

1 **CCPDP-RM – Non-Binding Mechanism – Independent Advice Review Mechanism**
2 **- DRAFT**

3 • **General Objective:**

4 Develop a review mechanism for IFO decisions that would meet most of the requirements
5 of the CCPDP-RM WG for an independent review except for being binding on the IFO or
6 ICANN.

7 Such a mechanism would be a logical, independent step following the IFO Customer Service
8 Complaint Resolution Process¹ and is available before launching [a binding review] or court
9 proceeding.

10 • **Specific Objective**

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12 Create an optional and independent review mechanism inspired by arbitration, which is
13 non-binding on the IFO or ICANN and will not prevent the Manager from using any other
14 dispute resolution mechanism to address the IFO decision affecting it.

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16 • **Scope:**
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Commented [BT1]: No change.

Commented [BT2]: No change.

Commented [BT3]: Significant change to consider who has standing to apply for a Review.

¹ <https://www.iana.org/help/complaint-procedure>

- 18 • The Independent Advice Review (Review) is available to ccTLD Managers² who are
19 directly impacted by an IFO decision (Decision) for the following processes:

Should the Independent Advice Review (Review) only be available to ccTLD Managers which are directly impacted by an IFO decision as well as applicants for a new ccTLD?

There is no consensus as to who should be eligible to apply for and Independent Advice Review.

If we are basing this on arbitration rules, then one would expect that this would limit eligibility to those parties that were directly involved in the process which led to the IFO decision for which a Review is being sought?

The only process where this is a question is of course revocation. Looking in detail at Revocation one notes that the decision to revoke is bestowed upon IFO though RC1591 as interpreted through the FOI. How the IFO reaches its decision as to whether or not a delegation should be revoked i.e. whether the threshold of significant misbehaviour is met is a decision of the IFO – this is analogous to the retirement of a 2 letter Latin non-ISO 3166 -1 ccTLD.

According to the FOI (section 4.7) Revocation is the last resort option for the IFO. Revocation is therefore a matter between the IFO and the ccTLD Manager and a Revocation would have a direct and material impact on the ccTLD.

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- 21 ○ Delegations of a new ccTLD:
- 22 ▪ Directly involved parties: Applicants
- 23 ▪ IFO timing: No deadline for the IFO to reach a decision.
- 24 ▪ IFO rejection of an application: Applications are never rejected but
- 25 usually go away if not accepted over a long period. The IFO has a process
- 26 for cancelling, as opposed to rejecting, inactive applications.
- 27 ▪ Proposed eligibility for a Review: Limit to All Applicants.
- 28 ▪ Basis for requesting a Review: Delegation by the IFO to another party.
- 29 ○ Transfers:
- 30 ▪ Directly involved parties: Current Manager and the proposed Manager
- 31 ▪ IFO timing: No deadline for the IFO to reach a decision.
- 32 ▪ IFO Rejection of an application: Applications are never rejected but
- 33 usually go away if not accepted over a long period. The IFO has a process
- 34 for cancelling, as opposed to rejecting, inactive applications.

² Given New ccTLDs do not have a Manager, and that it is clearly stated in RFC 1591 that there needs to be an appeal mechanism applicable to the delegation process for new ccTLDs the CCPDP-RM WG believes it is consistent with RFC 1591 that all applicants for a New ccTLD are eligible to request an Independent Advice Review.

