CCPDP-RM

Analysis of the ICANN Legal response to the CCPDP-RM question on Binding and options going forward.

202205

Objectives

- Review the relevant context

- Present the highlights of the ICANN Legal Response

- Analyse the implications of the Response

- ccTLDs - going to court vs IRP

- Adapting the IRP for use by ccTLDs

- Going forward from here.

Background

As part of its considerations to evolve a Binding review mechanism for IFO decisions regarding ccTLDs the CCPDP-RM submitted a set of questions to ICANN Legal in October 2021 regarding if and how a review decision could be made Binding on ICANN and the IFO.

Background - What is meant by binding

- The CCPDP-RM question to ICANN Legal envisioned that any binding decision could not go beyond what ICANN's current IRP means by binding:
  - The review mechanism can only decide if ICANN/IFO followed the applicable rules/Bylaws in making its decision.
  - If the review mechanism determines that ICANN/IFO did not follow the applicable rules/Bylaws then ICANN/IFO should bring appropriate corrective actions. This does not mean that ICANN has to reverse the decision that is being contested.

Background - What is meant by binding cnt'd

- Under the ICANN Independent Review Process (IRP) the ICANN Board is not obligated to accept the decision of the review. However, if the ICANN Board does not accept the decision the plaintiff can use the decision of the Review to have a court of competent jurisdiction enforce the IRP declaration.

Background - What is meant by binding cnt'd

- It is important to note that for gTLDs have a contract which contains a Disputes clause. However, ccTLDs are not subject to this requirement, given most do not have contracts, and as such can take ICANN to a court of competent jurisdiction at any time.

Highlights of the Response

- ICANN already has a binding review process with the Independent Review Process (IRP).

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- To date the IRP has not been used to challenge an IFO decision; using it this way would require a 'standard of review'

- As no Standard of Review yet exists, neither ccTLDs nor gTLDs can use the IRP to challenge an IFO decision.

- This makes it impossible for ccTLDs to use this option until such a Standard is developed.

Highlights of the Response – cnt'd

- The 2016 changes to the ICANN Bylaws regarding the IRP (4.3 (b)) specifically allow any "Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation" can use the IRP except for "Claims relating to ccTLD delegations and re-delegations" (i.e. a ccTLD does not need to wait for a Board decision to request and IRP)

Highlights of the Response cnt'd

- Note: ICANN Legal notes that the statement in the pending Retirement policy Section 5.2 "The Review Mechanism for relevant decisions pertaining to the Delegation, Transfer, Revocation or Retirement of ccTLDs is subject of a separate Policy development effort. Once the Policy is adopted by ICANN the decisions mentioned above in this section shall be subject to the Review Mechanism." makes it unclear if Retirement should be eligible for the IRP or be made exempt from it. ICANN Legal will be seeking clarification on this matter.

Highlights of the Response cnt'd

- The ccNSO can develop an alternative Binding review process that ICANN could accept if it meets all of the requirements listed in the response.

- ICANN Legal notes that current review processes (customer complaint, escalation and mediation processes) are available to all ccTLDs regarding any IFO decision related to ccTLDs and encourages their use.

Analysis of Response

- Based on the "Considerations When Designing Binding Review Mechanisms" in the Response one cannot expect that ICANN would accept any Binding review mechanism devised by the ccNSO which would:

  - Be more Binding on ICANN than the IRP.
  - That would be a De novo reconsideration of an IFO decision.

Analysis of Response – cnt'd

- The constraints outlined by ICANN Legal in their response with respect to the CCPDP-RM developing a new Binding review mechanism would make any new Binding review mechanism very similar or almost identical to the IRP.

- The development of a new Binding review mechanism would be a very long and expensive process.

Analysis of Response – cnt'd

- Considering these points along with the fact that some IFO/ICANN decisions concerning ccTLDs can use the IRP to obtain Binding decisions (and that the ccNSO could ask that the exceptions for Delegations and Transfers be removed making all decisions subject to the IRP) it seems obvious that the development of a new Binding review mechanism by the CCPDP-RM would be a highly ineffective undertaking.

ccTLDs - going to court vs IRP

- As noted earlier ccTLDs can take the IFO/ICANN to court for any decision regarding them.

- A California court ruling against ICANN would be binding on ICANN vs IRP decisions which are not absolutely binding on ICANN.

ccTLDs - going to court vs IRP - cnt'd

- IRPs have very limited timeframes for a complainant to submit a complaint after which the complaint becomes ineligible – timeframes for taking ICANN to court are considerably less limited.

- Undoing a ccTLD Delegation, Transfer, Revocation or Retirement once completed is highly problematic if not impossible and as such is a key concern for both IRPs and taking ICANN to court.

ccTLDs - going to court vs IRP – cnt'd

- Using the optional ICANN Cooperative Engagement Process (CEP) prior to filing an IRP does ensure ICANN will not seek costs from the complainant in any ensuing IRP that the complainant loses – this is not an option in court cases.

ccTLDs - going to court vs IRP - cnt'd

- The IRP was designed to be a quick and cheap alternative to court. Experience has shown that it is neither.

