

## ccTLD Delegation Appeals (DT B)

### Report of Design Team B - Assessment of the Level of Consensus within the ccTLD Community in Regard to a Possible Appeal Mechanism for ccTLD Delegations and Redelegations

#### Recommendation

The CWG recommends not including any appeal mechanism that would apply to ccTLD delegations and redelegations in the IANA stewardship transition proposal.

#### Background and Supporting Findings

While the CWG's December 1, 2014 draft proposal contained an appeal mechanism that would apply to ccTLD delegation and redelegations, some question arose as to the level of support within the ccTLD community on aspects of this proposal (see Appendix A). Design Team B was formed to assess whether there might be sufficient consensus within the ccTLD community on such an appeal mechanism. DT-B decided to undertake a survey of the ccTLD community to assess this (see the survey attached as Appendix A). After informing the ccTLD community about the upcoming survey, it was sent to the 'ccTLD World List', the most comprehensive list of the managers of the 248 ccTLDs on March 23, 2015 with responses accepted to April 3, 2015. Overall, responses on behalf of just 28 managers were received (see Appendix B). Such a low level of response was judged to be an insufficient a basis to provide a mandate for the inclusion of an appeal mechanism in the CWG's proposal. While acknowledging the limitations of drawing any conclusions from a survey with such a low response rate, it is nevertheless worthwhile pointing out that these limited responses tended to reinforce the overall recommendation. While 93% of respondents (Q.1) believe there is a need for an appeal mechanism, only 58% (Q.2) believe that it should be developed and introduced now as part of the IANA oversight transition and 73% (Q.3) agreed that it should be developed and introduced after the IANA transition has taken place. Questions designed to probe the level of consensus on the parameters of such an appeal mechanism (see Q.5 – Q.9) elicited no consensus suggesting that it would take considerable time for the ccTLD community to come to a consensus view on the details of an appeal mechanism. Some 71% of respondents (Q.3) indicated that they would not wish to see the design of such a mechanism delay the finalization of the IANA stewardship transition.

## Appendix A

### **Survey of ccTLD Managers on Need for Appeal Mechanism for ccTLD Delegations and Redelegations**

On December 1, 2014, the Cross Community Working Group on IANA transition issued a [draft proposal](#) which contained a proposal for an ‘independent appeal panel’:

“Independent Appeals Panel (IAP) - The CWG recommends that all IANA actions which affect the Root Zone or Root Zone WHOIS database be subject to an independent and binding appeals panel. The Appeals Mechanism should also cover any policy implementation actions that affect the execution of changes to the Root Zone File or Root Zone WHOIS and how relevant policies are applied. This need not be a permanent body, but rather could be handled the same way as commercial disputes are often resolved, through the use of a binding arbitration process using an independent arbitration organization (e.g., ICDR, ICC, AAA) or a standing list of qualified people under rules promulgated by such an organization.”

There exists in the ccTLD community an apparent lack of consensus on the question of the introduction of an ‘appeals mechanism’ in respect of ccTLD delegations and redelegations. At ICANN 51 in Los Angeles an overwhelming majority of ccTLD representatives at the October 15, 2014 ccNSO meeting indicated they wish for an ‘appeal mechanism’ as part of the IANA transition, though what was meant by ‘an appeal mechanism’ was not defined. In a survey of all ccTLD managers undertaken in November 2014, 94% of respondents agreed that ‘if the IANA operator does not perform well or abuses its position, the affected ccTLD should have the opportunity to (have access to) an independent and binding appeal process’. The expression of need resulted in the appeal mechanism proposal that the CWG released on December 1 2014. The proposal indicates that such a mechanism could be used in disputes over the consistency of ccTLD delegation or redelegation decisions.

A survey was undertaken in January of this year of CWG members and participants (this includes representation from many communities, not just ccTLD managers) on many aspects of the CWG’s December 1 proposal. It found that 97% of respondents agreed that *“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”*. However when questions were posed about potential specific parameters of such an appeal mechanism support for it was reduced. For example, only 54% of respondents agreed that *“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*. In addition, only 60% of respondents

agreed that “Governments should have standing to appeal any ccTLD delegation or redelegation decisions that they believe are contrary to applicable laws”.

