

1 **Overview results of break-out session on oversight and review.**

2 **Oversight & Review**

3 Assumption is that oversight process would develop in same manner as delegation and transfer process decisions. If Board acts as an oversight entity it is
4 limited to ensure that all steps/ the procedure has been followed. This implies that another entity take the substantive decisions. This is in -line and follows
5 the current practice since 2012. Which is included in ANNEX A

6 With respect to review of decisions, the role of the WG is limited to identifying which decisions in the Retirement process should be subject to the review
7 mechanism, which will be developed during the second part of the ccNSO PDP 3.

8 For reference some working descriptions are included in ANNEX B.

9

10 **Break-out session Marrakesh**

11 Questions

- 12
- Who takes a decision?
 - Which decision are subject to oversight and by whom?
 - Related, which decisions should be subject to a review mechanism?
- 14

15 The Consolidated Overview, which is a combination of flip-charts, is included below in Table 1.

16

17 **Combined Notes from the session on oversight and review & previous comments.** The description of the decision need to be refined, to include
18 qualifications which express room for discretion, but also have some (universal) legal ramifications such as “diligence, good faith, reasonable and/or
19 appropriate” to allow for discretionary room to maneuver as “not-one-size-fits-all”.

20

21 Oversight in delegation/transfer processes (i.e. the division of roles and responsibilities between PTI (staff) and ICANN Board of Directors) good example to
22 start from. Identifying decision which should be subject to Oversight and review is fists and foremost exercise in identifying discrete decisions (i.e subjective
23 elements /room for interpretation on merits of subject matter).

24 With respect to the review of decisions one of the questions was whether a review would allow for recourse on the basis of substance (factual (re-)
25 assessment If there is disagreement or just on procedural basis).

26 **Consolidated Overview**

27 The overview takes the results from the individual groups and per item combines them in a the column call cons. If no consensus on oversight
28 or subject to review is included, there is a question mark entered in cons. Column and further discussion is needed on whether or not:

- 29 - Entity making a decision
- 30 - Oversight is needed, and if so by whom
- 31 - Reference to review of the decision is needed.

32 Table 1: Consolidated overview

Item #	Decision	Who takes decision?					Oversight ?					Subject to Review ?					Comment
		1	2	3	4	Co ns.	1	2	3	4	Con s.	1	2	3	4	Cons.	
1	Decision to send out notice of retirement	IFO	IF O	IF O	IF O	IFO		ICAN N Board			?		X			?	Separate trigger from determining status/confirmation. Oversight should be review
2	Decision/Notification NO retirement in place	(IFO)	IF O	IF O	IF O	IFO		IFO			?		X			?	
3	Decision that Retirement Plan meets requirements	IFO	IF O	IF O	IF O	IFO		IFO			?	X	X	X	X	X	How does this relate to # 7? Essentially same issue as 4 and 7 Merge with 4
4	Decision on Duration of extension	IFO	IF O	IF O	IF O	IFO		IFO			?		X	X	X	?	Essentially same issue as 3 and 7. Merge with 3?
5	Decision on Administrative Transfer		IF O	IF O		?		IFO	ICAN N Boar d		?		X		X	?	Following existing procedures? Need to excluded from basic process.

Item #	Decision	Who takes decision?					Oversight ?					Subject to Review ?					Comment
			IF O			?					No ove rsig ht		X		X	?	
6	Decision to extend period to PROPOSE Retirement Plan		IF O			?					No ove rsig ht		X		X	?	
7	Decision to agree to Retirement plan		IF O	IF O		?		ICAN N Board			?	(X)	X	(X)	X	X	Should be ICANN Board approval How does this relate to # 3 and #4 Essentially same decision as 3 and 4. How does this relate to # 3? Confusing with number 3 and 4.
8	Declaration/decre that execution of retirement plan has been completed/not completed		IF O	IF O		?		IFO			?		X		X	?	“Decree” too strong, Use Notification?
9	Declaration/decre that 5 years have passed since notice of retirement		IF O			?		IFO			?		X			?	Decree too strong, replace with “decision to notify” Unclear, what is meant by it? Need to rephrased

