CCPDP-RM – Independent Advice Review (IAR) Mechanism – Final Working document

- **General Objective:**

Develop a review mechanism for IFO decisions that would meet most of the requirements of the CCPDP-RM WG for an independent review except for being binding on the IFO or ICANN.

Such a mechanism would be a logical, independent step following the IFO Customer Service Complaint Resolution Process[1] or IFO mediation and is available before launching a court proceeding.

- **Specific Objective**

Create an optional and independent review mechanism inspired by arbitration, which is non-binding on the IFO or ICANN and will not prevent the Manager from using any other dispute resolution mechanism to address the IFO decision affecting it.

- **Scope:**

  - The Independent Advice Review (Review) is available to ccTLD Managers[2] who are directly impacted by an IFO decision (Decision) for the following processes:

    o Delegations of a new ccTLD:

      - Directly involved parties: Applicants
      - IFO timing: No deadline for the IFO to reach a decision.
      - IFO rejection of an application: Applications are never rejected but usually go away if not accepted over a long period. The IFO has a process for cancelling, as opposed to rejecting, inactive applications.
      - Proposed eligibility for a Review: Limit to All Applicants.
      - Basis for requesting a Review: Delegation by the IFO to another party.

    o Transfers:

      - Directly involved parties: Current Manager and the proposed Manager

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[1] https://www.iana.org/help/complaint-procedure

[2] Given New ccTLDs do not have a manager, and that it is clearly stated in RFC 1591 that there needs to be an appeal mechanism applicable to the delegation process for new ccTLDs the CCPDP-RM WG believes it is consistent with RFC 1591 that all applicants for a New ccTLD are eligible to request an Independent Advice Review.

34			▪ IFO timing: No deadline for the IFO to reach a decision.
35			▪ 7IFO Rejection of an application: Applications are never rejected but
36			usually go away if not accepted over a long period. The IFO has a process
37			for cancelling, as opposed to rejecting, inactive applications.
38			▪ Proposed eligibility for a Review: Limit to Current (or incumbent)
39			Manager.
40			▪ Basis for requesting a Review: Rejection of an application for Transfer
41			which never occurs?

o Revocations (A last resort action by the IFO[3]):

- ▪ Directly involved parties: Current Manager[4]
- ▪ IFO timing: No deadline for the IFO to reach a decision.
- ▪ IFO Rejection of an application: N/A
- ▪ Proposed eligibility for a Review: Current Manager.
- ▪ The basis for requesting a Review:

  - Current Manager requesting a Review of a Revocation notice by the IFO.

o Refusal to grant an extension to the retirement deadline per the CCNSO Retirement Policy:

- ▪ Directly involved parties: Current Manager.
- ▪ IFO timing: Per the Retirement Policy the IFO must reply to the application for an extension within 90 days of it being submitted by the Manager.
- ▪ IFO Rejection of an application: Can be rejected by the IFO but per the Retirement Policy "*The approval of an extension request shall not be unreasonably withheld.*"
- ▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
- ▪ Basis for requesting a Review: Rejection of an application for an Extension by the IFO that is being unreasonably withheld.

o Notice of Retirement for 2-letter Latin ccTLD which does not correspond to an ISO 3166-1 Alpha-2 Code Element per the CCNSO Retirement policy:

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[3] How the IFO processes revocation requests from third parties is beyond the scope of this policy. If the IFO decides to revoke a delegation it must notify the Manager and allow it 30 days to apply for an Independent Advice Review. According to the FOI (section 4.7) Revocation is the last resort option for the IFO. Revocation is therefore a matter between the IFO and the ccTLD Manager
[4] The IFO does not have a formally documented process for revocations.

70			▪	Directly involved parties: Current Manager.