This information suggests that while there may be support for an appeal mechanism in general, consensus may be difficult to achieve on some of the important aspects of such a mechanism, including:

- who would ‘have standing’ to appeal a decisions,
- what aspects of decisions might be subject to an appeal,
- whether the scope should be limited to determining whether the process followed was complete and fair,
- whether the dispute resolution panel would have the authority to substitute its own view on a delegation, for example, direct that the incumbent manager be retained rather than a proposed new manager, or
- be limited to requiring that the delegation process be repeated.

As a consequence, this survey is intended to determine whether they might be sufficient consensus within the ccTLD community as a whole to seek a binding appeal mechanism and if so, whether this should be sought as part of the IANA stewardship transition process.

## **QUESTIONS**

### Overall Need for an Appeal Mechanism

1. Do you as a ccTLD manager believe that there is a need for an appeal mechanism on ccTLD (re)delegation decisions?
2. If you answered ‘yes’ should such a mechanism be
  - a. Developed now and introduced as part of the IANA oversight transition , or
  - b. Developed later, likely by the ccNSO, and introduced after the IANA transition has taken place.
3. If the design of this appeal mechanism were preventing the finalization of the IANA stewardship transition, would you agree to defer finalizing it so that the IANA process could be completed (this would likely entail the ccNSO proceeding with a separate process).

### Form of Appeal Mechanism and Composition of Panel

4. The CWG indicated it believes that an appeal need not be a permanent body, but rather could be handled the same way as commercial disputes are often resolved, through the use of a binding arbitration process, an independent arbitration organization, such as the ICC, ICDR or AAA, or a standing list of qualified panelists under established rules promulgated by such an organization. The CWG recommended that a three person panel be used, with each party to a dispute choosing one of the three panelists, with these two panelists choosing the third panelist. Do you agree with this overall approach to establishing an appeal mechanism?
  - a. Do you have another idea – please indicate.
  
5. Where there is a panel of individuals, should they be chosen:
  - a. From a list of recognized international experts regardless of country, or
  - b. from individuals the country that the ccTLD represents.
  - c. In another manner (please specify)

### Eligibility to Appeal a (re)delegation decision.

6. Who do you believe should be permitted to appeal a ccTLD (re)delegation decision?
  - a. The governmental or territorial authority referred to in a. above?
  - b. The incumbent ccTLD manager?
  - c. Other individuals, organizations, companies, associations, educational institutions, or others that have a direct, material, substantial, legitimate and demonstrable interest in the operation?
  
7. Should any of the parties referenced above be excluded from the appeals process? If yes, please indicate.

### Scope and Authority of the Appellant Organization

8. Should there be any limit on the scope of the appeal?
  - a. Should the scope be limited to questions about whether procedures have been followed properly?
  - b. Should a panel have the authority to order that an existing delegation process be done again?
  - c. Should it have the authority to suspend a pending delegation?
  - d. Should it have authority to order to revoke an existing delegation?

- e. Should it have the authority to order that another party be delegated the ccTLD ?

