

CCWG-Accountability:

Using Stress Tests to evaluate existing & proposed accountability measures [Draft v9, 27-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+Tests+Work+Party>

Starting in Singapore, the work party prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.

Note that we cannot apply stress tests definitively until CCWG and CWG have defined mechanisms/structures to test. Still, we've done our best with the proposed mechanisms at this point in the process.

Also, please note that several stress tests apply to work of the CWG regarding transition of the IANA naming functions contract (see Stress Tests #1 & 2, 21, 19, 20, 25)

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. If not, registry operators pay the fees.</p> <p>ICANN's reserve fund could support operations in a period of reduced revenue. Reserve fund is independently reviewed periodically.</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>

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 has annual independent audit that includes testing of internal controls designed to prevent fraud and corruption.</p> <p>ICANN maintains an anonymous hotline for employees to report suspected fraud.</p> <p>ICANN board can dismiss CEO and/or executives responsible.</p> <p>The community has no ability to force the board to report or take action against suspected corruption or fraud.</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. This measure enables blocking a board proposal or decision that is tainted by corruption or fraud.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would not be adequate if litigation costs or losses were extreme and sustained.</p>	<p>Proposed measures are helpful, but might not be adequate if litigation costs and losses were extreme and sustained.</p>

Stress test category II. Failure to Meet Operational Expectations

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>1. Change authority for the Root Zone ceases to function, in part or in whole. also</p> <p>2. Delegation authority for the Root Zone ceases to function, in part or in whole.</p> <p>Consequence: interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.</p>	<p>Under the present IANA functions contract, NTIA can revoke ICANN’s authority to perform IANA functions and re-assign to different entity/entities.</p> <p>After NTIA relinquishes the IANA functions contract, this measure will no longer be available.</p>	<p>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.</p> <p>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.</p> <p>Another measure is to require annual external security audits and publication of results. [Mathieu]</p> <p>Another measure is to require certification per international standards (ISO 27001) and publication of results. [Mathieu]</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures would be inadequate after NTIA terminates the IANA contract.</p>	<p>At this point, CWG’s recommendations are still in development.</p>

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>11. Compromise of credentials.</p> <p>Consequence: major impact on corporate reputation, significant loss of authentication and/or authorization capacities.</p>	<p>Regarding compromise of internal systems:</p> <p>Based upon experience of the recent security breach, it is not apparent how the community holds ICANN management accountable for implementation of adopted security procedures.</p> <p>It also appears that the community cannot force ICANN to conduct an after-action report on a security incident and reveal that report.</p> <p>Regarding DNS security: Beyond operating procedures, there are credentials employed in DNSSEC.</p> <p>ICANN annually seeks SysTrust Certification for its role as the Root Zone KSK manager. The IANA Department has achieved EFQM Committed to Excellence certification for its Business Excellence activities.</p> <p>Under C.5.3 of the IANA Functions Contract, ICANN has undergone annual independent audits of its security provisions for the IANA functions.</p>	<p>Regarding compromise of internal systems:</p> <p>No measures yet suggested would force ICANN management to conduct an after-action report and disclose it to the community.</p> <p>Nor can the community force ICANN management to execute its stated security procedures for employees and contractors.</p> <p>Regarding DNS security: One proposed measure empowers the community to force ICANN's board to implement a recommendation arising from an AoC Review – namely, <i>Security Stability and Resiliency</i>.</p> <p>Another measure might empower the community to force ICANN to respond to security recommendations from advisory committees such as SSAC.</p> <p>Another measure is to require annual external security audits and publication of results. [Mathieu]</p> <p>Another measure is to require certification per international standards (ISO 27001) and publication of results. [Mathieu]</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>Proposed measures would be helpful to mitigate and remedy the scenario, but not to prevent it.</p>

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.</p> <p>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>[Does ATRT2 have a recommendation on this?]</p> <p>One proposed measure is to empower the community to force ICANN’s board to implement a recommendation arising from PDP or 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 refer that board decision to the IRP.</p>
<p>Conclusions: This threat is partially related to the transition of IANA stewardship</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>

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>21. A government official demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD Manager.</p> <p>However, the IANA Function Manager is unable to document voluntary and specific consent for the revocation from the incumbent ccTLD Manager.</p> <p>Also, the government official demands that ICANN assign management responsibility for a ccTLD to a Designated Manager. But the IANA Function Manager does not document that: Significantly Interested Parties agree; that other Stakeholders had a voice in selection; the Designated Manager has demonstrated required capabilities; there are not objections of many Interested Parties and/or Significantly Interested Parties.</p> <p>This stress test examines the community's ability to hold ICANN accountable to follow established policies. It does not deal with the adequacy of policies in place.</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 contract with NTIA, the IANA Department issues a boiler plate report to the ICANN Board, which approves this on the Consent Agenda and forwards to NTIA, which relies on the Board's certification and approves the revocation, delegation or transfer.</p> <p>There is presently no mechanism for the incumbent ccTLD Manager or the community to challenge ICANN's certification that process was followed properly.</p> <p>[more to come from Eberhard Lisse]</p>	<p>The CWG may recommend that the IANA Function Manager extensively document the process of revocation, transfer and/or delegation, and publish all internal and external documents in this regard, without redaction.</p> <p>The CWG may recommend an Independent Appeals Process (IAP) to handle such disputes.</p> <p>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 board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to revoke or assign management responsibility for ccTLD, the IRP mechanism could review that decision [would require a standard of review].</p> <p>[awaiting edits from Eberhard Lisse]</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>

