

1 **Summary discussion Wednesday 17 February, 3 March, 17 March 2021 and 7 April 2021**

2 Version 03 - 20 April

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4 For WG to determine: Which topics should be discussed more in depth and the order of discussion.

5 **Clusters of topics and Proposed order**

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7 **Topic Cluster 1: ICANN Corporate Governance Fundamentals**

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9 • **Timing of review of decision**

10 ICANN Board role is to confirm the process went as expected.

11

12 • **Complete re-hearing vs. administrative review.** Complete re-hearing to be interpreted as Full review of the
13 decision. Review must be a substantive review (not how it was done)

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15 • **Scope (Binding and replacing previous decision or handing back to previous decision-maker, taking into account
16 decision of panel))**

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18 • **Is the scope still open? Binding decision of IANA or Board?**

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21 **Topic Cluster 2: Relevant policy references**

22 • **Reference to delegation, transfer, revocation and retirement?**

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24 • **Process and policy MUST be “timeless”**

1 The point of inclusion is that the policy be ‘timeless’ was that if there is superseding policy coming out for the
2 ccNSO in the future, it is automatically applicable instead of locking the RM to RFC 1591 and FOI specifically.

- 3
- 4 • **The reference to RFC1591 as a source doc as interpreted by the FOI sets the parameters for the RM, especially the**
5 **decision-making etc.**
- 6

7 **Topic Cluster 3: Applicability of ccNSO policies.**

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9 **Topic Cluster 4: Fundamental Fairness/some ccNSO members cannot go to court**

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11 **Topic Cluster 5: Rules and Procedures**

- 12 • **Rules and Procedures of processes**
13 (must be included, nice to include, or does reference suffice?)
14 To be addressed at later stage
- 15
- 16 • **Internal Procedure Must be exhausted first i.e. CONDITION to be eligible to enter into RM?**
- 17
- 18 • **Look at existing mechanisms to build on**
- 19
- 20 • **Summary requirements**
21 At least one external, independent tribunal. Binding decision (replacing the litigated decision?)
22 “tribunal” was the language used by Nigel. Broader interpretation. Does not automatically mean arbitration
23 4 stages:
 - 24 ○ Internal review. By the people that made the decision
 - 25 ○ Mediation
 - 26 ○ Binding arbitration

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- Court proceedings
Tribunal used to mean “judge”. Could be 1 or many.

- **Process must have set, pre-defined milestones and timelines**

Topic Cluster 6: Choice of law

Topic Cluster 7: Determine who has standing at panel?

Has been discussed and is included in spreadsheet

1 **Topics Identified by the group**

2 **Topic 1: The reference to RFC1591 as a source doc as interpreted by the FOI sets the parameters for the RM, especially**
3 **the decision-making etc.**

4
5 **Topic 2: Complete re-hearing vs. administrative review.** Complete re-hearing to be interpreted as Full review of the
6 decision. Review must be a substantive review (not how it was done)

7
8 **Topic 3: Summary requirements**

9 At least one external, independent tribunal. Binding decision (replacing the litigated decision?)

10 “tribunal” was the language used by Nigel. Broader interpretation. Does not automatically mean arbitration

11 Nigel: 4 stages:

- 12 • Internal review. By the people that made the decision
- 13 • Mediation
- 14 • Binding arbitration
- 15 • Court proceedings

16 Tribunal used to mean “judge”. Could be 1 or many.

17
18 **Topic 4: Process and policy MUST be “timeless”**

19 The point of inclusion is that the policy be ‘timeless’ was that if there is superseding policy coming out for the ccNSO in the
20 future, it is automatically applicable instead of locking the RM to RFC 1591 and FOI specifically.