Item #	Decision	Who takes decision?					Oversight ?					Subject to Review ?				Comment	
10	Declaration/decreed that the extended period has passed since notice of retirement with retirement plan		IF O			?		IFO			?		X			?	Decree too strong, replace with "decision to notify" Rewrite not necessary Unclear, what is meant by it? Need to be rephrased.
11	Breach of retirement plan. Decision to return to the initial 5 year period		IF O	IF O		?		ICAN N Board			?		X	X		?	Back to 5-year base or other way? What if breach after 4, 5 after initial notification (#1 above) or 6 years?
12	Decision that a ccTLD met the ccTLD retirement policy and ready to be taken out of the root zone					IF O					Boa rd						Out of scope of policy: IFO decision subject to oversight by the Board.

34 **Annex A: Scope of roles and responsibility of ICANN Board with respect to decisions pertaining to ccTLDs**

35 Included is the text from the email from Kim Davies to the ccPDP RET-WG on the scope of the role of the ICANN Board of Directors since 2012.

36 *“As noted in the discussion, this exchange clarified the scope of the ICANN Board’s role under the NTIA contract to be limited to ensuring proper procedures*
37 *were followed only, and we have operated on that basis since.*

38 1. *ICANN’s response to the solicitation from the US Department of Commerce, National Telecommunications and Information Administration to*
39 *perform the IANA Functions dated 31 May 2012:*

40 a. *ICANN’s response detailed the process used to perform a transfer or a delegation of a country-code top-level domain. Specifically, on page*
41 *137, the submission describes a step in which a ccTLD delegation or transfer request is reviewed by the ICANN Board: “SUB-PROCESS 3*
42 *ICANN BOARD REVIEW Description Upon completion of the Delegation or Redelegation Report, it is transmitted to ICANN’s Board of*
43 *Directors for review and consideration. The Board may request additional information before making a determination.”*

44
45 b. Reference: <https://www.ntia.doc.gov/other-publication/2012/icann-proposal>

46 2. *ICANN’s Response to the Contracting Officer’s additional questions dated 23 June 2012:*

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49

50 a. *The role of the ICANN Board was further explained in ICANN’s response to the Contracting Officer’s additional request for information under*
51 *question number 10 which asked ICANN to elaborate on the role of the ICANN board in reviewing delegation and transfer requests and the*
52 *policies that govern this review. ICANN’s response was:*

53

54 *“The ICANN Board’s review of delegation and redelegation recommendations of a country code Top Level Domain (ccTLD) provides*
55 *confirmation to the multi-stakeholder community that the ICANN staff has implemented the defined polices for making such delegation or*
56 *redelegation recommendations. ICANN staff submits to the ICANN Board a report summarizing how the specific delegation or redelegation*
57 *application complies with and meets the defined criteria of the policy. The Board reviews and confirms that the appropriate application of*
58 *the policy has occurred. If the Board deems that additional work to satisfy the policy requirements may be needed, the report is sent back to*
59 *ICANN staff to take additional steps. If the Board is satisfied that all criteria of the policy were addressed and applied properly, it issues a*
60 *resolution to that effect.*

61

62 *ICP-1 is the result of the multi-stakeholder discussions to clarify the current practices of ccTLD administration and delegation and documents*
63 *the outcome of those discussions. The document was adopted by the ICANN Board in a meeting on February 12, 2002. The resolution was*

64 adopted with a vote of 16-1-0 and the posting on the ICANN website states : "Resolved [02.10] that the Board adopts the designation of ICP-
65 1, ICP-2, and ICP-3 as members of the ICP series of documents." ICANN utilizes this document because it is the output of the multi-
66 stakeholder process.

