies and decisions. The standards of review may need to be adjusted based on whether the community or an individual sought the review /redress.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures seem to be adequate.</p>	<p>Proposed measures may need to distinguish community powers from those available to individuals.</p>

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>16. ICANN engages in programs not necessary to achieve its limited technical mission. For example, uses fee revenue or reserve funds to expand its scope beyond its technical mission, giving grants for external causes.</p> <p>Consequence: ICANN has the power to determine fees charged to TLD applicants, registries, registrars, and registrants, so it presents a large target for any Internet-related cause seeking funding sources.</p>	<p>As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to expand scope without community support. But as a result of IANA stewardship transition, ICANN would no longer need to limit its scope order to retain IANA contract with NTIA.</p> <p>Community was not aware of ICANN Board’s secret resolution to initiate negotiations to create NetMundial. There was no apparent way for community to challenge/reverse this decision.</p> <p>The Community has input in ICANN budgeting and Strat Plan.</p> <p>Registrars must approve ICANN’s variable registrar fees, though Registrars do not view this as an accountability measure.</p> <p>California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>One proposed measure is empowering the community to veto ICANN’s proposed annual budget. This measure could block a proposal by ICANN to increase its expenditure on initiatives the community believed were beyond ICANN’s limited mission. However, this would be an extreme measure since the entire budget would have to be vetoed.</p> <p>Another proposed mechanism is a challenge to a board decision, made by an aggrieved party or the Community as a whole. This would refer the matter to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a commitment or expenditure outside the annual budget process, the IRP mechanism enables reversal of that decision.</p> <p>Another proposed measure is to amend ICANN bylaws to prevent the organization from expanding scope beyond what is needed for SSR in DNS operations and to meet mission and core values of ICANN.</p> <p>If ICANN’s board proposed to amend/remove these bylaws provisions, another proposed measure would empower the community to veto that proposed bylaws change.</p>
<p>Conclusions: threat is directly related to the transition of IANA stewardship Discussed in Singapore.</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures in combination may be adequate.</p>

Samantha Eisner 3/10/15 6:17 PM
Comment [16]: Actually, once the resolution was made public, then any of the appropriate mechanisms could have been initiated.

Stress test category IV. Failure of Accountability (cont'd)

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 online expression, for example.</p>	<p>Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try and 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>"¹ But the GAC may at any time change its procedures to use majority voting instead of consensus.</p>	<p>One proposed measure is to give the community standing to veto a board decision. If ICANN board acquiesced to GAC advice that was not supported by GAC consensus, the community veto could enable reversal of that decision.</p> <p>Another proposed measure is to amend ICANN bylaws (Section XI 1j) to give due deference only to GAC consensus advice, and add a definition of "consensus".</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>This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures are adequate.</p>

Discussed on 17-Feb CCWG call and 24-Feb CCWG call

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

Stress test category IV. Failure of Accountability (cont'd)

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>22. ICANN Board fails to comply with bylaws and/or refuses to accept the decision of a redress mechanism constituted under the bylaws.</p> <p>Consequence: Community loses confidence in multistakeholder structures to govern ICANN.</p>	<p>As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to ignore bylaws. But as a result of IANA stewardship transition, ICANN would no longer need to follow bylaws in to retain IANA contract with NTIA.</p> <p>Aggrieved parties can ask for Reconsideration of board decisions, but this is currently limited to questions of whether process was followed.</p> <p>Aggrieved parties can file for IRP, but decisions of the panel are not binding on ICANN.</p> <p>California's Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged.</p> <p>One proposed measure is to empower the community to force ICANN's board to implement a recommendation arising from ATRT. There may be other forms of board inaction that may require additional accountability mechanisms.</p> <p>One proposed measure is empowering the community to challenge a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN failed to comply with its bylaws, the IRP mechanism enables a reversal of that decision.</p> <p>If the ICANN board were to ignore binding IRP decisions, another proposed measure would empower the community to force resignation ICANN board member(s).</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship Discussed in Singapore</p>	Existing measures are inadequate.	Proposed measures in combination are adequate because the community has power to spill the board.

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>23. ICANN uses RAA or other agreements to impose requirements on third parties, outside scope of ICANN mission. Affected third parties, not being contracted to ICANN, have no effective recourse against ICANN. Contracted parties, not being implicated by the requirements themselves, do not avail themselves of mechanisms allowing them to challenge ICANN's decision.</p> <p>Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.</p>	<p>Affected 3rd parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies.</p> <p>Affected 3rd parties (e.g. registrants and users) have no standing to challenge ICANN management and board on how it has implemented approved policies.</p> <p>If ICANN changes its legal jurisdiction, that could affect the ability of aggrieved 3rd parties to sue ICANN.</p>	<p>Affected 3rd parties (e.g. registrants and users) could lobby for these community powers of review and redress:</p> <p>A proposed measure to empower a supermajority of ICANN community representatives to veto a board decision.</p> <p>A proposed measure to empower the community to challenge a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. [What would be the standard used for this review?]</p> <p>Another proposed measure is to amend ICANN bylaws to prevent the organization from expanding scope beyond what is needed for SSR in DNS operations and to meet mission and core values of ICANN.</p>
<p>Conclusions: This threat is not directly related to IANA transition</p>	Existing measures are inadequate.	Proposed measures

Samantha Eisner 3/10/15 6:24 PM
Comment [18]: Is this about approved policies? Aren't those community developed? If it's the community policy that impacts third parties, is this truly an ICANN Board-only issue of accountability to the larger Internet community? Totally separate issue from implementation.