21 **Topic 5: Process must have set pre-defined milestones and timelines**

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23 **Topic 6: Look at existing mechanisms to build on**

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25 **Topic 7: Choice of law**

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- 1 **Topic 8: Scope (Binding and replacing previous decision or handing back to previous decision-maker, taking into account**
2 **decision of panel))** still to be determined
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- 4 **Topic 9: Determine who has standing at panel?**
5 Has been discussed and is included in spreadsheet
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- 7 **Topic 10: Rules and Procedures of processes**
8 (must be included, nice to include, or does reference suffice?)
9 To be addressed at later stage
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- 11 **Topic 11: Internal Procedure Must be exhausted first i.e. CONDITION to be eligible to enter into RM?**
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- 13 **Topic 12: Is the scope still open? Binding decision of IANA or Board?**
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- 15 **Topic 13: Applicability of ccNSO policies.**
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- 17 **Topic 14: ICANN Corporate Governance Fundamentals**
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- 19 **Topic 15: Fundamental Fairness/some ccNSO members cannot go to court**
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- 21 **Topic 16: Timing of review of decision**
22 ICANN Board role is to confirm the process went as expected.

1 **Must Include**

2 **1. Topic: Reference to RFC 1591 and FOI needed?**

3 All groups added reference to RFC1591 and FOI.

4 To which extent? In the sense of a policy doc (delegation, transfer, revocation), or referring to a specific part of RTFC
5 1591?

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7 If parties are not satisfied, they have an avenue for appeal. Then the question comes what can you appeal? It originates
8 from the RFC. Need reference to both RFC 1591 and FOI. Complete rehearing is a must.

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10 Comment: Not refer to RFC1591. Not always unambiguous. Many elements are not relevant anymore. When the FOI was
11 prepared, attempt to make it up to date. Everything should be in the FOI report. Reference to RFC1591 would confuse
12 matters. FOI should take precedence, it supersedes the RFC.

13 Note FOI is not a formal policy and was not developed through a ccPDP. Is that relevant? Yes, not new policy. It's role was
14 to interpret policy. Agreed formulae: “

15 Further noted: From RFC as developed through IETF procedures: RFC1591 is information only memo, not normative. It
16 provides some information. Be careful to use

17

18 **The reference to RFC1591 as a source doc as interpreted by the FOI sets the parameters for the RM, especially the**
19 **decision-making etc.**

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21 Note that in the FOI the topic of a review panel/ or review mechanism is NOT included.

22

23 Should include a reference to the Retirement policy or limit to description of decisions

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25

1 **Must Include**

2 **2. Topic: Complete re-hearing vs. administrative review**

3 Complete re-hearing to be interpreted as Full review of the decision.

4 Review must be a substantive review (not how it was done)

5 Majority of participants on the call feel that one point a full rehearing of facts etc should be feasible

6

7 Question: Does that mean that in the procedure new facts/figures can be brought in, that were not judged before by PTI?

8 There is no review mechanism for matters related to cctlD transfers and delegation. Carve out. Accountability

9 mechanisms. Internal review. IANA might think again, appeals to the icann board. But: those are not independent, and we

10 need that.

11

12 **Summary requirements**

13 At least one external, independent tribunal.

14 Binding decision (replacing the litigated decision?)

15 “tribunal” was the language used by Nigel. Broader interpretation. Does not automatically mean arbitration

16 Nigel: 4 stages:

17 • Internal review. By the people that made the decision

18 • Mediation

19 • Binding arbitration

20 • Court proceedings

21 Tribunal used to mean “judge”. Could be 1 or many.

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24 Review must be substantial: Bring on “new” facts, dispute about the facts, interpretation of the applicable policy rule, was

25 process followed

26

1 **Must Include**

2 **Topic: Process and policy MUST be “timeless”**

3 The point of inclusion is that the policy be ‘timeless’ was that if there is superseding policy coming out for the ccNSO in the
4 future, it is automatically applicable instead of locking the RM to RFC 1591 and FOI specifically.

5 The review mechanism would be intended to apply to the policy at the time the review is being conducted. Retirement
6 policy in final stages. If you tie the review mechanism to close to RFC1591 and other documentations, this could cause
7 interpretation difficulties. The applicability of the policy should be generally stated as the adopted policies at the time.

8 Question: how does that relate to the work done to date, with respect to identifying the decisions that should be subject
9 to the RM? If the link is too loose, i.e every step / whenever there is a decision under policy may be become subject to
10 RM.

11 Counter argument. “This could be applicable to delegation as defined in RFC1591”. What if the ccNSO develops policy, and
12 the source document at the time this RM policy is developed no longer applies?