- ▪ Directly involved parties: Current Manager.
- ▪ IFO timing: None - per the Retirement Policy the IFO must send a Notice of Retirement.
- ▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
- ▪ Basis for requesting a Review: Per the Retirement Policy - *For 2 letter Latin ccTLDs which do not correspond to an ISO 3166-1 Alpha-2 Code Element – The Trigger is the ISO 3166-1 MA making a change (other than making it an ISO 3166-1 Alpha-2 Code Element) to any of these. For each such Triggering Event, the IFO will consider if the change requires deleting that ccTLD. 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.*

  - o Any other policy developed by the ccNSO and adopted by the ICANN Board which allows ccTLDs to appeal a decision by the IFO.

- • The Independent Advice Review (IAR) will only provide advice on whether or not:

  - o There were significant issues with the IFO properly following its procedures and applying these fairly in arriving at its Decision; or
  - o There were significant issues in how the IFO complied with RFC 1591, the CCNSO FOI for RFC1591 as adopted by the ICANN Board, and any other policies developed through a ccNSO policy development process and adopted by the ICANN Board in making its Decision.

- • **Administrative objectives:**

  - o Low cost (Registry/Manager fees will be established at implementation but need to take into account the size/ability to pay of the Registry by having variable fees).
  - o Fast – Reviewers to return a decision in less than 90 days from the beginning of their consideration of the case.
  - o Minimize the total time required to review any specific IFO decision which can be reviewed by this mechanism.

- • **Process Overview**

  (Note: Once the process is agreed a summary will be kept here, and the details will be moved to an annex)

  - o Prior to applying for an Independent Advice Review (IAR or Review):

- Note: The CCPDP-RM will have to decide if an Internal IFO Review and/or IFO Mediation is/are a pre-requisite to apply for an IAR. Regardless of if they are prerequisites or not, a party who is eligible to apply for an IAR should not be prevented from applying for an IAR because they have passed the 30-day deadline as a result of their choosing to use these other mechanisms first. Details of this requirement will be established in implementation.

- The IFO makes a Decision regarding a ccTLD which is eligible for an IAR.
- An eligible party for an IAR submits an application (Application) for an IAR to the Administrator.
- The Administrator confirms receipt of the Application and requests that the IFO take no further action regarding this decision until advised otherwise by the Administrator[5].
- The Administrator evaluates the application (see application requirements in the Applicant/Claimant section):

  - If the Administrator accepts the Application, it will:

    - Advise the Applicant (now Claimant) that the Application has been accepted.
    - Advise the IFO that the Application has been accepted and that the IFO may not proceed further with the Decision until informed otherwise by the Administrator.
    - Update the IAR website accordingly.
    - Will request that the Applicant select which type of Review it will opt for (Administrator, 1 Reviewer, 3 Reviewers – see Reviewer section for details) and advise the IFO of this.
    - The Administrator will work with the Applicant and the IFO to select the Reviewer(s). Once selected the Administrator will launch the review.

  - If the Administrator rejects the Application, it will:

    - Advise the Claimant that its application has been cancelled.
    - Advise the IFO of the rejection and that the IFO may proceed with this Decision.
    - Close the Application and update the IAR website accordingly.

> **Commented [BT1]:** Will there be a prerequisite to an IAR? Internal IFO Review and/or Mediation?

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[5] Regardless of if the decision required Board approval.

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150   o   Conducting the Review:

152   ▪   The Administrator will manage the Review as the Reviewer(s) consider(s) the
153   case:

155   •   The Reviewer(s) may request a presentation by the IFO or ask
156   formal questions of the IFO.

158   ▪   The Reviewer(s) will decide if there were significant issues or not and
159   indicate this in their report (Report)
160   ▪   The Administrator will evaluate the Report and work with the Reviewer(s) to
161   ensure it is consistent with the requirements for such reports.
162   ▪   The Administrator will publish the Report and advise the Claimant.

164   o   If the Reviewer(s) did not find any significant issues:

166   ▪   The Administrator will advise the Claimant, close the Review and advise the
167   IFO that it may proceed with its Decision.