- 35 ▪ Proposed eligibility for a Review: Limit to Current (or incumbent)
36 Manager.
- 37 ▪ Basis for requesting a Review: Rejection of an application for Transfer
38 which never occurs?
- 39 ○ Revocations (A last resort action by the IFO³):
- 40 ▪ Directly involved parties: Current Manager⁴
- 41 ▪ IFO timing: No deadline for the IFO to reach a decision.
- 42 ▪ IFO Rejection of an application: There is no formal IFO process for
43 revocation.
- 44 ▪ Proposed eligibility for a Review: Current Manager.
- 45 ▪ The basis for requesting a Review:
- 46 • Current Manager requesting a Review of a Revocation notice by
47 the IFO.
- 48 ○ Refusal to grant an extension to the retirement deadline per the CCNSO
49 Retirement Policy:
- 50 ▪ Directly involved parties: Current Manager.
- 51 ▪ IFO timing: Per the Retirement Policy the IFO must reply to the
52 application for an extension within 90 days of it being submitted by the
53 Manager.
- 54 ▪ IFO Rejection of an application: Can be rejected by the IFO but per the
55 Retirement Policy *“The approval of an extension request shall not be*
56 *unreasonably withheld.”*
- 57 ▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
- 58 ▪ Basis for requesting a Review: Rejection of an application for an
59 Extension by the IFO that is being unreasonably withheld.
- 60 ○ Notice of Retirement for 2 letter Latin ccTLD which does not correspond to an
61 ISO 3166-1 Alpha-2 Code Element per the CCNSO Retirement policy:
- 62 ▪ Directly involved parties: Current Manager.
- 63 ▪ IFO timing: None - per the Retirement Policy the IFO must send a Notice
64 of Retirement.
- 65 ▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
- 66 ▪ Basis for requesting a Review: Per the Retirement Policy - *For 2 letter*
67 *Latin ccTLDs which do not correspond to an ISO 3166-1 Alpha-2 Code*
68 *Element – The Trigger is the ISO 3166-1 MA making a change (other than*
69 *making it an ISO 3166-1 Alpha-2 Code Element) to any of these. For each*
70 *such Triggering Event the IFO will consider if the change requires deleting*

³ How the IFO processes revocation requests from third parties is beyond the scope of this policy. If the IFO decides to revoke a delegation it must notify the Manager and allow it 30 days to apply for an Independent Advice Review. According to the FOI (section 4.7) Revocation is the last resort option for the IFO. Revocation is therefore a matter between the IFO and the ccTLD Manager

⁴ The IFO does not have a formally documented process for revocations.

71 *that ccTLD. If the ccTLD Manager disagrees with the IFO's decision to*
72 *initiate the Retirement process it can appeal the decision using the ccTLD*
73 *Appeals Mechanism.*

- 74 ○ Any other policy developed by the ccNSO and adopted by the ICANN Board
75 which allows ccTLDs to appeal a decision by the IFO.

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- 77 • **The Independent Advice review will only provide advice whether or not:**

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- 79 ○ There were significant issues with the IFO properly following its procedures and
80 applying these fairly in arriving at its Decision; or
- 81 ○ There were significant issues in how the IFO complied with RFC 1591, the CCNSO
82 FOI for RFC1591 as adopted by the ICANN Board, and any other policies
83 developed through a ccNSO policy development process and adopted by the
84 ICANN Board in making its Decision.

Commented [BT4]: Minor edit to ensure it is clear the decision must be binary.

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- 86 • **Administrative objectives:**

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- 88 ○ Low cost (10,000 to 100,000\$US maximum including all administrative and
89 Arbitrator(s) costs for both parties).
- 90 ○ Fast – less than 90 days to return a decision **for simple cases.**
- 91 ○ Minimize the total time required to review any specific IFO decision which can be
92 reviewed by this mechanism.

Commented [BT5]: Upon reflection the original text really did not make sense given the Decision itself is not the issue vs RFC 1591 etc but rather how those requirements were considered in making the Decision. After thinking on this for a while I would propose the following.

Commented [BT6]: Minor edit.

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- 94 • **Process Overview**

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96 (Note: Once the process is agreed a summary will be kept here, and the details will be
97 moved to an annex)

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- 99 ○ The IFO makes a Decision that can be reviewed.
- 100 ○ An eligible party submits an application (Application) for a Review to the
101 Administrator.
- 102 ○ The Administrator evaluates if the Application and requests that the IFO take no
103 further action regarding this decision until advised otherwise by the Administrator.
- 104 ○ If the Administrator rejects the Application, it will:
 - 105 ▪ Advise the Applicant and request that the Application fee minus a processing
106 fee be reimbursed to the Applicant (TBD). The Applicant may re-apply if
107 within the 30 day deadline.
 - 108 ▪ Advise the IFO of the rejection and that the IFO may proceed with this
109 Decision.
 - 110 ▪ Close the Application and update the review website accordingly.

