

Stress Test Analysis for Test 23

Test Original Description

“ICANN uses RAA or other agreements to arrange that its counter-parties impose requirements on third parties, allegedly outside scope of ICANN mission. Affected third parties, not being contracted to ICANN, have little or 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. Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.”

CCWG Proposed Solution

The CCWG’s proposes to solve the problem identified by Stress Test 23 in the following manner:

- Changes to the Bylaws would more clearly specify ICANN’s Mission, in particular
 - Specify that the Mission is limited to enumerated purposes and that ICANN is not authorised to act for purposes outside the Mission
 - Explicitly prohibit ICANN from using its authority over unique Internet identifiers (which includes its authority to make gTLD policy) does not include regulation of services that use the DNS or the regulation of the content these services carry or provide
- Change the Bylaws to state that the IRP so that it is available to all materially affected parties
- Expand the role of the IRP, so that it is able to consider substantive complaints (including complaints that ICANN has acted outside its Mission) as well as procedural ones
- Make provision in the bylaws intended to change the IRP from an advisory function to a form of independent arbitration that is intended to be binding
- **(Still under discussion and still disputed within CCWG)** Provide for the enforceability of the Bylaws through either an “Empowered SO/AC (Membership) Model” or an “Empowered SO/AC (Designator) Model”.

Generic Scenario used to examine Stress Test 23

The original text of stress test 23 envisages an undesirable outcome, rather than the circumstances that give rise to that outcome. We have therefore reformulated the text into a plausible scenario that is susceptible to analysis so as to determine whether the CCWG's proposal would avoid that outcome occurring.

The scenario is:

"A Registrant in a gTLD registry has their domain cancelled, suspended, or otherwise rendered inoperable as a sanction for failure to comply with an ICANN policy. The Registrant wishes to challenge that validity of the policy that resulted in domain cancellation on either procedural or substantive grounds (or both)."

- A challenge on **procedural grounds** is a challenge that the policy was not properly arrived at in such a fundamental way that it should not be considered a policy at all. For example, an allegation would fall under this heading if it claimed that the policy was entirely an emanation of the ICANN staff, and had never been through the PDP or even been authorised by the Board.
- A challenge on **substantive grounds** is a challenge that the policy is inconsistent with binding commitments on the content of policy. For example, an allegation would fall under this heading if it claimed that the policy improperly sought to regulate end-user content, in contravention of the Bylaw commitment that ICANN must not seek to regulate the content or behaviour of the services that are supported by the unique Internet identifiers it manages.

Note that procedural and substantive challenges can be made independently: a policy would be invalid if it had not been validly adopted, even if the substance of the policy was an entirely legitimate policy for ICANN to adopt; likewise, a policy is substantively invalid if it conflicts with binding commitments in the ICANN bylaws, even if it has been adopted through a valid procedure.

It is part of the CCWG's proposal that a "materially affected party" will be able to challenge an ICANN policy on procedural or substantive grounds by invoking the IRP.

For the purposes of this analysis, we assume that a domain registrant whose domain has been cancelled as a sanction for failure to comply with ICANN policy qualifies as a materially affected party.

