

The background features a complex, abstract pattern of concentric circles and scattered, multi-colored squares (in shades of blue, green, purple, and black) on a light gray background. The circles are composed of many small, overlapping segments, creating a mosaic-like effect. The squares are scattered across the scene, some appearing as part of the circular patterns and others as isolated shapes.

# CCPDP-RM

Considerations regarding the development of a new  
binding review mechanism

202205

# FINAL Report 10 April 2015 DT-B CWG Stewardship Transition

Of the 10 cc responses with respect to binding:

- 4 supported a non-binding review mechanism
  - Nominet, NORID, CENTR and LACTLD.
- 2 supported a binding review mechanism:
  - AFNIC, AUDA.
- 4 showed no indication of a preference:
  - SIDN, DIFO, CIRA, Internet NZ.

# ICANN - how IRP can be binding for IFO

- An IRP Panel could declare that under the specific facts and circumstances, the IFO applied a policy incorrectly, if that is the still to-be established and appropriately scoped standard of review.
- An IRP Panel could not, however, determine what the relevant and corrective measures are to remedy that policy violation; it cannot tell ICANN/IFO what to do to fix a violation. Allowing the IRP Panel such leeway would put it in the role of implementing IANA policy, which is not allowable.
- ICANN as the IFO, in or after accepting an IRP Panel declaration of a violation, would then identify the path to compliance with the declaration.

# ICANN - how IRP can be binding for IFO

- In the words of the BWG, compliance with the declaration could include appropriately scoped relevant and effective corrective measures.
- ICANN Legal notes that neither the terms “compliance” nor “relevant and corrective measures” guarantee that a different outcome from the IFO’s application of policy; that is a fact-specific issue. As we do not understand the BWG’s question to require the IRP Panel to have the authority to define “relevant and effective measures”, we do not anticipate this is an issue.
- If the ICANN Board rejects compliance with the IRP Panel declaration, the Claimant could go to a court with appropriate jurisdiction to seek enforcement of the IRP declaration.

# ICANN - Considerations When Designing Binding Review Mechanisms

- Pre-filing opportunities to resolve the conflict. (Of note, IANA has existing customer complaint, escalation and mediation processes in place; IRP claimants are encouraged to request and participate in good faith in cooperative engagement processes pre-filing.)
- Clear identification of action at issue and grounds for challenge (which could be clarified through pre-filing engagement)
- ICANN and Claimant opportunity to consent to neutral reviewer(s)

# ICANN - Considerations When Designing Binding Review Mechanisms

- Adherence to conflict of interest and independence practices for neutral reviewer(s)
- Limitation on scope of review to whether the action was properly taken, based on facts, with record supplied by parties
- Limitation on scope of review finding to a predefined and agreed upon standard of review, with no ability to compel a specific outcome
- Enforceability of finding in court of appropriate jurisdiction is likely not appropriate without the protections of formal arbitration

# ICANN - Considerations When Designing Binding Review Mechanisms

- ICANN org encourages the ccPDP-RM working group to leverage existing ICANN accountability mechanisms to the greatest extent possible. The design of additional formal, binding mechanisms through which the community can hold ICANN accountable is a lengthy, iterative process, as the ccPDP-RM working group is already aware. Implementation of such policy, including the specification of rules and processes, might also be resource intensive.

# CCPDP-RM - Considerations When Designing Binding Review Mechanisms

- Developing, adopting and implementing a new binding review mechanism will certainly require several years of effort by the CCPDP-RM, the ccNSO and ICANN.
- Independent legal advice for developing such a new mechanism would be a requirement and would be very expensive – it is unclear who would pay for this.



# CCPDP-RM - Considerations When Designing Binding Review Mechanisms

- Implementation of such a new mechanism would be very expensive.
- It is unclear, given the ICANN Legal requirements for a new binding RM, how significantly different such a new mechanism would be vs the current IRP.

# CCPDP-RM - Considerations When Designing Binding Review Mechanisms

- A new binding review mechanism would, as the IRP, require a Standard of Review which would have to be the same or similar as for the IRP.
- Given there is currently no Standard of Review for the IRP it is difficult to understand how effective the IRP, or a new binding RM using the same or a similar Standard of Review, could be for ccTLDs.

# CCPDP-RM - Considerations When Designing Binding Review Mechanisms

- It is generally acknowledged that, unfortunately, the costs for the IRP and going to court are similar for the complainant.
- It is unclear if all these investments could be justified in a context where ccTLDs have always been able to take ICANN to court and have never done so to date – and if for reasons of costs a binding mechanism will not be less expensive.

Mechanism	Independent	Binding	Costs	Time to resolution	Probability of success for ccTLD
IRP (Revocation and Retirement?)	Yes	Yes (per ICANN definition)	\$\$\$\$	Months/years	Possible
New binding review mechanism	Yes	Yes (per ICANN definition)	\$\$\$\$	Months/years	Possible
Court (all IFO actions)	Yes	Yes	\$\$\$\$	Months/years	Possible
New non-binding mechanism (all IFO actions)	Yes	No (but can advise Board)	\$ - \$\$ (per # of panellists)	Months	Possible

# Question for CCPDP-RM on binding

- Should the CCPDP-RM undertake the development of a new binding RM?