Updates to Stress Testing for CCWG 20-Jun-2015

Since we published our first draft recommendations on 3-May, there have been several queries and requests of the Stress Test work party, as described below

The role of Courts. On 21-May, Chris Disspain suggested a scenario resulting in "handing ultimate authority to a state-based American court and allowing it to make binding and precedent setting decisions about the interpretation of ICANN's mission." Below is the ST team reply to Chris, which could be turned into two additional stress tests:

> The ST team had difficulty identifying a scenario under which a California court would make binding decisions about interpretation of ICANN's mission. This was due in part to a misunderstanding embedded in Chris' scenario.
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> We amended Chris' scenario into two scenarios that could happen under the Member powers described in the CCWG proposal. We don't think either of these scenarios would result in the outcome Chris worried over.
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> Stress Test version 1: Board refuses to follow community recommendation
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> > 1. An ATRT (Accountability and Transparency Review Team) recommends a new policy for implementation.
> >
> > 2. The ICANN board decides to reject the recommendation, saying it conflicts with ICANN's limited Mission Statement in the amended bylaws.
> >
> > 3. Community Members vote to challenge the board's decision with an IRP. An IRP panel of 3 international arbitrators (not a Court) finds that the ATRT recommendation does not conflict with "substantive limitations on the permissible scope of ICANN's actions" (p.32). The IRP panel therefore cancels the board decision to reject the ATRT recommendation.(pp. 31-32 of proposal) Our current proposal does not give Members the power to force ICANN board to accept and implement the ATRT recommendation. (p.32)
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> > 4. If the board refused to implement the ATRT recommendation (see step 1), Members could vote to recall the board. Members could also vote to block the very next budget or strat plan if it did not include the ATRT recommendation.
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> Stress Test version 2: Board follows community recommendation, but is reversed by IRP decision
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> > 1. An ATRT (Accountability and Transparency Review Team) recommends a new policy for implementation.
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> > 2. The ICANN board decides to accept the recommendation, believing that it does not conflict with ICANN's limited Mission Statement in the amended bylaws.
> >
> > 3. An aggrieved party or Community Members challenges the board's decision with an IRP. An IRP panel of international arbitrators (not a Court) finds that the ATRT recommendation does conflict with "substantive limitations on the permissible scope of ICANN's actions" (p.32). The IRP panel therefore cancels the board decision to accept and implement the ATRT recommendation.(pp. 31-32 of proposal)
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> > 4. If the board ignored the IRP ruling and continued to implement its earlier decision, parties to the IRP could ask courts to enforce the IRP decision. Would that court re-litigate the IRP's substantive decision interpreting the ICANN bylaws? That is not our expectation, since it is only "expected that judgments of the IRP Panel would be *enforceable* in the court of the US and other countries that *accept international arbitration results*" (p.34, emphasis added)
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> > 5. If the ICANN Board continued to ignore the IRP decision and court orders to enforce it, Members could vote to recall the board. Members could also vote to block the very next budget or strat plan if it included implementation of the ATRT recommendation.

Corruption (like FIFA). On 3-Jun, Mathieu Weil asked if we had tested corruption similar to the recent FIFA scandal. We believe the FIFA corruption scandal is adequately covered in Stress Test #9, on page 70 of our proposal:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
9. Major corruption or fraud. Consequence: major impact on corporate reputation, significant litigation and loss of reserves.	ICANN has annual independent audit that includes testing of internal controls designed to prevent fraud and corruption. ICANN maintains an anonymous hotline for employees to report suspected fraud. ICANN Board can dismiss CEO and/or executives responsible. The community has no ability to force the Board to report or take action against suspected corruption or fraud.	One proposed measure is to empower the community to force ICANN's Board to consider a recommendation arising from an AoC Review. An ATRT could make recommendations to avoid conflicts of interest. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP. Another proposed measure would empower the community to veto ICANN's proposed annual budget. This measure enables blocking a budget proposal that is tainted by corruption or fraud. If ICANN's Board were involved, or if the Board did not act decisively in preventing corruption or fraud (for instance by enforcing internal controls or policies), a proposed measure empowers the community to remove individual Directors or recall the entire Board.

Note that existing accountability measures provide some accountability to the community for events of corruption. The hotline, for example, was recommended by an ATRT team and we understand it has been implemented by ICANN. If it were not implemented, however, there is no means to force implementation under existing accountability measures.

Our proposed accountability measures add further ways the community could prevent or respond to corruption. The community could challenge ICANN's failure to implement a recommendation from an ATRT, for example. . As in most of the stress tests, adequate accountability is provided only if community powers are enforceable, including blocking bylaws, decisions of an IRP, blocking budgets, etc.