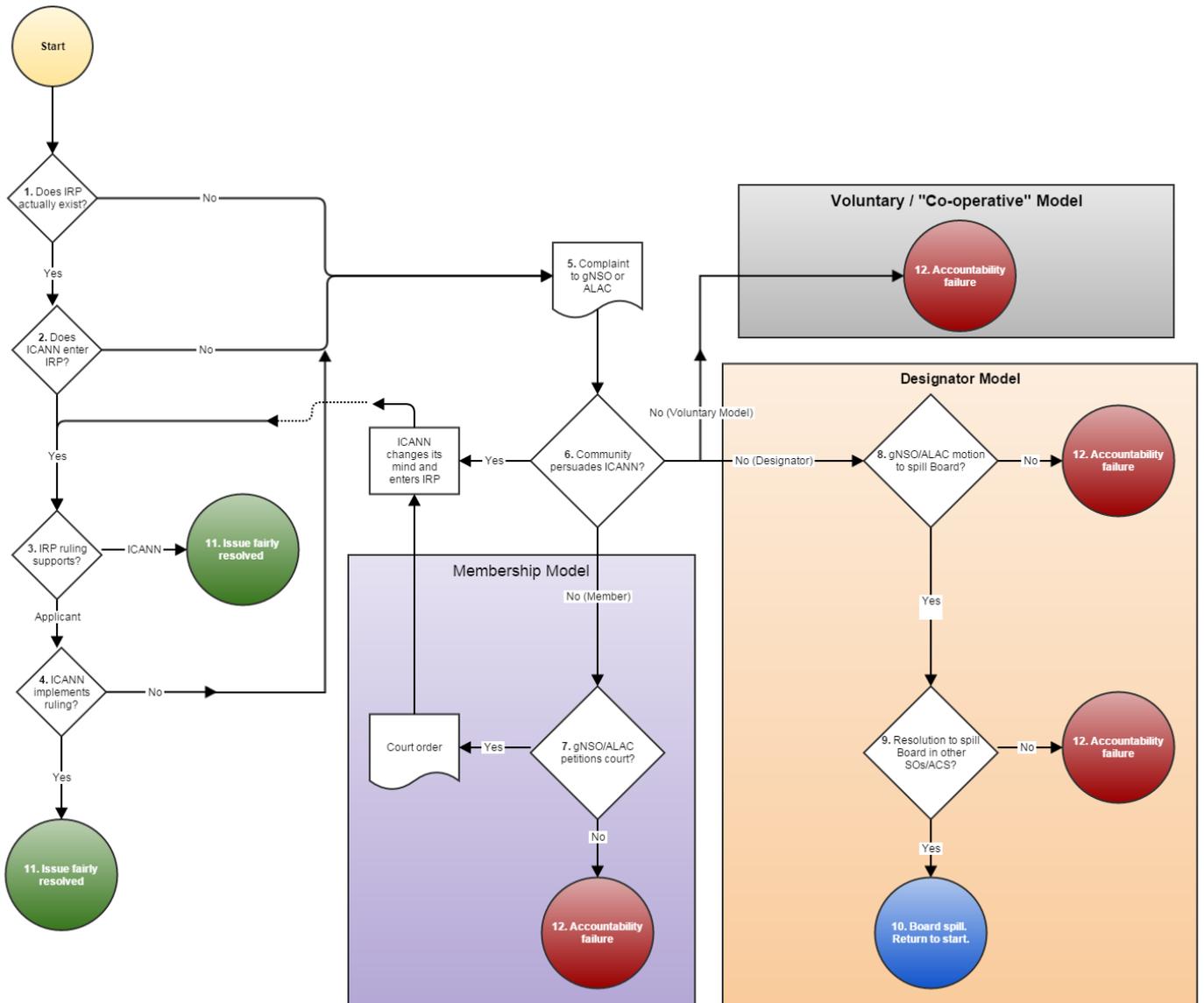
This paper analyses whether the CCWG's proposed solution satisfies Stress Test 23 by considering applying the procedures in the CCWG's proposal to the scenario. The test is deemed satisfied if the proposed solution provides an effective guarantee that complaints of the nature described will be considered by an impartial and independent body, and that ICANN will comply with a ruling against it by that body.

Structure of analysis

We set out below the process steps that an IRP applicant would have to follow to seek satisfaction diagrammatically (in the form of a flow-chart) under both the “Empowered SO/AC (Membership) Model”, and again under the “Empowered SO/AC (Designator) Model”, and identify potential failure modes with each. The notes to the diagram explain the steps, and should be read as an integral part of the diagram.

It should be noted carefully that none of the failure modes identified necessarily depend on sheer lawlessness on the part of the ICANN Board; we do identify circumstances in each case where there might exist a plausible (but nonetheless problematic) reasons for failing to uphold the promise in the Bylaws that ICANN will submit to independent, binding arbitration and abide by the outcome.