169   o   If the Reviewer(s) did find significant issues:

171   ▪   The Administrator will advise the Claimant of the findings and of the possible
172   next steps.
173   ▪   The Administrator will contact the IFO asking it to confirm which option it will
174   take vs the Advice – the IFO will have 30 days to advise the Administrator of
175   its decision:

177   •   If the IFO responds within the 30-day deadline with one of the
178   following options, the process can continue:

180   o   Accepts the Reviewer(s) decision and reverses its original
181   Decision.
182   o   Accepts the Reviewer(s) decision but opts to re-do the
183   evaluation of the request which led to the original
184   Decision.
185   o   Rejects the Reviewer(s)' decision.

187   o   If the IFO accepts the Reviewer(s) Advice and reverses its original decision:
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189   ▪ The Administrator will advise the Claimant and will close the case and
190   update the IAR website.
191   ▪ Note: This assumes that IFO Decisions are basically binary in most cases.
192   Transfers, Revocations, requests for an extension in a retirement process,
193   and Retirement of a 2-letter Latin non-ISO 3166-1 ccTLD can only be
194   binary. Delegation of a new ccTLD between 2 contending parties is also
195   binary but is not if there are 3 or more applicants (which should be very
196   exceptional).
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198   o If the IFO rejects the Reviewer(s) decision:
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200   ▪ If the IFO decision requires Board approval: The Administrator will close
201   the case and work with the IFO to ensure that the Advice is properly
202   included in any IFO recommendation to the ICANN Board on this matter.
203   ▪ If the IFO decision does not require Board approval: The Administrator
204   will close the case and advise the ICANN CEO and the ccNSO Council of
205   the situation and request appropriate action.
206
207   o If the IFO accepts the Reviewer(s) decision but opts to re-do its process with
208   respect to this Decision:
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210   ▪ Once the IFO has completed re-doing its process that Decision will be
211   presented to the Claimant.
212   ▪ The Administrator will request that the Claimant select one of the two
213   following options and respond within 30 days:
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215   • Accept the new Decision.
216   • Apply for a Review of this new decision at the IFO's expense (no
217   charge to the Claimant).
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219   ▪ If the Claimant accepts the new decision the Administrator will close the case
220   and update the IAR website.
221   ▪ If the Claimant decides to apply for a new Review the Review process begins
222   anew with the following changes:
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224   • If the Application for a Review is accepted the IFO will bear all
225   costs.
226   • If the Review finds significant issues with the new IFO Decision the
227   IFO can only opt to accept the new Review decision and reverse

228	its Decision or reject the Review's findings – the IFO will have 30
229	days to advise the Administrator of its decision.
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231	▪ If the Review does not find any significant issues the Administrator will advise
232	the Claimant and the IFO and will advise the IFO that it can proceed with its
233	Decision and close the case.
234	▪ If the Review finds there were significant issues and the IFO reverses its
235	Decision the Administrator will advise the Claimant and close the case.
236	▪ If the Review finds there were significant issues and the IFO rejects the
237	Advice:
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239	▪ If the IFO decision requires Board approval: The Administrator will close
240	the case and work with the IFO to ensure that the Advice is properly
241	included in any IFO recommendation to the ICANN Board on this matter.
242	▪ If the IFO decision does not require Board approval: The Administrator
243	will close the case and advise the ICANN CEO and the ccNSO Council.
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245	• **The Administrator - details not included in the process overview:**
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247	o The Administrator must be a non-conflicted[6] individual who is an SME with respect
248	to ccTLDs, the IFO and ICANN and who will be responsible for overseeing and
249	managing the Independent Advice system.
250	o The office of the Administrator will be funded and managed by ICANN.
251	o General administrative responsibilities of the Administrator:
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253	▪ Maintain an ongoing relationship with the ccNSO, IFO and ICANN. This
254	includes monitoring Decisions by the IFO which have the potential to be
255	reviewed.
256	▪ Set up and oversee the operation of the website which will include:
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258	• General information on the Review process.
259	• Q&A section.
260	• All relevant forms.
261	• List of certified Reviewers.
262	• List of ongoing cases.
263	• List of Review decisions.