Commented [BT7]: Per the results of previous CCPDP-RM meetings.

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- If the Administrator accepts the Application, it will:
 - Advise the Applicant (now Claimant) that the Application has been accepted.
 - Advise the IFO that the Application has been accepted and that the IFO may not proceed further with the Decision until informed otherwise by the Administrator.
 - Update the Review website accordingly.
 - Will request that the Applicant select which type of Review it will opt for (Administrator, 1 Arbitrator, 3 Arbitrators – see Arbitrator section for details) and advise the IFO of this.
 - The Administrator will work with the Applicant and the IFO to select the Arbitrator(s).
 - Conducting the Review
 - The Administrator will manage the Review as the Arbitrator(s) consider(s) the case:
 - The Arbitrator(s) may request a presentation by the IFO or ask formal questions of the IFO.
 - The Arbitrator(s) will decide if there were significant issues or not in their report.
 - The Administrator will review the Arbitrator(s)' report to ensure it is consistent with the requirements for such reports.
 - The Administrator will publish the Arbitrator(s) decision and advise the Claimant.
 - If the Arbitrator(s) did not find any significant issues:
 - The Administrator will advise the Claimant, close the case and advise the IFO that it may proceed with its Decision
 - If the Arbitrator(s) did find significant issues:
 - The Administrator will contact the IFO asking it to confirm which option it will take vs the Advice (30 days):
 - Accept the Arbitrator(s) decision and Reverse its original Decision.
 - Accept the Arbitrator(s) decision but opt to re-do the evaluation of the request which led to the original Decision.
 - Reject the Arbitrator(s) decision.
 - If the IFO accepts the Arbitrator(s) Advice and reverses its original decision:
 - The Administrator will advise the Claimant and will close the case and update the website.
 - Note: This assumes that IFO Decisions are bascially binary in most cases. Transfers, Revocations, request for an extension in a retirement process, and Retirement of a 2 letter Latin non-ISO 3166-1 ccTLD can only be binary. Delegation of a new ccTLD between 2 contending parties is also

- 150 binary but is not if there are 3 or more applicants (which should be very
151 exceptional).
- 152 ○ If the IFO rejects the Arbitrator(s) decision:
 - 153 ▪ The Administrator will close the case and work with the IFO to ensure
154 that the Advice is properly included in any IFO recommendation to the
155 ICANN Board on this matter.
 - 156 ○ If the IFO accepts the Arbitrator(s) decision but opts to re-do its process with
157 respect to this Decision:
 - 158 ▪ Once the IFO has completed re-doing its process that Decision will be
159 presented to the Claimant.
 - 160 ▪ The Administrator will request that the Claimant select one of the two
161 following options (30 days):
 - 162 ● Accept the new Decision.
 - 163 ● Apply for a Review of this new decision at the IFO's expense (no
164 charge to the Claimant).
 - 165 ▪ If the Claimant accepts the new decision the Administrator will close the case
166 and update the website.
 - 167 ▪ If the Claimant decides to apply for a new Review the Review process begins
168 anew with the following changes:
 - 169 ● If the Application for a Review is accepted the IFO will bear all
170 costs.
 - 171 ● If the Review finds significant issues with the new IFO Decision the
172 IFO can only opt to accept the new Review decision and reverse
173 its Decision or reject the Review's findings. (30 days).
 - 174 ● If the Review does not find any significant issues the
175 Administrator will advise the Claimant and the IFO and will advise
176 the IFO that it can proceed with its Decision and close the case.
 - 177 ▪ If the Review finds there were significant issues and the IFO reverses its
178 Decision the Administrator will advise the Claimant and close the case.
 - 179 ▪ If the Review finds there were significant issues and the IFO rejects the
180 Advice the Administrator will close the case and work with the IFO to include
181 the results of both Reviews in any recommendations the IFO makes to the
182 ICANN Board.

Commented [BT8]: New limitation to avoid looping.

