

## **IAP (Independent Appeals Panel) STRUCTURAL AND FUNCTIONAL ANALYSIS**

- Summary of Key Points where there is Strong Agreement
  - Strong support for an IAP that is independent and can make binding decisions,
  - Rules should be adjusted for gTLDs vs. ccTLDs. **See issue 1 below.**
  - Grounds for appeal should be limited to whether or not relevant policy was followed.
  - gTLD registry operators should have standing to appeal delegation and redelegation decisions to which they are a party that they believe are contrary to approved gTLD policy.
  - ccTLD registry operators should have standing to appeal delegation and redelegation decisions to which they are a party that they believe are contrary to applicable laws and/or applicable approved ccTLD policy.
  - ccNSO should have standing to appeal any implementation of approved policies relating to delegation or redelegation of ccTLDs that it believes is inconsistent with those policies. **Is this limited to appeals from the particular application of an implemented rule (e.g., a particular delegation), or can this be used to challenge how a policy is implemented before it is applied?**
  - GNSO should have standing to appeal any implementation of approved policies relating to delegation or redelegation of gTLDs that it believes is inconsistent with those policies. **Is this limited to appeals from the particular application of an implemented rule (e.g., a particular delegation), or can this be used to challenge how a policy is implemented before it is applied?**
- Key Issues and Open Questions
  - **How should the treatment of ccTLD appeals differ from gTLD appeals?**
  - **Local Laws, ccTLDs and the IAP – Since delegation and redelegation of a ccTLD can be an extremely delicate international relations issue, does the CWG need to obtain knowledgeable advice on the subject of an appeals panel vs. local laws from experts or the GAC? What questions should be asked? What kind of expertise is needed?**
  - **The notion of a binding appeals mechanism which could potentially un-delegate or un-re-delegate a TLD is a very critical issue which could have drastic consequences for the IANA functions operator and the user community. How should the CWG further develop this point? Does the CWG need to seek legal advice prior to recommending the IAP?**
  - **Are delegation and redelegation decisions really IANA Function decisions? If not, are they out of scope for the CWG?**

- **gTLD vs. ccTLD APPEALS**

- CWG Survey
  - Appeals should be managed differently, depending on whether the appeal involves a gTLD or a ccTLD (Agree 96%, Disagree 4% - STRONG AGREEMENT).
- Comments from CWG Survey
  - Standard arbitration panels cannot handle ccTLD issues given these can be highly complex and delicate international issues.
  - Reference to the work of the ccNSO FOIWG draft report should be considered.
  - Uncertain how or if a panel should handle matters of application of local law.

- **GROUNDINGS FOR APPEAL**

- Draft Proposal
  - *All decisions and actions (including deliberate inaction) of the IANA Functions Operator that affect the Root Zone or Root Zone WHOIS database.*
  - *Any policy implementation actions that affect the execution of changes to the Root Zone File or Root Zone WHOIS.*
  - *Disputes as to the implementation of "IANA related policies."*
  - *Examples:*
    - *Disputes over the consistency of ccTLD delegation or redelegation decisions with accepted policy.*
- CWG Survey<sup>1</sup>
  - **The grounds for an appeal should be limited to whether or not relevant policy was followed (Agree 95%, Disagree 5% - STRONG AGREEMENT).**
  - **The appeals process should only challenge whether established policies have been properly applied or adhered to by the IANA Functions Operator. It should not evaluate the merits of such policies (Agree 84%, Disagree 16% - STRONG AGREEMENT).**
  - **The grounds for an appeal should be limited to whether or not relevant policy was followed (Agree 95%, Disagree 5% - STRONG AGREEMENT).**
  - All decisions and actions of the IANA Functions Operator that affect third parties and impact the Root Zone or Root Zone WHOIS database should be subject to an independent appeals process (Agree 71%, Disagree 29%).
- Comments from CWG Survey

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<sup>1</sup> Strong Agreements are in **BOLD**.