13 Conclusion: Ensure that RM is made future-proof, to a reasonable extent.

14
15 **Topic: Process must have set pre-defined milestones and timelines**

16 Discussion in IOT-IRP group on limitation and respose. Whatever the RM, there has to be finality in the decision

17 Relative to binding, consider that the IRP can only decide if the bylaws were followed or not. They do not decide on the
18 remedy. They only decide there is a fault. Replacing the previous decision. Likes this reference

19 Arbitration will be binding on all parties. ccNSO Members cannot go to court. If you want to go to court, the cctlD manager
20 needs to cease to be a member. Board replacing the decision that is being reviewed. The word “board” is also used in the
21 RFC.

22 Nigel: does not agree to call it a board. Confusion with icann board. Panel seems more appropriate

23
24 **Topic: Look at existing mechanisms to build on**

25 General agreement that we should look on the existing mechanism to use or build on, to save time/money.

26

1 With respect to saving time and money: mechanism should be affordable to smaller ccTLD Managers, to avoid that the
2 RM becomes non-accessible to those ccTLD Managers who may need it the most as an alternative dispute resolution
3 mechanism.

4
5 If feasible, best place for intervention is in between the decision of IANA and the decision by the Board. No spillage that
6 could possibly create secondary issues.

7
8 The Board has ultimate fiduciary responsibility for the entire corp. By convention IANA takes the decision and the Board
9 approves. Board has ultimate responsibility for what PTI does. To be included in the process. The board can correct a
10 mistake, if a mistake is being made.

11 See Discussion on Governance 17 March

12
13 Note: how this relate to some of the decisions identified in spreadsheet?

14 How related to "Covered Actions"

15 **Covered Actions**" are defined as any actions or failures to act by or within ICANN committed by the Board, individual
16 Directors, Officers, or Staff members that give rise to a Dispute.

17 Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

18 (ii) Claims relating to ccTLD delegations and re-delegations;

19
20 IRP could be made applicable by striking this section, and turning decisions identified into covered actions.

21
22 German administration. Rechtsmittelbelehrung. What options you have to file a request for appeal. If they fail to include
23 this, it has consequences. No preference : before or after the board

24
25 **Topic: Choice of law is a subject to further discussion.**

1 **Topic: Scope (Binding and replacing previous decision or handing back to previous decision-maker, taking into account**
2 **decision of panel))** still to be determined

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4 **Question: How have the ICANN review panels solved problems? To be asked to Sam Eisner.** Avoid Forum shopping.

5

6 At end of process understand if concerns Stewardship Transition are still valid. mconcerns still valid (2014, and discussion
7 relevant meeting RM). To be included as stress test.

8

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10 **Do not include**

11 **Topic: Subject to local law**

12 Subject to local law interpreted as potentially applicable national laws. One cannot expect that decisions that are subject
13 to review have to be interpreted according to law that applies to each and every ccTLD.

14

15 **Topic: Determine who has standing at panel?**

16 Has been discussed and is included in spreadsheet

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18 **Topic: Rules and Procedures of processes**

19 (must be included, nice to include, or does reference suffice?)

20 To be addressed at later stage

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1 **Pros and cons of various panels**

2 To be discussed by WG. Polling on experience to date

3

4 Per type of “tribunal”: Mediation, IRP like process, Arbitration (ICC< UNCITRAL, International Court of Arbitration)
5 Court-like litigation, Appeal process

6

7 **Experience with any of the procedure:**

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- 9 • IRP-like 1 out of 12
- 10 • Arbitration 10 out of 12
- 11 • Court-like litigation 8 out of 12
- 12 • Appeal 6 out of 12
- 13 • Mediation 6

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16 **Pro’s and Con’s analyses**

17 Not conducted

18 Question: is still necessary

1 **Two (2) or Three (3) step process?**

2 **Comments on 2 Step Process**

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Mediation

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(Voluntary?)

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Full, Independent Review

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**PTI/IFO complaint process
(Always available)**

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Comments:

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PTI complaint process. Word complaint could be misinterpreted. Term by IANA. IANA complaint process. Available for every step where PTI is involved. Internal remedy.

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Conclusion: Internal Procedure Must be exhausted first i.e. CONDITION to be eligible to enter into RM?