## Appendix B

### Survey Results

Question		Data			Percentage	
		Yes	No	Total	Yes	No
1. Do you as a ccTLD manager believe that there is a need for an appeal mechanism on ccTLD (re)delegation decisions?		26	2	28	93	7
2. If you answered 'yes' should such a mechanism be -						
a.	Developed now and introduced as part of the IANA oversight transition	14	10	24	58	42
b.	Developed later and introduced after the IANA transition has taken place.	11	4	15	73	27
3. If the design of this appeal mechanism were preventing the finalization of the IANA stewardship transition, would you agree to defer finalizing it so that the IANA process could be completed (this would likely entail the ccNSO proceeding with a separate process).		20	8	28	71	29
4. The CWG indicated it believes that an appeal mechanism need not include a permanent body. It suggested that disputes could be handled the same way as many commercial disputes, through the use of a binding arbitration process, using an independent arbitration organization, such as the ICC, ICDR or AAA, or a standing list of qualified panelists under established rules promulgated by such an organization. The CWG recommended using this approach and that it use a three person panel, with each party to a dispute choosing one of the three panelists, with these two panelists choosing the third panelist. Do you agree with this overall approach to establishing an appeal mechanism?		13	8	21	62	38
Do you have another idea – please indicate.						
<p>The approach should not be designed now.                      However I do not see any rason to decide on how it will be set now                      An "as and when" appeal panel is good because it allows panelist rotation which is an important safeguard against (permanent) panelist that may be lobbied or influenced by parties to a delegation dispute. One can have more confidence in a decision taken by a jointly agreed panel which is only convened for a specific dispute. The only potential challenging area is the choice of a 3rd panelist by the 2 appointed panelists. It may be more plausible to leave the appointment of the 3rd panelist to an arbitration organisation instead of the individual panelists themselves.                      I think ALL panelist should be chosen independently from each other, from an approved list of panelists, similar to a jury selection process.                      Let the ccs develop their own mechanism                      I do not think a central appeals mechanism is workable for ccTLD del/redel appeals but would think that every ccTLD designs its own appeals mechanisms together with its own local internet community (including the relevant government(s)).                      The ccTLD community should be empowered enough to seek redress at an international independent court in case of unfair treatment by IANA functions Operator. Since national laws are</p>						

<p>respected in ccTLD policies processes and development, disputes involving Governments with the IANA Functions Operator requires a mechanism that would be acceptable to such sovereign nations. I will suggest Court of Arbitration for IANA functions at the International Court of Appeal at the Hague, similar to Court of Arbitration for Sports put in place by FIFA.</p> <p>The issues are either much more complicated (for example, contested re-delegations) than could be sensibly dealt with by an independent appeals group, or are much simpler in that they just look to see whether due process has been followed and documented. In the first case, I would oppose the creation of such a group. In the second, it would work, but would not necessarily need a complex solution as is proposed. 2. There will be issues for ccTLDs of an organisation in another jurisdiction having a say over the national ccTLD. This is not an acceptable position.</p> <p>ce qui importe, c'est surtout la base sur laquelle ce panel doit se prononcer. Concernant les CCTLD, le cadre légal et réglementaire national doit être la base de la décision prise sur un recours, en même temps que le respect des procédures techniques de délégation - redélégation</p>						
5. Where the appeal mechanism uses a panel of individuals, should they be chosen:						
a.	From a list of recognized international experts regardless of country	11	13	24	46	54
b.	From individuals the country that the ccTLD represents.	11	10	21	52	48
c.	In another manner (please specify)	(no responses)				
6. Who do you believe should be permitted to launch an appeal a ccTLD (re)delegation decision?						
a.	The governmental or territorial authority associated with the ccTLD?	23	3	26	88	12
b.	The incumbent ccTLD manager?	24	0	24	100	0
c.	Other individuals, organizations, companies, associations, educational institutions, or others that have a direct, material, substantial, legitimate and demonstrable interest in the operation?	5	16	21	24	76
7. Should any of the parties referenced above be excluded from the appeals process? If yes, please indicate.						
<p>The FOI recommends only that the incumbent manager should have the right to appeal a non consented revocation decision.</p> <p>As already mentioned, my understanding was that the goal of the survey was to learn if the appeal mechanism is needed in general; than decide if it is mandatory at this stage of project to enable its completion within planned time frame. So my preliminary answer to all the questions here was YES, however as already pointed out the detail design of the mechanism may be agreed and completed later on.</p> <p>"Other individuals, organisations..." should be excluded because their interest will be very hard to define &amp; quantify. For example, if the ccTLD in dispute accredits foreign registrars, then foreign registrars have interest in the ccTLD operation even though they may not be from the concerned ccTLD country. Rather, let us keep the appeal process to the concerned government &amp; to the incumbent ccTLD manager.</p> <p>No, but there should be clear guidelines on what issues can trigger a valid appeal to prevent appeals tying up the process of running a ccTLD and wasting time and money.</p> <p>Let the ccs develop their own process...who can appeal and the scope will depend on the development of that</p> <p>anyone with a relevant interest (to be determined locally per ccTLD)</p>						