Capture by insiders. Public comments from Govt-ES, CRG, and DBA noted that stress tests did not adequately reflect scenarios where parties inside an AC/SO succeeded in acquiring undue influence over the published positions of the AC/SO. Also, NTIA Secretary Strickling asked about "potential risk of capture" in his 16-Jun statement.

We believe the capture scenario is partly addressed in Stress Tests 12 and 13, on p. 80 of our proposal:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
12. Capture by one or several groups of stakeholders. Consequence: major impact on trust in multistakeholder model, prejudice to other stakeholders.	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.	CCWG proposals for community empowerment rely upon supermajority to veto ICANN budgets and strategic plans, to remove ICANN board director(s). A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough. Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community. To prevent capture by governments, another proposed measure would amend ICANN bylaws (Article XI, Section 2, item 1j) to obligate trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.
Conclusions: This threat is not directly related to the transition of IANA stewardship	Existing measures would be inadequate	Proposed measures would be adequate.

We believe Stress Tests 12 and 13 could be expanded to address capture by parties inside an AC/SO.

Enforcement of contract provisions that exceed limited mission of ICANN. In a public comment from David Post and Danielle Kehl (link), two additional stress tests were proposed:

> First, they describe a scenario where ICANN enforces the new gTLD registry and registrar contract provision to investigate and respond to reports of abuse, resulting in terminations of some name registrations. They indicate this is not the result of consensus policy and ask how a registry operator could challenge the enforcement by ICANN, under present and proposed accountability mechanisms. The improved IRP could give an aggrieved party an opportunity to challenge, with a potentially binding decision.
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> Second, they describe a scenario where ICANN compliance department terminates registrars for failing to investigate and respond to reports of copyright infringement. They ask how an aggrieved party operator could challenge the termination actions by ICANN, under present and proposed accountability mechanisms. The improved IRP could give an aggrieved party an opportunity to challenge, with a potentially binding decision.

Member/Designator representatives fail to honor voting instructions from their AC/SO. Several individuals asked us to evaluate a stress test scenario where the individual selected by an AC/SO failed to follow their AC/SO voting instructions when exercising one of the community powers proposed by CCWG. We believe this scenario is partly addressed in Stress Test #13, on page 81 of our proposal.

> We discussed adding another stress test to explicitly address the scenario of "rogue" voting in community mechanisms. Potential ways to address the stress test include:
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> > The voting rules for community empowerment mechanisms could specify procedures to invalidate a vote if any member/designator representative voted against the express wishes of their AC/SO.
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> > If any elected AC/SO officer is aware that their designator or member representative is not following AC/SO policy or position in casting their votes in a community mechanism, the officer could publicize this issue to ICANN staff and to all other AC/SO communities.
> >
> > After such notice, the results of community voting would be set aside, pending correction of the problem by the AC/SO. Correction might entail giving more explicit instructions to voting representative, or replacing the voting representative. Upon notice that the problem has been remedied, another round of voting would be held.
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> Note that the Empowered AC/SO model being developed in Buenos Aires would fully mitigate this stress test, since the elected officers of the AC/SO would exercise their votes directly.

Revocation and reassignments of ccTLD managers. In their public comment, the government of India noted that ST #21 did not address revocation and reassignment of ccTLD managers. The ST team believes this issue must wait for the ccNSO to develop policy pursuant to the most recent Framework of Interpretation.

Response to legislation. In his public comment, Richard Hill suggests ST #4 (regarding ICANN response to legislation) points to need to relocate ICANN's place of incorporation. CCWG legal advice suggests this would not insulate ICANN from jurisdictional reach of governments.

NTIA Statement. There are four stress test items in Larry Strickling's statement from 16-Jun (link):

> ST NTIA-1: Test preservation of the multistakeholder model if individual ICANN AC/SOs opt out of having votes in community empowerment mechanisms.
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> ST NTIA-2: Address the potential risk of capture? (ST 12 and 13 partly address this, but not adequately for capture by internal parties in an AC/SO)
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> ST NTIA-3: Barriers to entry for new participants?
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> ST NTIA-4: Unintended consequences of "operationalizing" groups that to date have been advisory in nature (e.g. GAC)?

ICANN Legal/Board questions. There are many stress test items in the ICANN Legal/ICANN Board letter of 19-Jun (link). Have not yet had time to analyze.

Blank template for Stress Tests:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
Consequence:		
Conclusions: This threat is not directly related to the transition of IANA stewardship	Existing measures	Proposed measures