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., Antitrust suit</p> <p>In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>The community could develop new policies that respond to litigation challenges.</p> <p>An ICANN board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction.</p>	<p>After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>The community could develop new policies that respond to litigation challenges.</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 are inadequate.</p>	<p>Proposed measures would help the community hold ICANN accountable, but might not be adequate to stop interference with ICANN policies.</p>

Note: Stress Tests 3 and 4 were split per request from Sam Eisner

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<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>In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>The community could develop new policies that respond to new regulations.</p> <p>An ICANN board decision on how to respond to the regulation (litigate or change policy/implementation) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction.</p>	<p>After ICANN board responded to the regulation (litigate or change policy/implementation), the community would have several response options:</p> <p>The community could develop new policies that respond to regulation.</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 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>In response, ICANN board would decide whether to litigate, concede, settle, etc.</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 US Government. [pending verification]</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>A separate consideration: An ICANN board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow 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 of ICANN decision to re-delegate or its decision to acquiesce or litigate the court order.</p> <p>Another proposal is for ICANN to hold harmless and/or indemnify the root zone maintainer for legal costs incurred for properly publishing the root.</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>After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) 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>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures might not be adequate.</p>	<p>At this point, CWG's recommendations are still in development.</p>

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>For example, an existing gTLD operator might sue to block delegation of a plural version of the existing string.</p> <p>In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>Consequence: ICANN's decision about how to respond to court order could bring liability to ICANN and its contract parties.</p>	<p>Before delegation, the community lacked standing to object to string similarity decisions. Reconsideration requests looks at process but not at <i>substance</i> of the decision.</p> <p>An ICANN board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction, and may consider factors such as cost of litigation and insurance.</p>	<p>Preventive: During policy development, the community would have standing to challenge ICANN board decisions about policy and implementation.</p> <p>A future new gTLD Guidebook could give the community standing to file objections.</p> <p>Remedial: After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) 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>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>

Stress test category IV. Failure of Accountability

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>10. Chairman, CEO or officer acting in a manner inconsistent with the organization’s mission.</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: Community ceases to see ICANN as the community’s mechanism for limited technical functions, and views ICANN as an independent, <i>sui generis</i> 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 risks 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 to trigger reconsideration or IRP. A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough.</p> <p>Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.</p> <p>To prevent capture by governments, another proposed measure would amend ICANN bylaws (Article XI, Section 2, item 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</p>	<p>Existing measures would be</p>	<p>Proposed measures would be adequate.</p>

the transition of IANA stewardship	inadequate	
------------------------------------	------------	--

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 might enable 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>There is no present mechanisms for a ccTLD operator to challenge a revocation decision.</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 to trigger reconsideration or IRP. A supermajority requirement is an effective prevention of paralysis by one or a few groups, provided that quorum requirements are high enough.</p> <p>Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.</p> <p>Consider means for ccTLD operator to challenge revocation decisions.</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 in 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</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures in combination may be adequate.</p>

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 (Article XI, Section 2, item 1j) to give due deference only to GAC consensus advice, and add a definition of "consensus" to codify the definition 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>
<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>

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</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures in combination are adequate because the community has power to spill the board.</p>

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. (e.g. registrant obligations)</p> <p>Affected third parties, not being contracted to ICANN, have no effective recourse.</p> <p>Contracted parties, not affected by the requirements, may choose not to use their ability to challenge ICANN's decision.</p> <p>This issue occurs in policy development, implementation, and compliance enforcement.</p> <p>Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.</p>	<p>During policy development, affected third parties may participate and file comments.</p> <p>Affected third parties may file comments on proposed changes to registry and registrar contracts.</p> <p>Affected third parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies.</p> <p>Affected third parties (e.g. registrants and users) have no standing to challenge ICANN management and board on how it has <i>implemented</i> approved policies.</p> <p>If ICANN changes its legal jurisdiction, that might reduce the ability of third parties to sue ICANN.</p>	<p>Affected third parties (e.g. registrants and users) could lobby for these community powers of review and redress:</p> <p>A proposed measure would 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>	<p>Existing measures are inadequate.</p>	<p>Proposed measures would, in combination, be adequate.</p>

On 12-March, Edward Morris suggested this additional stress test in category IV: Failure of Accountability

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>___ During implementation of a properly approved policy, ICANN staff substitutes their preferences and creates processes that effectively change or negate the policy developed. Whether staff do so intentionally or unintentionally, the result is the same.</p> <p>Consequence: Staff capture of policy implementation undermines the legitimacy conferred upon ICANN by established community based policy development processes.</p>	<p>The reconsideration review mechanism allows for appeal to the Board of staff actions that contradict established ICANN policies.</p>	<p>If the staff action involved a board decision, there are proposed improvements to challenge a board decision by referral to an Independent Review Panel (IRP) with the power to issue a binding decision.</p>
<p>Conclusions:</p>		

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 standing to challenge a board decision by 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>

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 might 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. 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 transition of IANA stewardship</p>	<p>Existing measures are inadequate once NTIA terminates IANA contract.</p>	<p>Proposed measures improve upon existing measures, and may be adequate.</p>

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>Nor would NTIA's required principles for transition be relevant after transition occurred.</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>