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Mediation is without prejudice. Meaning, whether it is used or not, no pre-condition to have access to RM. Mediation is NOT required before going to court/ RM. Mediation is external tribunal-connected

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Bernie: going back to IRP. the advantages are significant to both parties. CEP is optional. To encourage parties to undertake this first, some of the costs in an IRP can be covered by icann

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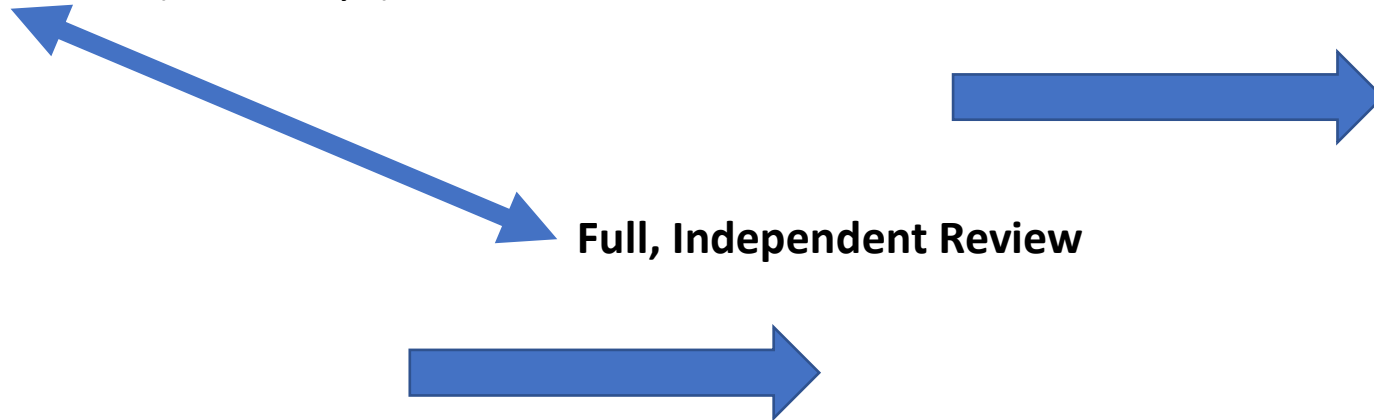
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Three (3 step Process

Mediation

(Voluntary?)

Appeal



Full, Independent Review

**PTI/IFO complaint process
(Always available)**

21 Do you want to allow for an appeal of the independent reviewer? Including appeal
22 IRP currently looks at an appeals mechanism to its decision. It is Expensive. Finding appropriate people and train them. For
23 the ccNSO this would be a step even further. This potentially affects usefulness to small and medium-sized ccTLDs.
24 Otherwise it is not fair. **Cost issue to be discussed.**
25 Understands the arguments. Note that the procedures in all should not take too much time, and should not be too costly

1 Should the outcome be binding? If it is binding, will there be no court proceedings afterwards? On the other hand, people
2 may not use the RM, but go to court directly, and there they will have an appeals opportunity. Having the appeal
3 mechanism available in court-system may be reason for choosing that avenue.

4

5 Results of initial call for preference/temperature of the room

6 Large majority of participants (9) in favor of 2 step process

7 Only 3 in favor of 3 step process, whereby one participant noted that 2 step is understandable, but from user perspective

8 3 step process is most likely preferred.

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1 **Discussion PDP3 RM WG with Samantha Eisner (ICANN Legal) (17 March 2021)**

2 Prior to conversation with Samantha Eisner Comment from Patricio on composition of “independent panel”
3 FOI Report mentions review mechanism. Experts from ccTLDs would hear IANA and the complainant and decide whether
4 or not to take the complaint further.

5 For fairness suggestion should be:

- 6 1. IFO selects one panel member
- 7 2. the ccTLD Manager selects one
- 8 3 the two selected panelist select a third one, who should be chair and independent

9

10 **Topic: Is the scope still open? Binding decision of IANA or Board?**

11 (Slide 4 ppt, Page 6 and Page 4 of summary document)

12

13 The latest version of the doc has not been vetted yet. page 4 was still unclear at the time, and is still unclear now
14 RFC said that decision should be binding. We do not need to include in our developed policy an appeal mechanism on our
15 review mechanism. Binding means to ICANN and ccNSO members. They do not have a legal recourse in this. Therefore
16 jurisdiction is not our problem.