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184 • **The Administrator - details not included in the process overview:**

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- 186 ○ The Administrator must be a non-conflicted individual who is a SME with respect to
187 ccTLDs, the IFO and ICANN and who will be responsible for overseeing and managing
188 the Independent Advice system.

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- Conflict of interest will disqualify anyone with a current “relationship” (business, financial or family) with a ccTLD, known applicant for a new ccTLD, the IFO or who is pursuing legal action against these same parties. This would be assessed via a Conflict-of-Interest Declaration form (TBD).
 - The office of the Administrator will be funded and managed by ICANN.
 - General administrative responsibilities of the Administrator:
 - Maintain ongoing relationship with the ccNSO, IFO and ICANN.
 - Monitor Decisions by the IFO which have a potential to be reviewed.
 - Set up and oversee the operation of the website which will include:
 - General information on the Review process.
 - Q&A section.
 - All relevant forms.
 - List of certified Arbitrators.
 - List of ongoing cases.
 - List of Review decisions.
 - List of past cases.
 - Prepare and manage application of all relevant forms including:
 - Application/contract for a Review.
 - Application to become a certified Arbitrator.
 - COI form for specific cases.
 - NDA for certified Arbitrators.
 - Review decision form.
 - Fee agreements for Arbitrators.
 - Billing forms for Arbitrators.
 - Set up process to certify and manage Arbitrators.
 - Establish criteria for the certification of Arbitrators with the ccNSO and the IFO.
 - Manage the recruiting process for potential Arbitrators.
 - Certification of Arbitrators (validation as a SME, COI, NDA, contract).
 - Creation and management of a list of certified Arbitrators.
 - Manage financial matters including:
 - Review application payments and refunds.
 - Approval of Arbitrator billing.
 - Billing of Claimant and IFO for Arbitrators.
 - **Arbitrator(s) - details not included in the process overview:**
 - All Arbitrators will be certified, managed, and supported by the Administrator.

Commented [BT9]: Given we are proposing two new options with single individuals to reduce Claimant costs it did not make sense to continue using Panel for a single individual. There are other significant changes including proposed certification requirements.

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- Certification requirements will include:
 - Functional ability to work in English.
 - CV highlighting that the individual is a Subject Matter Expert (SME) with respect to CCNSO policies, RFC1591 and its FOI as well as IFO procedures. Minimum qualification will be 10 years of practical experience in all these areas (proposal TBD in cooperation between the Administrator, the ccNSO and the IFO). Legal experience is also desirable.
 - Interview with the Administrator to confirm SME status and ability to work in English.
 - Duly executed NDA regarding any non-public information obtained while acting as an Arbitrator on any Independent Advice case.
 - Duly executed Arbitrator contract with ICANN.
 - Duly executed COI form which will include certification of no COI with ICANN or the IFO. If selected for a specific case Arbitrators will have to provide a formal confirmation that they are impartial with respect to the Claimant.
 - Conflict of interest is defined as a party having a “relationship” (business, financial or family) with another party or who is involved in any formal legal action vs another party.
 - Being a Manager or employee of a ccTLD registry will not be considered a COI vs ICANN or the IFO in this context unless there are significant pending issues between the parties.

Is it a requirement that Arbitrators be impartial?

The impartiality requirement has been proposed as it is established practice for arbitral service providers.

E. Lisse does not agree that an Arbitrator chosen by the Claimant must be impartial wrt the Claimant.

From the ICC Rules section 11.1: Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

From PERMANENT COURT OF ARBITRATION OPTIONAL CONCILIATION RULES: Even in lite-weight proceedings like conciliation, the conciliators are expected to be impartial: the appointment of an independent and impartial conciliator, and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