<p>There might be good reason for the third category, but it would be in limited cases where the role of these organisations was already defined.</p> <p>dans une décision de délégation -redélégation, on peut s'attendre à ce que l'autorité territoriale soit celle qui effectue la demande, et que le conflit se situe entre elle et le gestionnaire du CCTLD. Les autres parties, qui doivent être consultées (consensus de la communauté internet locale) ne devraient pas pouvoir interjeter appel d'une décision, sauf à rendre le processus extrêmement instable.</p>					
8. Should there be any limit on the scope of the appeal?	19	7	26	73	27
9. Should the scope be limited to questions about whether procedures have been followed properly	18	8	26	69	31
a. Should a panel have the authority to order that an existing delegation process be done again?	17	8	25	69	31
b. Should it have the authority to suspend a pending delegation?	14	6	20	70	30
c. Should it have authority to order to revoke and existing delegation?	4	21	25	16	84
d. Should it have the authority to order that another party be delegated the ccTLD?	2	22	24	8	92



## Appendix C

<b>Design Team A.</b>	<b>Assessment of the Level of Consensus within the ccTLD Community in Regard to a Possible Appeal Mechanism for ccTLD Delegations and Redelegations</b>
<b>Draft Transition Proposal Reference</b>	III.A.1.1.3 – Independent Appeals Panel
<b>Summary Description</b>	The focus of the Design Team will be assess the level of consensus within the ccTLD Community in regard to a possible appeal mechanism on ccTLD Delegations and Redelegations.
<b>Detailed description</b>	<p>On January 30<sup>th</sup> CWG RFP3 reviewed a detailed document (available <a href="#">here</a>) summarizing the status of the IAP proposal and information flowing from the survey. During the RFP3 discussion, it was noted that the IAP is in response to a request from ccTLDs. RFP3 concluded with the following ‘Request/Action:’ “ccTLD members and participants in CWG to come up with a consistent proposal on IAP” (see <a href="https://community.icann.org/pages/viewpage.action?pageId=52232278">https://community.icann.org/pages/viewpage.action?pageId=52232278</a>)</p> <p>Later that day, January 30, the CCWG of Accountability sent a <a href="#">letter</a> to the CWG indicating that it has begun to elaborate its own work and that it will include consideration of binding redress mechanisms. It has subsequently established an ‘Appeals and Redress’ work stream. In their January 30<sup>th</sup> letter, the CCWG also said that it has no intention to give an accountability mechanism decision-making powers relating to the (re)delegation of ccTLDs.</p> <p>The survey that the CWG undertook in January indicated that at a high level, there appeared to be a consensus on the desirability for such a mechanism, but when issues such as who should have standing to appeal, e.g. managers, governments etc. the level of consensus was considerably reduced. In light of this, it is proposed that a Design Team assess, likely by means of a survey, whether there is any reasonable level of consensus in the ccTLD community for a ccTLD delegation and redelegation appeal mechanism and whether there might be design attributes that might lead to an acceptable level of consensus.</p>
<b>Proposed Membership</b>	<p>It is proposed that the Design team be made up of two to three ccTLD representatives (Allan MacGillivray, Maarten Simon, Paul Szyndler) and one or two GAC representatives/observers (Elise Lindeberg).</p> <p>The DT will investigate the potential to include an expert that may have been identified to work with the CCWG on Accountability.</p>
<b>Proposed by / Lead</b>	Allan MacGillivray, CIRA - .ca, supported by Maarten Simon SIDN - .nl Paul Szyndler - .au, Elise Lindeberg (GAC), observer
<b>Staff Support</b>	Bart Boswinkel/ Grace Abuhamad
<b>Status</b>	<b>Step 7</b>
<b>Determination by CWG Chairs</b>	<b>Priority 1 (Final)</b>
<b>Mailing list archives</b>	<a href="http://mm.icann.org/pipermail/dt2/">http://mm.icann.org/pipermail/dt2/</a>
<b>Wiki page</b>	<a href="https://community.icann.org/x/GhEnAw">https://community.icann.org/x/GhEnAw</a>
<b>Target delivery date</b>	<b>10 April 2015</b>