Samantha Eisner 3/10/15 6:21 PM
Comment [17]: Not sure what this means. The contracted parties do not challenge the requirements because they don't actually impact the contracted parties? Maybe we can say it more simply?
 Also, an example would be helpful here – what is it that we're trying to test against. It's not clear, and I think that we should be VERY clear when we're suggesting market power issues.

Samantha Eisner 3/10/15 6:21 PM
Comment [19]: We've discussed before that changing jurisdiction may not be as absolute as imagined.

Stress test category V. Failure of Accountability to External Stakeholders

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC)</p> <p>Consequence: ICANN would no longer be held to its Affirmation commitments, including the conduct of community reviews and required implementation of review team recommendations.</p>	<p>The AoC can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p> <p>But as a result of IANA stewardship transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain the AoC .</p>	<p>One proposed mechanism is community challenge to a board decision, such as referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN canceled the AoC, the IRP mechanism could enable reversal of that decision.</p> <p>Another proposed measure is to import AoC provisions into the ICANN bylaws, and dispense with the bilateral AoC with NTIA. Bylaws would be amended to include AoC commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9, or other provisions that are deemed essential by the community.</p> <p>If ICANN's board proposed to amend the AoC provisions added to the bylaws, another proposed measure would empower the community to veto that proposed bylaws change.</p> <p>Note: none of the proposed measures could prevent NTIA from canceling the AoC.</p>
<p>Conclusions: This threat is directly related to IANA transition</p>	<p>Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>Proposed measures in combination are adequate.</p>

Discussed in Singapore.

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>15. ICANN terminates its legal presence in a nation where Internet users or domain registrants are seeking legal remedies for ICANN's failure to enforce contracts, or other actions.</p> <p>Consequence: affected parties could be prevented from seeking legal redress for commissions or omissions by ICANN.</p>	<p>As long as NTIA controls the IANA contract, ICANN could risk losing IANA functions if it were to move in order to avoid legal jurisdiction.</p> <p>Paragraph 8 of the AoC requires ICANN to remain headquartered in the US, but the AoC can be terminated by ICANN at any time.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p>	<p>One proposed measure is to give the community standing to veto a board decision. If ICANN board voted to vacate a legal presence, the community veto could enable reversal of that decision.</p> <p>One proposed measure is to import AoC provisions into the ICANN bylaws, and dispense with the bilateral AoC with NTIA. Bylaws would be amended to include AoC commitments 8, requiring it to maintain legal presence in the US, where it is subject to legal redress by any aggrieved party.</p> <p>If ICANN's board proposed to amend the AoC provisions added to the bylaws, another proposed measure would empower the community to veto that proposed bylaws change.</p>
<p>Conclusions: This threat is directly related to the</p>	<p>Existing measures are inadequate once NTIA terminates IANA</p>	<p>Proposed measures improve upon existing measures, and may be adequate.</p>

Samantha Eisner 3/10/15 6:26 PM
Comment [20]: We've discussed earlier on calls that the jurisdictional change issue isn't so cut and dried; it's hard to escape jurisdiction. Not saying it's out of the question, but it's very difficult. If a company moves, the jurisdiction of the place that they did (and likely still do) a lot of business doesn't just disappear.

transition of IANA stewardship	contract.	
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Stress test category V. Failure of Accountability to External Stakeholders (cont'd)

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>25. ICANN delegates or subcontracts its obligations under a future IANA agreement to a third party. Would also include ICANN merging with or allowing itself to be acquired by another organization.</p> <p>Consequence: Responsibility for fulfilling the IANA functions could go to a third party that was subject to national laws that interfered with its ability to execute IANA functions.</p>	<p>The present IANA contract (link) at C.2.1 does not allow ICANN to sub-contract or outsource its responsibilities to a 3rd party without NTIA's consent.</p> <p>NTIA could exert its control over ICANN's decision as long as it held the IANA contract. But not after NTIA relinquishes the IANA contract.</p>	<p>The CWG planning the IANA stewardship transition might prohibit or restrict ICANN's ability to sub-contract or outsource its responsibilities to a 3rd party.</p> <p>The CWG might design mechanisms and structures that enable separation, such that the IANA functions could be readily revoked and re-assigned if ICANN were to violate its agreement by attempting to sub-contract or outsource its responsibilities to a 3rd party without required approval.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures would not be adequate after NTIA relinquishes the IANA contract.</p>	<p>At this point, CWG's recommendations are still in development.</p>