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- Choice of Arbitrators by Claimants - 3 options for a review:
 - Review by the Administrator only. This will be a minimal cost option only requiring the Administrative costs.
 - Review by one Arbitrator selected jointly by the IFO and the Applicant from the list of pre-Certified Arbitrators managed and maintained by the Administrator. The selection process will be managed by the Administrator and if the parties cannot agree on a single Arbitrator within 30 days of the Application being approved, the Administrator will select one from the list. The selected Arbitrator will be required to formally confirm that it is impartial with respect to the Claimant. Both parties will share the cost of the selected Arbitrator evenly.
 - Review by 3 Arbitrators.
 - The IFO and the Claimant will each chose an Arbitrator. The proposed Arbitrators do not have to be from the list of pre-certified Arbitrators. If the candidates are not from the list of pre-certified Arbitrators, they will have to be certified by the Administrator prior to undertaking any work on the case. Once certified the IFO and Claimant Arbitrators will cooperatively pick a third Arbitrator from the list of pre-certified Arbitrators through a process managed by the Administrator. If the two Arbitrators cannot agree on a third within 30 days, the Administrator will nominate the third from the list of pre-certified Arbitrators.
 - The IFO and the Claimant must select their Arbitrators within 30 days of the Application being approved. Failure to do so will cause the Administrator to select and Arbitrator for the party from the list of pre-certified arbitrators.
 - If the chosen Arbitrator is not pre-certified it will have to be Certified by the Administrator within 30 days of being named before it can join the proceedings. If the chosen Arbitrator fails to be certified prior to the deadline the party may chose another if still within the original 30 day limit to choose an Arbitrator.
 - All Arbitrators will be required to formally confirm that they are impartial with respect to the Claimant.
 - Each party will pay for its chosen Arbitrator as well as 50% of the costs for the third Arbitrator.
 - Any decision in a 3 Arbitrator system will require the support of at least two of the three.

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- Arbitrators will only accept supplementary materials from the Claimant or the IFO if approved by the Administrator. All such requests to submit additional material must be made using the appropriate form (TBD) and submitted to the Administrator within 30 days of the request for Independent Advice being approved by the Administrator. The Administrator, using his best judgement for the fair administration of justice, will consider the following in determining if any new material should be accepted and made available to the Panel:
 - Is this material directly and critically relevant to the case?
 - Why was this material not included in the original request to the IFO?
 - Can hold individual teleconference hearings with all the involved parties.
 - Can request a presentation by the IFO on the matter under review. The Panel, at its discretion, can also request answers to its questions from the IFO which must respond promptly to these (2 business days (TBD with the IFO) California time following the day of the request – this should be included in the IFO SLE process statistics).
 - Definition of Significant Issue – Any clearly demonstrable inconsistency or deviation by the IFO of properly following its procedures and applying these fairly or how the IFO complied with the requirements of RFC 1591, the CCNSO FOI for RFC1591 as adopted by the ICANN Board as well as any other policies developed through a ccNSO policy development process and adopted by the ICANN Board in making its Decision which, in the opinion of the Arbitrator(s), could have significantly impacted the Decision if it had not occurred.
 - The Arbitrator(s)' Advice will explain in detail their decision.
 - The Administrator will review the Advice from the Arbitrators to ensure it meets all the requirements prior to publishing it. The Administrator may work with the Arbitrator(s) to amend the Advice to ensure it meets the requirements:
 - The Advice provides all the relevant administrative and background information.
 - The Advice will clearly indicate if there were any significant issues or not.
 - If there were issues the Advice clearly indicates what the issues are as well as why they are issues.
 - Formal sign-off of the Arbitrator(s) on the final Advice and a statement of majority opinion if necessary.
 - Final Independent Advice from the Arbitrator(s) cannot be appealed.
- IFO - details not included in the process overview:
 - Will maintain a good working relationship with the Administrator.
 - Must amend its procedures to allow concerned parties sufficient time to file for Independent Advice prior to the IFO implementing or making a recommendation to the ICANN Board regarding the decision which is being challenged. As such the IFO

Commented [BT10]: First attempt a defining what a Significant issue is.

Commented [BT11]: Minor updates to align with the updated process.

335 will advise all directly involved parties of any appealable decisions. Such decisions
336 will be labelled Preliminary Decisions and will advise the concerned parties of their
337 options for appealing such decisions.