Flowchart of accountability process available to IRP applicants



Notes

- 1. Does IRP actually exist?** This asks whether the IRP system exists in reality, rather than just as an empty promise in the Bylaws. For the answer to this to be “Yes”, the system must be fully implemented, panellists must have been appointed and be ready to accept applications from complainants.
- 2. Does ICANN enter IRP?** This asks whether ICANN actually chooses to submit to the IRP in the particular case. If ICANN simply defied a Bylaws requirement to submit to the IRP for adjudication of a complaint against it, the answer to this would be “No”, but that is not the only (or, arguably, the most likely) reason for a “No”. It is generally recognised that the IRP will have to have some mechanism for the swift and efficient disposal of claims that are vexatious, frivolous, or have no realistic prospect of success. However, if ICANN chooses to abrogate to itself the power to decide whether claims have a realistic prospect of success (rather than letting this be decided independently, within the IRP system itself), it could choose to set the threshold so high that many reasonable claims were denied a hearing. For the purposes of this analysis, the question “Does ICANN enter IRP” should therefore be answered “No” if ICANN refuses to enter the IRP *for any reason*, as this will chart whether ICANN is accountable for its decision to refuse; on the other hand, if ICANN does submit to the IRP in each case, the answer is “Yes” even if the panellists dispose of the case without a full hearing.
- 3. IRP finding?** This question asks whether the IRP rules in favour of ICANN or in favour of the applicant.
- 4. IRP decision implemented?** This question asks whether ICANN complies with the ruling of the IRP panellists.
- 5. Complaint to gNSO/ALAC.** We assume that any Registrant in any gTLD will be eligible for representation in the gNSO, either through membership in one of the constituencies in the Non-Contracted Parties House or through ALAC. In this step of the procedure, the applicant notifies either ALAC or, through its representative body, the gNSO either that the IRP has not been made available, that ICANN has refused to enter into it in this case, or that the IRP has granted a ruling in favour of the applicant that ICANN has ignored (as applicable).
- 6. Community persuades ICANN?** This question asks whether the non-availability of the IRP or ICANN’s failure to abide by the IRP (as applicable) was resolved through ordinary, community-based processes.
- 7. gNSO/ALAC petitions court?** This question asks whether gNSO/ALAC responds to the applicant’s complaint about the failure of the IRP process by petitioning the court to instruct ICANN to implement the IRP and submit to it in this case, or to comply with the ruling of the IRP panellists.
- 8. gNSO/ALAC Resolution to spill Board?** This question asks whether gNSO/ALAC seeks to resolve the issue by passing a resolution to discharge the entire Board.
- 9. Resolution to spill Board in other SO/ACs?** This question asks whether a sufficiency of other SOs and ACs invoke their power so that the entire Board is actually discharged.
- 10. Board spill.** The entire ICANN Board is discharged and a new Board is appointed.

11. Issue fairly resolved. The applicant has had the opportunity to be heard by the IRP resulting in either an independent ruling in ICANN's favour, or a ruling in the applicant's favour with which ICANN complied.

12. Accountability failure. *Either*

- a. The applicant has not been able to avail itself of the IRP process as guaranteed in the Bylaws, and there are no further steps that the applicant is able to take to seek redress; *Or*
- b. The applicant has obtained a ruling in its favour from the IRP but ICANN has ignored or defied this ruling, and there are no further steps that the applicant is able to take to seek redress.

Conclusion

Neither Empowered SO/AC (Membership) Model nor the Empowered SO/AC (Designator) Model guarantee ICANN's accountability to materially affected parties: both models depend on the willingness of community structures to enforce the promise of accountability made in the Bylaws as they would stand if the CCWG's proposal is adopted. These models can therefore be described as being designed to guarantee ICANN's accountability *to its own internal community structures*, rather than to the parties affected by its actions.

In the case of Empowered SO/AC (Membership) Model, affected parties rely either on ICANN actually implementing the IRP and abiding by its outcome of its own volition, or on gNSO or ALAC enforcing the bylaws on their behalf. For the latter to be a realistic prospect, these bodies would have to develop the organisation and financial capacity to bring a petition in court: if this model is selected, such development should be addressed as part of Workstream 2. On the positive side, both gNSO and ALAC are comprised of parties that have an interest in the IRP being available and effective as a means of redress for circumstances such as those described in this scenario. This constitutes a "representative" form of accountability that some may find adequate while others may not.

In the case of Empowered SO/AC (Designator) Model, the only recourse is a Board spill, and that depends on the consent of other SOs and ACs beyond gNSO and ALAC. The other SOs are comprised of parties that are not affected by the scenario described. Moreover, unlike registrants and other gNSO constituent parties they have alternative accountability mechanisms apart from the IRP. It is therefore doubtful that a Board spill would ever be a realistic prospect or a credible threat as a response to failure to make the IRP available or abide by its outcomes.

For these reasons we conclude that:

- The Empowered SO/AC (Membership) Model has the potential to satisfy Stress Test 23, but it also has the potential to fail it. Further work in Workstream 2 could improve this balance.
- The Empowered SO/AC (Designator) Model **does not** satisfy Stress Test 23.
- The Voluntary or Cooperative Model **does not** satisfy Stress Test 23.

Areas of enquiry for further improvement

- Can registrants be given the legal right to enforce their bylaws in their own name, for example by making them members of ICANN?
- Can registrants be given a *contractual right* to access the IRP?