- As such it is uncertain if the ICANN IRP is a significantly better option than using the courts for ccTLDs.

Adapting the IRP for use by ccTLDs

- Even if Revocations are eligible to use the IRP they cannot do so until a Standard of Review is established for ccTLDs wishing to use this mechanism.

Adapting the IRP for use by ccTLDs – cnt'd

- Once the ICANN Board confirms a change to a ccTLD as recommended by the IFO that change is usually implemented promptly. In many cases it would be impossible to undo the implementation of these changes based on an IRP decision which can take years to be finalized (changes to IFO processes?).

Adapting the IRP for use by ccTLDs – cnt'd

- The IRP has short timing requirements for submitting applications and these are not synchronized with other processes – This would imply that the requirement to use other processes prior to launching an IRP, such as IFO Mediation, could cause a potential applicant to be outside the specified time window to launch an IRP.

Going forward from here

- First let us recap the review options currently available to ccTLD vs any IFO/ICANN Decisions including the potential CCPDP-RM option for a non-binding mechanism.

Mechanism	Independent	Binding	Costs	Time to resolution	Probability of success for ccTLD
IFO Review (all IFO actions)	No	No	N/A	Days/weeks	Extremely low
IFO Mediation (all IFO actions)	Yes	No	N/A	Weeks/months?	Extremely low
RFR (Revocation and Retirement?)	No	Yes	N/A	30 -90 days?	Extremely low
CEP (Revocation and Retirement?)	No	?	N/A	Months/years	Extremely low
IRP (Revocation and Retirement?)	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

Going forward from here – cnt'd

- In this context the questions the CCPDP-RM must answer are:

  1. Should the CCPDP-RM undertake to finalize the work to make RFRs and IRPs functional for Revocations?

  2. Should the CCPDP-RM request that Delegations and Transfers be eligible for RFR and IRP?

  3. Should the CCPDP-RM request that the ccNSO Council/ CCPDP-RET confirm that Retirements are eligible for RFR and IRP?

  4. Should the CCPDP-RM complete the development of the non-binding solution?

Going forward from here – cnt'd

1. Should the CCPDP-RM undertake to finalize the work to make RFRs and IRPs functional for Revocations?

- Currently there is no Standard of Review in place for a Revocation to use the RFR or IRP.

- Need to confirm if ICANN Legal will require IFO Mediation prior to submitting an RFR or IRP.

- Need to ensure there is a mechanism to prevent the implementation of IFO decisions prior to reviews being completed (point 4).

Going forward from here – cnt'd

2. Should the CCPDP-RM request that Delegations and Transfers be eligible for RFR and IRP?

- The exception for these is in the Bylaws and would require a change to Fundamental Bylaws (cannot be rejected by any decisional SO or AC).
- Would provide even access for all ccTLD processes.
- ICANN Legal would support this.
- Would imply some work by the CCPDP-RM and the ccNSO Council to ensure its approval.
- GAC reaction to this would have to be assessed.
- Given the option of using the courts is this worth it?

Going forward from here – cnt'd

3. Should the CCPDP-RM request that the ccNSO Council/ CCPDP-RET confirm that Retirements are eligible for RFR and IRP?

- Not a resource-intensive undertaking.
- Would provide ccTLDs with an additional review option.
- Would require finalizing the work to make RFRs and IRPs functional for Revocations (point 1).

Going forward from here – cnt'd

4. Should the CCPDP-RM complete the development of the non-binding solution?

- Would provide a useful and low-cost independent option for ccTLDs which meets all of the CCPDP-RM requirements with the exception of being binding.
- Could provide a basis for preventing the implementation of IFO decisions which are being challenged by ccTLDs using RFR and IRP (point 1).
- Development of the non-binding mechanism is almost complete.

Going forward from here – cnt'd

Sub-Group recommendations to the CCPDP-RM:

1. Should the CCPDP-RM undertake to finalize the work to make RFRs and IRPs functional for Revocations? - YES

2. Should the CCPDP-RM request that Delegations and Transfers be eligible for RFR and IRP? – NO RECOMMENDATION

3. Should the CCPDP-RM request that the ccNSO Council/ CCPDP-RET confirm that Retirements are eligible for RFR and IRP? - YES

4. Should the CCPDP-RM complete the development of the non-binding solution? - YES

Process going forward

- Present the sub-group report and recommendations to the CCPDP-RM and work with the CCPDP-RM to develop a consensus position on the various points.

- Present the CCPDP-RM consensus position to the ccNSO to obtain a confirmation of the updated approach.

- Undertake necessary actions to complete the work of the CCPDP-RM.