- Appealing a decision via the IAP after a TLD is delegated or re-delegated seems unproductive. At issue here is dealing with how policies are turned into processes and procedures.
- **STANDING: WHO CAN APPEAL?**
  - Draft Proposal
    - *appeals would be available to customers of IANA*
    - *likely to other parties who feel that they were affected by an IANA action or decision.*
  - CWG Survey
    - **Standing to file appeals should be defined (Agree 94%, Disagree 6% - STRONG AGREEMENT).**
    - **gTLD registry operators should have standing to appeal delegation and re-delegation decisions to which they are a party that they believe are contrary to approved gTLD policy (Agree 97%, Disagree 3% - STRONG AGREEMENT).**
    - **ccTLD registry operators should have standing to appeal delegation and re-delegation decisions to which they are a party that they believe are contrary to applicable laws and/or applicable approved ccTLD policy (Agree 97%, Disagree 3% - STRONG AGREEMENT).**
    - **The ccNSO or GNSO, as applicable, should have standing to appeal implementation of any approved policies relating to delegation of ccTLDs or gTLDs, as applicable, that they believe are inconsistent with those policies (Agree 81%, Disagree 19% - STRONG AGREEMENT).**
    - gTLD registry operators should have standing to appeal delegation and redelegation decisions that they believe are contrary to approved gTLD policy, even if the operator is not a party involved in the delegation or redelegation (Agree 65%, Disagree 35%).
    - ccTLD registry operators should have standing to appeal delegation and redelegation decisions to which they are a party that they believe are contrary to applicable laws and/or applicable approved ccTLD policy, even if the operator is not a party involved in the delegation or redelegation (Agree 54%, Disagree 46% - Split).
    - Governments should have standing to appeal any ccTLD delegation or redelegation decisions that they believe are contrary to applicable laws (Agree 60%, Disagree 40%).
    - Governments should have standing to appeal ccTLD delegation or re-delegation decisions that they believe are contrary to applicable laws only where that country's ccTLD is involved (Agree 75%, Disagree 25%). Note: many "Is Acceptable" and "No Response" answers, so this is not classified as a "major agreement."

- Affected third parties should have standing to appeal; e.g., registrants could appeal a gTLD re-delegation, or a national community of users could appeal a ccTLD re-delegation (Agree 71%, Disagree 29%). Note: most respondents selected “Is Acceptable.”
- **BINDING NATURE OF DECISION**
  - CWG Survey
    - **The appeals process should be binding on the IANA Functions Operator (Agree 94%, Disagree 6% - STRONG AGREEMENT).**
    - Awarding binding powers with regard to an appeal from a ccTLD delegation and redelegation (or lack thereof) should be out-of-scope for the IAP (Agree 55%, Disagree 45%).
    - Even if the IAP’s scope is limited to determining whether relevant policy was followed in a ccTLD delegation or re-delegation (or in not delegating or re-delegating a ccTLD), awarding the IAP binding powers in an appeal should be out-of-scope for the IAP (Agree 39%, Disagree 61%).
    - Any decision by the IAP should be limited to agreeing that the IANA Functions operator’s processes and procedures have been followed and documented, or to referring the case back to the IANA functions operator for further consideration and explanation. In other words, the IAP should not be able to overturn an action by the IANA functions operator (Agree 36%, Disagree 64%).
- **STRUCTURE AND PROCESS**
  - Draft Proposal
    - *Not a permanent body*
    - *binding arbitration process, an independent arbitration organization or a standing list of qualified panelists*
    - *Use established rules promulgated by an independent arbitration organization*
    - *Three person panel*
      - *each party chooses one panelist; two panelists choose the third panelist*
  - CWG Survey
    - **Terms of reference for the IAP and details on the composition of the panel should be defined (Agree 93%, Disagree 7% - STRONG AGREEMENT).**
    - **Existing arbitration providers should be used instead of creating a new body (Agree 75%, Disagree 25% - STRONG AGREEMENT).**
- **EXISTENCE OF IAP**
  - Results of Public Comment:
    - IAP was supported by 78% of respondents
  - CWG Survey

- **The IAP component of the IANA CWG proposal is crucial, and its location outside of both ICANN and the IANA oversight function is necessary (Agree 87%, Disagree 13% - STRONG AGREEMENT).**
- **An appeal mechanism is not needed a (Agree 15%, Disagree 85% - STRONG AGREEMENT).**
- **A mechanism for an affected party to appeal a decision relating to the Root Zone would be beneficial for Internet stakeholders and consumers (Agree 80%, Disagree 20%- STRONG AGREEMENT).**
- **There should be standard procedures for catching IANA process errors before resorting to an appeals process (Agree 100%, Disagree 0% - STRONG AGREEMENT).**
- The creation of an independent appeals panel would be better addressed as part of the broader ICANN Enhancing Accountability process because it should be applicable to ICANN as a whole and not just the IANA naming functions (Agree 67%, Disagree 33%).
- The creation of accountability mechanisms on different tracks in the IANA CWG and the Accountability CCWG risks creating the potential for confusion and “forum shopping.” (Agree 70%, Disagree 30%).