17 The mechanism: will you have some form of law or jurisdiction. Under what legal framework are RFC panels proceeding?
18 Placeholder. Early stages of the discussion

19

20 **Topic: choice of law.**

21 Not discussed

22

23 **Topic: Applicability of ccNSO policies.**

24 ccNSO Policies are only applicable to ccNSO members. What happens to non-members? Those external to the process?
25 Concern to apply this equally to all ccTLDs, whether or not they are a member of the ccNSO?

26

1 RFC is clear. If 2 parties cannot come to an agreement they can apply for a review. 2 contending parties: IFO and the ccTLD
2 manager. First do the internal remedies and process. Nothing we can do to prevent a ccTLD manager from suing ICANN.
3 However, costs may be prohibitive to seek recourse through the courts. should not be prohibitive to seek recourse.
4 Some Agree with intent. Cost-neutral. ccTLD managers are not large corporations.
5 Fundamental fairness. Small ccTLD managers cannot afford going to court in a foreign country (US)
6 Eberhard is requested to explain on the mailing list what is meant by fundamental fairness
7
8

9 **Topic: Corporate Governance Fundamentals**

10 ICANN board cannot defer decision making to other bodies. Fiduciary duty was discussed by several lawyers during IANA
11 transition.

12 Issue: empower an entity outside of ICANN/PTI to perform the IANA function is not possible.

13

14 This is an important point. Was not considered before. Should we inform Council we ran into an issue: we cannot develop
15 a binding policy.

16

17 Question: Defer decision-making to other bodies? Understanding from discussion is that there may be an issue. However
18 does this imply that ICANN Board is also prevented to subject itself to mediation?

19 Response: the board can and does subject itself to challenges of its decisions. Outcome of the challenge is important. IRP
20 for instance. Board to be held accountable for every decision it makes. However, the outcome of that challenge cannot
21 dictate to the Board what it must do to remedy. Board is expected to act accountably. There is the ability to build in
22 meaningful review or appeal mechanisms. But they need to be supportable and allowable within the corporate
23 governance structure.

24 Risk: The community could take an IRP declaration and walk in court. The court can compell actions, but the arbitration
25 panel cannot compell actions.

26 This is an important point to be dealt with. To what extent are external reviews feasible, within the sketched parameters?

1 Request to provide a document in a digestible form, on what is feasible, to focus the discussions by the WG.

2

3 **Topic: Fundamental Fairness/some ccNSO members cannot go to court**

4 ccNSO members are bound by ICANN policy, non-ccNSO members are not. Assumption is that whilst you are a ccNSO
5 member you cannot take ICANN to court for policy

6

7 **Topic: Mediation**

8 Questions: What is anticipated to happen in the mediation? Impacts applicability and cost issues.

9 Needs to be more than just a procedural review. Look at fundamental fairness. See also above

10

11 **Question 1 regarding mediation: How is it developed?**

12

13 **Q 2: Understands the value of mediation. But what is the dispute about?** There is a value of looking at things

14 procedurally. Asking for a re-look at the info, to make sure the right decision is reached. This is not really an appeal. It

15 does not create a legal question that you mediate over. What are the questions, beyond asking for the fulsome review?

16 Response: Look at Fundamental fairness. Courts decide to narrow issues: Only award remedies that were asked for. RFC is

17 clear: A panel formed by IFO, takes a decision which is final.

18

19 **Q3. Who is part of the dispute? Who has standing?**

20 Response: Difficult to compel government to participate in an out of country area. That is their problem, if they do not
21 want to participate. Understandable: It is a reality to face.

22 Contested delegation. Under Fol: This is delegation of new TLDs, Change of managers (transfer is another bucket to
23 consider).

24

25

26 **Topic: Timing of review of decision**

- 1 ICANN Board role is to confirm the process went as expected. Is there value in a review? Did IANA do what it was
- 2 supposed to do? Why insert a step before the Board decision. Changing Board role to accepting review?
- 3