- 338 ○ After reaching a decision on a ccTLD request which can be appealed, the IFO will
- 339 advise those parties which could apply for a Review of the Decision and of their
- 340 options for appealing the Decision as well as the timeline for doing so.
- 341 ○ If a Decision is being appealed to the Administrator, the IFO cannot make a
- 342 recommendation to the ICANN Board on the matter being reviewed prior to the
- 343 Administrator confirming it can do so.
- 344 ○ Will make all relevant internal materials available to the Arbitrator(s) who will be
- 345 under a formal confidentiality agreement. These will include all internal emails on
- 346 the matter and all communications from all the relevant parties but does not include
- 347 formal legal advice to the IFO.
- 348 ○ Will make itself available to the Arbitrator(s) to present details of the case or answer
- 349 questions.
- 350 ○ If the Review finds there were significant issues and the IFO rejects the Advice the
- 351 IFO will work with the Administrator to include all Review results in any
- 352 recommendations on this matter to the ICANN Board.

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354 • **Applicant and Claimant - details not included in the process overview:**

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- 356 ○ Must be a ccTLD Manager except in the case of the delegation of a new ccTLD where
 - 357 any applicant for that new ccTLD is eligible.
 - 358 ○ To launch an Independent Advice Review (Review), the Claimant must submit an
 - 359 application (Application) via the website to the Administrator (in English) within 30
 - 360 days of the Decision being made.
 - 361 ▪ 30 days to be calculated as follows – The IFO publishing its Initial Decision
 - 362 will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0.
 - 363 The opportunity to submit an application for an Independent Advice
 - 364 Review will expire on Day 30 at one minute past 23:59 UTC.
 - 365 ○ The evaluation criteria for an Independent Advice Review Application are:
 - 366 ▪ Be on the properly completed form/contract (TBD)
 - 367 ▪ Be received prior to the 30 day deadline.
 - 368 ▪ Clearly indicate which IFO Preliminary Decision is being appealed.
 - 369 • An Application for Independent Advice cannot be approved for a
 - 370 Decision which is currently the subject of an Independent Advice
 - 371 Review or was the subject of a completed Independent Advice
 - 372 Review.
 - 373 ▪ Have paid the required fees (fees and details TBD).

Commented [BT12]: The Independent Advice process will only consider a given Decision once. See section below concerning multiple potential Claimants for dealing with that issue.

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- Be a party listed in the IFO Decision that is a ccTLD manager listed in the IANA database or in cases related to the delegation of a new ccTLD any parties who applied to be the Manager for that ccTLD.
 - Clearly indicate the individual the Applicant has delegated to be responsible for the Application including all relevant contact information.
 - Clearly state why the Claimant believes that:
 - That the IFO did not properly follow its procedures or applied these fairly in arriving at its preliminary decision; or
 - The IFO decision being reviewed is inconsistent with RFC 1591, the CCNSO FOI for RFC1591 as approved by the ICANN Board, as well as any other policies which apply to CCNSO members and is approved by the ICANN Board.
 - For cases where there is a potential for more than one Claimant⁵. In all such cases where the Administrator has approved an Application for a Review, the Arbitrator(s) will consider all elements of the IFO Decision for all potential Claimants.
 - By submitting an Application, the Claimant will agree to the rules for the Independent Advice Review, which will include a clause preventing the Applicant from taking the Administrator, Arbitrators, the CCNSO, or ICANN to court with respect to the Independent Advice Review. This in no way prevents the Claimant from taking the IFO or ICANN to a relevant court regarding the Decision by the IFO and any approval of such recommendation by the ICANN Board.
 - The Administrator may interact with the Claimant's contact person to obtain clarifications on the application (and may allow the Applicant to resubmit).
 - If the Administrator rejects the application for an Independent Advice Review the Claimant's payment will be refunded minus administrative costs (objective 1,000 to 5,000\$US maximum - TBD). There is no mechanism to appeal the Administrator's decision to reject an application however the Administrator will be required to publish its reasons for rejecting the application.

Commented [BT13]: Significantly simplified by limiting the consideration of a Decision to a single time – see Application approval criteria above.

⁵ e.g. a Decision regarding the delegation of a new ccTLD that had three applicants – if the ccTLD is allocated to one of the three, the two others could appeal – obviously a corner case