

Issues to explore and define with respect to the review mechanism

Introduction

To date decisions taken as part of the processes for the delegation, transfer and revocation of ccTLDs are not subject to a review or appeal mechanism:

RFC 1591

According to RFC 1591, section 3.4, *the Internet DNS Names Review Board (IDNB), a committee established by the IANA, will act as a review panel for cases in which the parties [BB: the Significantly Interested Parties¹] can not reach agreement among themselves. The IDNB's decisions will be binding.*

This IDNB was never established by IANA, or any other entity.

Framework of Interpretation

With respect to the IDNB the FOI WG noted: *The FOI WG believes it is consistent with RFC 1591 (section 3.4) and the duty to act fairly to recognize the manager has the right to appeal a notice of revocation by the IANA Operator to an independent body.*

CWG-Stewardship and CCWG-Accountability

Following public comments on its first proposal, the CWG-Stewardship proposed that: *An appeal mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions. For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC will have access to an Independent Review Panel. The appeal mechanism will not cover issues relating to ccTLD delegation and re-delegation, which mechanism is to be developed by the ccTLD community post-transition.*

In addition, as part of the CCWG Accountability Proposal to enhance the Independent Review Process, the results of delegation/redelegations are explicitly excluded². *In its letter dated 15 April 2015, the CWG-Stewardship indicated that "any appeals mechanism developed by the CCWG -Accountability should not cover country code top-level domain delegation/redelegation issues as these are expected to be developed by the country code top - level domain community through the appropriate processes."*

As requested by the CWG - Stewardship, decisions regarding country code top- level domain delegations or re delegations would be excluded from standing, until the country code top -

¹ Section 3.4 RFC 1591 is about the definition and role of Significantly Interested parties.

² The CCWG- Accountability also proposes that the IRP:

Be subject to certain exclusions relating to the results of an SO's policy development process, country code top- level domain delegations/ redelegations, numbering resources, and protocols parameters.

See: page 33 <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-workstream-1-recs-23feb16-en.pdf>

level domain community, in coordination with other parties, has developed relevant appeals mechanisms.³

ICANN Bylaws 1 October 2016

According to latest version of the ICANN Bylaws (Section 4.2) Reconsideration: ⁴

Section 4.2. RECONSIDERATION

(a) ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request ("Requestor") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "Staff" includes employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly.

....

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

(i) Disputes relating to country code top-level domain ("ccTLD") delegations and re-delegations;

Following the discussions and comments on the Framework of Interpretation and – later – on the initial proposals of the CWG-Stewardship, and input and feed-back from the community at the Marrakesh and Helsinki meeting, the community present was of the view that a policy needs to be developed with respect to the introduction of a review mechanism. Based on the consultations to date this is considered to be of highest priority, in particular in light of the IANA Stewardship transition.

Issues to be explored and defined as part of the PDP pertaining to Review Mechanism

Given the expressed need for a review mechanisms and based on the community discussions, feed-back and comments to date, including but not limited those with respect to the CWG-Stewardship proposals and related work, the following issues have been identified:

Scope of the review mechanism

- 1. Which decisions and/or actions should be subject to a review mechanism?*
- 2. Who's decisions and/or actions should be subject to a review mechanism?*

With regard to question 1 and 2 please note the following:

³ <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf> Annex 07 page 7, 8.

⁴ <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>

According to RFC 1591 section 3.4: [The IDBS] *will act as a review panel for cases in which the parties [i.e the Significantly Interested Parties] cannot reach agreement among themselves. The IDNB's decisions will be binding.* This assumes that disputes among Significantly Interested parties (as defined in the Framework of Interpretation) are subject to a binding review mechanism.

According to the FOI⁵, recognising that ultimate authority on public policy for any country is its government and legislature, nothing in the FOI is intended to, or should be taken to constrain or limit applicable law in respect to matters relating to country-code or IDN string, or in the state of incorporation/place of business of the IANA operator.

Further, the FOI WG *believes it is consistent with RFC 1591 (section 3.4) and the duty to act fairly to recognize the manager has the right to appeal a notice of revocation by the IANA Operator to an independent body.*

3. Should review Mechanism applicable to all ccTLDs?

Some members in the cTLD community have raised the point that a ccNSO developed policy is only applicable to members of the ccNSO and hence a review mechanism developed through a PDP is only applicable for members of the ccNSO and only for the duration of the membership. At the same time the ccNSO is the only entity through which policies for the IANA naming functions are developed.

Further, although considered ccTLDs by definition IDN ccTLDs managers can not become member yet of the ccNSO awaiting the implementation of the IDN ccTLD policy recommendations.

4. What will be result / scope of the review decision? What powers will be bestowed upon review panel?

Assuming the introduction of a review mechanism the scope of the decision of the review will need to be defined. Some members of the community raised the question whether through such a review mechanism a final binding decision is taken (replacing the decision subject to the review) or should it be limited to a due process check (and if that is not the case refer it back to the entity that took the decision in the first instance)

Standing at review mechanism

1. Who will have standing at a review mechanism?

Some members in the community argue that only the [incumbent] ccTLD manager should have standing. Others have argued, at least raised, the point that potentially other parties should have standing, in particular parties with a significant interest.

As noted above, according RFC 1591 *the Internet DNS Names Review Board (IDNB), a*

⁵ <https://ccnso.icann.org/workinggroups/foi-final-07oct14-en.pdf>, page 3.

*committee established by the IANA, will act as a review panel for cases in which the **parties** [emphasis added] can not reach agreement among themselves. The IDNB's decisions will be binding.* This seem to imply that others then the ccTLD manager may have standing.

2. *What are the grounds?*

Should the questions for a review be limited to questions whether due process was followed in terms of a ccTLD delegation, transfer, revocation or retirement or should they be broader?

Rules and structure of review mechanism

1. *the rules and procedures to be used?*

Should existing mechanisms be used (like the reconsideration process or independent review process for covered actions) or other existing rules?

2. *Structure of panel and requirements and selection of panelist*

As part of the review mechanism proposals need to be developed around the structure of the panel (for example how many panelists, standing panel or to be selected from a pool of panelists) and requirements and selection of panelists.

1. *Structure of panel and requirements and selection of panelist*

Depending on scope of the decisions for review, the choice of law may be considered relevant to ensure the consistency with RFC 1591 and the Framework of Interpretation. According to the FOIWG, *"recognizing that ultimate authority on public policy for any country is its government and legislature, nothing in the FOI is intended to, or should be taken to constrain or limit applicable law in respect to matters relating to country-code or IDN string, or in the state of incorporation/place of business of the IANA operator."*