67
68 The current procedures associated with delegation and redelegation of ccTLDs is the result of the evolution of the process over the past 30
69 years. While there has been no definitive policy document published that represents all factors that must be considered, a number of
70 notable documents are considered references that influence how the process is conducted:

- 71
- 72 • RFC 1591, an articulation written by staff performing the IANA Functions of what the procedures and policy considerations were as of
73 1994
- 74 • ccTLD Memo #1, an articulation that governments had a role to play in determining how ccTLDs are operated, written by staff performing
75 the IANA Function in 1997
- 76 • The Principles and Guidelines for Delegation and Administration of ccTLDs, a framework developed by governments for the relationship
77 between governments, ccTLD managers and ICANN.

78
79 ICANN will continue to implement the procedures based on these key documents, and the significant amount of precedent that has been
80 developed through the execution of many ccTLD delegations and redelegations. Furthermore, ICANN will continue to support efforts — such
81 as the work being conducted by the Framework of Interpretation Working Group — to clarify the interpretation of these frameworks by the
82 community to better inform the work of the IANA Functions.

83
84 Utilizing change control processes is a best operational practice. The reason for describing them as “appropriate” is to reflect that the type
85 of change control process used will be specific to the type of change being implemented and the affected and interest parties that are
86 impacted.”

- 87
88 b. Reference: https://www.ntia.doc.gov/files/ntia/publications/june_23_redacted.pdf

- 89
90 3. ICANN’s understanding of the role of the ICANN Board was also stated in an email dated 26 June 2012

91
92 ICANN repeated its understanding of the review completed by the ICANN board for ccTLD Delegation or Transfer requests through an email to the
93 Contracting Officer where it stated that “ICANN agrees with this term. 3. With regard to SOW C.2.9.2.c, “review and approval” of a delegation or
94 redelegation request by the Board of Directors is not required or permitted under the contract, except to the extent that the **review is limited to ensuring**
95 **that ICANN staff has followed proper procedures** [emphasis added].”

97 **ANNEX B: Working Descriptions Review Mechanism**

98 From the ccNSO PDP 3 Issue report March 2017:

99 **Section 2.2.1 Contextual information Review Mechanism**

100 To date decisions taken as part of the processes for the delegation, transfer and revocation of ccTLDs are not subject to a review or appeal
101 mechanism:

102 **RFC 1591** According to RFC 1591, section 3.4, *the Internet DNS Names Review Board (IDNB), a committee established by the IANA, will act as a*
103 *review panel for cases in which the parties [Issue Manager: the Significantly Interested Parties[1]] can not reach agreement among themselves. The*
104 *IDNB's decisions will be binding.*

105 IANA has never established the IDNB (or any other entity) to review disputed cases.

106 **Framework of Interpretation.** With respect to the IDNB the FOIWG noted: *The FOI WG believes it is consistent with RFC 1591 (section 3.4) and the*
107 *duty to act fairly to recognize the manager has the right to appeal a notice of revocation by the IANA Operator to an independent body.*

108 **CWG-Stewardship and CCWG-Accountability.** Following public comments on its first proposal, the CWG-Stewardship proposed that: *An appeal*
109 *mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions. For example, direct customers with*
110 *non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC will have access to an Independent Review Panel. The*
111 *appeal mechanism will not cover issues relating to ccTLD delegation and re-delegation, which mechanism is to be developed by the ccTLD*
112 *community post-transition.*

113 In addition, as part of the CCWG Accountability Proposal to enhance the Independent Review Process, the results of delegation/re-delegations are
114 explicitly excluded[2].

115
116 **ICANN Bylaws 1 October 2016.** According the latest version of the ICANN Bylaws (Section 4.2)Reconsideration:[3]

117 **Section 4.2. RECONSIDERATION**

118 (a) *ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may*
119 *request ("Requestor") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "Staff" includes*
120 *employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors*
121 *directlydirectly....*

122 (d) *Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:*

123 (i) *Disputes relating to country code top-level domain ("ccTLD") delegations and re-delegations¹;*

124

¹ The ccPDP RET-WG will inform the ccNSO Council that Section 4.2 of the Bylaws need to amended and to adjust the terminology of section (i) to:) **Disputes relating to country code top-level domain ("ccTLD") delegations, transfers, revocations and retirements.**