

Stress Tests -- Analysis of public comments on 2nd draft (version 1)

From CCWG 2nd Draft Proposal

The CCWG 2nd draft proposal describes Stress Tests on pages 83 thru 119. Between the first and second draft proposal, we added 10 Stress Tests, per requests from public comment, a Board/Legal letter, and NTIA's 16-Jun Statement.

Public Comments: We had 20 public commenters on Stress Tests.

Areas of Consensus

None of the commenters expressed any overall concern with our application of Stress Testing to CCWG proposed mechanisms.

Areas Needing Clarification/Refinement

1. Stress Tests on capture or unintended consequences of changes (12, 13, NTIA's 33 - 35).

A few commenters said that our analysis should dig deeper – particularly on CMSM voting.

We express concern over the potential rebalancing of power between the SO/AC community as defined by the method of participation in the community mechanism. We respectfully suggest that Stress Test 35 (NTIA-4) may not have fully examined the potential impact of operationalising the advisory committees into roles that may not have been envisaged for them during their creation.

Requests for New Stress Tests

1. ELIG (law firm) suggested stress testing on a “deadlock” over approving changes to Fundamental bylaws, and blocking changes to regular bylaws: "We believe that it would be helpful to also explain the details of the legislation procedures in case of a deadlock during the amendment/enactment of a bylaw."

Others?

Areas of Concern/Divergence

1. Stress Test 21, regarding revocation and re-assignment of a ccTLD manager. (p.94)

We did not propose a specific review & redress mechanism for this, per request by CWG-Stewardship

We concluded that neither existing or CCWG proposals adequately address this scenario, and that ccNSO is developing policy per the Fol (Oct-2014)

The Govt of NZ suggests that IRP should be available for this scenario.

While not part of the public comment, this ST was discussed at the CCWG meeting in Los Angeles:

Dot-NZ suggested a moratorium on re-delegations of ccTLD managers during the “gap” while ccNSO does its policy development.

Chris Disspain said ccNSO should say what to do in the gap period.

ST Team believes we should retain current ST 21 analysis and not recommend other actions.

2. Stress Tests 29 and 30: (pp 112-13)

These STs were added in response to public comment from New America Foundation.

7 commenters object to ST 29 and 30 (CoA, RIAA, IPC, ITI, US Chamber, USCIB, BC). Staff summarized objections this way:

submissions were concerned about conflation with content regulation. To quote the US Chamber of Commerce on the topic: “We are concerned with the framing of Stress Tests # 29 and 30, which seems to conflate the enforcement of certain mutually-agreed to contractual obligations with that of “content regulation.” ICANN has a duty to enforce and enter into mutually agreeable contractual provisions, that are aimed at preventing malicious, abusive, or illegal conduct and the CCWG should add language clarifying this this obligation is not altered by ICANN’s revised Mission statement. We have a concern that the by-laws can be interpreted to limit ICANN’s ability (or willingness) to enforce existing contract terms and Public Interest Commitments with Registrars, agree to new contracts with strong protection provisions or otherwise participate in other programs designed to promote public interest goals.”

Let’s discuss whether the ST team properly analyzed the Stress Tests: we said the IRP could potentially find that contract enforcement could be tested against bylaws requirement for bottom-up policy and ICANN’s mission statement. (We have no idea what an IRP would say). Commenters in Los Angeles said that we should not have accepted the Consequence text from New America: “ICANN effectively becomes a regulator of conduct and content on registrant websites”

The ST analysis as succeeded in focusing attention on the need to clarify whether limited mission and B-Up process bylaws would interfere with contract enforcement.

WP2 is considering new text for the mission statement draft.

ST team recommends ...

3. Stress Test 18: (p.85)

Of the 36 comments listed in the GAC tab and 20 in the Stress Test tab of the PC tool:

16 explicitly in favor (BC, Internet NZ, Cyberinvasion, New Zealand, UK, i2Coalition, ICANN Board, ITI, Intel, Internet Association, IPC, Registries SG, SIIA, USCIB, CoA, US Chamber)

4 explicitly opposed (Argentina, Brazil, France, Spain).

That's 80% — and doesn't count the NTIA, who considers ST 18 a requirement for transition.

Staff summarized the public comments this way:

Of the Stress Tests, ST18 received the most comments. Argentina, Brazil, France and Spain were opposed to ST18. To quote France on the issue: "[...] the French Government shall formally object to any approval by GAC of a final proposal that would not leave Bylaws Article XI.2.1.j unchanged." There were 5 submissions against: COA, IFPI & RIAA, IPC, US Chamber of Commerce, and USCIB.

While not part of the public comment, this ST was discussed at the CCWG meeting in Los Angeles:

Olga Cavalli said several more GAC reps are concerned about ST 18, so the total is 12 against.

Steve DelBianco apologized for the example used in setting-up ST 18, since it apparently was offensive to some governments. Steve and Cheryl proposed removing the text in para 611 and 832 that said "A majority of government's could thereby approve GAC advice that restricted free online expression, for example". This example is not necessary to analyze the stress test.

Several GAC reps asked for more rationale for this bylaws change.

GAC Chair and US GAC Rep said they are considering new text for ST 18. Nothing seen yet.

ST team recommends ...

Options for Consideration by full CCWG

Areas where we could present options for CCWG consideration include: