

Response to Binding Working Group of the ccNSO's Policy Development Process on Review Mechanisms Regarding "Binding" Appeals

5 April 2022

INTRODUCTION:

The Binding Working Group (BWG) of the ccNSO's Policy Development Process on Review Mechanisms (ccPDP-RM) working group submitted to ICANN Legal a hypothetical situation where the ccTLD Manager for a retiring ccTLD requests an extension of the retirement period as contemplated within the pending policy recommendation from the ccNSO's PDP on Retirement (the Retirement Policy Recommendations). In the BWG's hypothesis, the IANA Naming Function Operator (IFO) denies the request for extension. Under the Retirement Policy Recommendations, the IFO is granted discretion in considering a request for extension and the IFO should not reasonably withhold the extension. The BWG hypothesis suggests that the ccTLD Manager for the retiring ccTLD has already availed itself of the existing complaint escalation procedures for IANA and now seeks to formally challenge the IFO's denial through a binding appeal mechanism.¹

The BWG posed the following questions regarding this situation:

How can the panel's decision in the example be made binding on ICANN and what is required to ensure this?

¹ The Retirement Policy Recommendations have not yet been approved by the ICANN Board. Section 5.2 of the Retirement Policy Recommendations suggests the existence of a review mechanism in addition to the paths already in existence for customers of the IANA Functions:

5.2 Review Mechanism

In this Policy on Retirement, decisions have been identified which shall be subject to a Review Mechanism. These decisions are:

1. The IFO initiating the Retirement Process for a 2 letter Latin ccTLD which does not correspond to an ISO 3166-1 Alpha-2 Code Element following the ISO 3166-1 MA making a change to this entry (other than making it an ISO 3166-1 Alpha-2 Code Element). If the ccTLD Manager disagrees with the IFO's decision to initiate the Retirement Process it can appeal the decision using the ccTLD appeals mechanism.
2. The IFO refusing to grant a request by the ccTLD Manager for an extension to the Default Retirement Date of its ccTLD (section 4.4). If the ccTLD Manager disagrees with the IFO's decision to refuse the request for an extension it can appeal the decision using the ccTLD Review Mechanism.

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.

If the decision made via the mechanism proposed in this example cannot be made binding on ICANN, please explain in detail the reasons for this and identify, if any, the types of mechanisms which could produce a decision which would be binding on ICANN in the above example.

The BWG's also provided its preferred definition of binding:

For the purposes of this scenario, the ccPDP-RM defines binding as ICANN having to accept the results of the review mechanism and implement any relevant and effective corrective measures to the case being reviewed (subject to similar conditions as per the IRP rules in section 4.3(x) of the ICANN Bylaws).²

RESPONSE:

ICANN organization (org) understands that the BWG is using the reference to Section 4.4 of the Retirement Policy Recommendations as a means to illustrate potential review mechanisms that might be developed in furtherance of the Retirement Policy Recommendations. The BWG is looking for specific advice on how to build a review mechanism to allow review of the IFO action taken under a standard defined as "at the discretion of the IFO and shall not be unreasonably withheld." Section 4.4 of the Retirement Policy Recommendations states "If the request for an extension is rejected and the ccTLD Manager believes that the rejection is unreasonable or is inconsistent with the Reasonable Requirements Document, it may appeal the decision by the IFO (see Section 5.2 of this Policy)." This recommendation then confirms that the review mechanism through which a challenge to the IFO's rejection of an extension would be brought is still to be developed through the efforts of the ccPDP-RM working group, of which the BWG is part.

Many IFO Actions Are Already Subject to Binding Review

In 2016, as part of the implementation of the Cross-Community Working Group on Enhancing ICANN Accountability's Work Stream 1 Recommendations, ICANN's Independent Review Process as set forth in the Bylaws was updated to specifically allow for "(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract, and (C) Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation." (Bylaws, 4.3(b)(iii)(B)-(C).)³ The Bylaws also specifically exclude "(ii) Claims

² Note: The BWG does not identify what group or entity would be responsible for identifying "relevant and effective corrective measures", so for the purposes of this memo the assumption is that the IFO itself is responsible for development of relevant and effective corrective measures that are aligned with proper application of policy. If the BWG wishes for a different entity to define relevant and corrective measures, the information presented in this memo will need to be reevaluated.

³ Note: The ICANN Bylaws specify that IRPs regarding service complaints about the IFO "shall be subject to a separate standard of review as defined in the IANA Naming Function Contract." The IANA Naming Function

relating to ccTLD delegations and re-delegations. (Bylaws, 4.3(c)(ii).) These particular revisions to the Bylaws were made at the request of the Cross-Community Working Group to Develop an IANA Stewardship Proposal on the Naming Related Functions (CWG-Stewardship). Specifically, the CWG-Stewardship requested the *inclusion* of the IFO service complaints as a category of IRP claims and requested the *exclusion* of ccTLD delegation and re-delegation (now referred to as transfer) issues, based upon a survey of ccTLD operators.

(<https://community.icann.org/display/acctcrosscomm/15+April+2015+--+CWG+Chairs+Correspondence?preview=/52897357/53283215/Detail%20on%20CWG%20Requirements%20for%20the%20CCWG%5B1%5D.pdf>). The CWG-Stewardship identified that the ccNSO would be undertaking policy work on an appeal or review mechanism relating to transfer and delegation issues after the transition. ICANN org understands that work to develop an appeal or review mechanism for IFO actions on ccTLD transfers and delegations has been a main focus of the ccPDP-RM working group's broader efforts.

ICANN org notes that the issue as identified within the BWG's question as presented (dissatisfaction with the IFO's discretion in rejecting an extension for retirement) appears to be a matter that already falls within the matters that are identified within the ICANN Bylaws as subject to the IRP, which is a binding review process. While the Retirement Policy Recommendations are not yet adopted, once in force, decisions related to requests for extension of retirement plans appear to be neither about delegations nor transfers, and therefore would not be excluded from the IRP's Bylaws exclusion.

Questions for the BWG and ccNSO Council:⁴

As there is specific reference in the Retirement Policy Recommendations to the ccPDP-RM in relation to two retirement-related issues, does the ccNSO consider both retirement issues set out at 5.2 of the Retirement Policy Recommendations as matters relating to delegation and transfer sufficient to both be excluded from the ICANN Independent Review Process?

If either or both of the items identified at 5.2 of the Retirement Policy Recommendations are not within the delegation and transfer exclusion from the IRP, then are the ICANN org and Board to understand that the ccNSO Council, through the Retirement Policy Recommendations, are seeking an additional IRP exclusion from the ICANN Bylaws?

Application to BWG's Example

Contract, however, does not specify a standard of review. https://www.icann.org/iana_pti_docs/151-iana-naming-function-contract-v-30sep16.

⁴ Note: ICANN org will send these clarifying questions to the ccNSO Council as part of its work in preparing the Retirement Policy Recommendations for ICANN Board consideration.

The following provides some considerations of whether and how a review of the BWG's Proposed Example Complaint that the IFO was unreasonable in its rejection of an extension of the retirement period could be made binding on ICANN.

A Denial of Request for Extension Appears to Be Subject to Binding Review of the IRP, But That is Not Determinative Here

Assuming for the sake of illustration that the example from the BWG is appropriate for an IRP, there still remains an issue that there is not yet a standard of review upon which to base a review of the IFO's conduct.⁵ A standard of review is important, as it defines the bounds of what the IRP Panel is empowered to review and declare. ICANN org therefore cannot base a firm exploration of "binding" on an application of an unknown standard. However, below provides further exploration of how current IRP practices support this discussion.

Current IRP Practices are Informative as to How Results of a Review Could be Binding

To date, the ICANN IRP has only been used to challenge whether ICANN Board or staff actions or inactions were in violation of ICANN's Articles of Incorporation or Bylaws. When an IRP Panel issues its declaration, "ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration." (ICANN Bylaws 4.3(x)(iii).) The Board is obligated to consider the declaration and "affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel . . . shall be final regardless of such Board action, to the fullest extent allowed by law." (ICANN Bylaws 4.3(x)(iii)(A).) If the Board rejects the Panel decision "the Claimant . . . may seek enforcement in a court of competent jurisdiction." (ICANN Bylaws 4.3(x)(iii)(C).)

IRP Panels are limited in the scope of their allowable findings. They can make findings of fact on whether an act violated ICANN's Articles of Incorporation or Bylaws, while not being authorized to declare how ICANN should remedy such a violation. IRP Panels "shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction with the realm of reasonable judgment." (ICANN Bylaws 4.3(i)(iii).) For potential claims of IANA Naming Function Contracts, the Panel may declare if there "was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant." (ICANN Bylaws 4.3(i)(iv).) What each of these hold in common is an IRP Panel can evaluate and determine if ICANN did something improper – *i.e.*, tell ICANN that it did something wrong – but it cannot tell ICANN how to correct what was it did wrong. When ICANN accepts an IRP Panel declaration finding that states that ICANN violated the Articles of Incorporation or Bylaws, ICANN then, in the words of the BWG, has accepted the results of the review mechanism. After that, ICANN is then responsible for defining and implementing "relevant and effective corrective measures" in order to remedy the violation.

As it relates to the performance of the IANA Functions, ICANN takes on the role of the IFO through its Bylaws-mandated requirement to establish a separate legal entity to provide IANA services. (ICANN Bylaws, Article 16.) The IANA Naming Function Agreement binds the IFO to

⁵ ICANN org will flag this issue internally to help identify paths to clear up this standard of review issue.

apply community-developed policies in neutral and appropriate manners. The IANA Naming Function Contract does not contemplate that any entity other than the IFO will perform any part of the IANA naming function. With this limitation in mind, it is still possible to envision how an IRP relating to the performance of the IANA Functions could be made binding:

- 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.⁶
- 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.
- 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”,⁷ 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.

Considerations When Designing Binding Review Mechanisms

As ICANN org understands, many of the issues before the ccPDP-RM working group are focused on delegation or transfer issues for which the IRP is not currently available, which appears different from an extension of a delegation deadline. Some of the hallmarks of the IRP that lead ICANN to agree to rely upon it as a binding mechanism include:

- 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)
- Adherence to conflict of interest and independence practices for neutral reviewer(s)

⁶ Supplemental Procedures will also need to be developed or refined to support Independent Review Process claims relating to the performance of the IANA Naming Functions.

⁷ The BWG stated that the hypothetical panel declaration was “the refusal of the IFO to grant the extension was unreasonable and therefore goes against the Board approved policy for the retirement of ccTLDs.” The BWG did not specify that a panel directed the IFO to change its decision or any other specific outcome.

- 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 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.

ICANN org appreciates the prior invitations to discuss issues with the ccPDP-RM working group and look forward to continuing a working relationship with the ccPDP-RM working group to support its policy development activities.