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[6] A conflict of interest is defined as anyone with a current "relationship" (business, financial or family) with a ccTLD, a known applicant for a new ccTLD, the IFO or who is pursuing legal action against these same parties. This would be assessed via a Conflict-of-Interest Declaration form (implementation).

264   •   List of past cases.

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266   ▪   Prepare and manage the application of all relevant forms including:

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268   •   Application/contract for a Review.
269   •   Application to become a certified Reviewer.
270   •   COI form for specific cases.
271   •   NDA for certified Reviewers.
272   •   Review decision form.
273   •   Fee agreements for Reviewers.
274   •   Billing forms for Reviewers.

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276   ▪   Set up a process to certify and manage Reviewers. This includes, but is
277   not limited to:

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279   •   Establishing criteria for the certification of Reviewers with the
280   ccNSO and the IFO.
281   •   Managing the recruiting process for potential Reviewers.
282   •   Certification of Reviewers (validation as an SME, COI, NDA,
283   contract).
284   •   Creation and management of a list of certified Reviewers.

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286   ▪   Manage financial matters including:

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288   •   Review application payments and refunds.
289   •   Approval of Reviewer billing.

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291 •   **Reviewer(s) - details not included in the process overview:**

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293   o   All Reviewers will be certified, managed, and supported by the Administrator.
294   o   Reviewers will be paid for by ICANN/IFO.
295   o   Certification requirements will include:

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297   ▪   Functional ability to work in English.
298   ▪   CV highlighting that the individual is a Subject Matter Expert (SME) with
299   respect to CCNSO policies, RFC1591 and its FOI as well as IFO procedures.
300   The minimum qualification will be 10 years of practical experience in all
301   these areas (proposal TBD at implementation in cooperation between the
302   Administrator, the ccNSO and the IFO). Legal experience is also desirable.

- Interview with the Administrator to confirm SME status and ability to work in English.
- Duly executed NDA regarding any non-public information obtained while acting as a Reviewer on any Independent Advice case.
- Duly executed Reviewer contract with ICANN.
- Duly executed COI form which will include certification of no COI with ICANN or the IFO. If selected for a specific case Reviewers will have to provide a formal confirmation that they are impartial with respect to the Claimant:

  - Conflict of interest is defined as a party having a "relationship" (business, financial or family) with another party or who is involved in any formal legal action vs another party.
  - Being a Manager or employee of a ccTLD registry will not be considered a COI vs ICANN or the IFO in this context unless there are significant pending issues between the parties.

- Choice of Reviewers by Claimants - 3 options for a review:

  - Review by the Administrator only. This will be a minimal cost option only requiring the Administrative costs.
  - Review by one Reviewer selected jointly by the IFO and the Claimant from the list of pre-Certified Reviewers managed and maintained by the Administrator. The selection process will be managed by the Administrator and if the parties cannot agree on a single Reviewer within 30 days of the Application being approved, the Administrator will select one from the list. The selected Reviewer will be required to formally confirm that it is impartial with respect to the Claimant.
  - Review by 3 Reviewers:

    - The IFO and the Claimant will each choose a Reviewer. The proposed Reviewers do not have to be from the list of pre-certified Reviewers. If the candidates are not from the list of pre-certified Reviewers, they will have to be certified by the Administrator prior to undertaking any work on the case. Once certified the IFO and Claimant Reviewers will cooperatively pick a third Reviewer from the list of pre-certified Reviewers through a process managed by the Administrator. If the two Reviewers cannot agree on a third within 30 days, the Administrator will nominate the third from the list of pre-certified Reviewers:

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344   o   The IFO and the Claimant must select their Reviewers
345   within 30 days of the Application being approved. Failure
346   to do so will cause the Administrator to select a Reviewer
347   for the party from the list of pre-certified reviewers.
348   o   If the chosen Reviewer is not pre-certified it will have to be
349   Certified by the Administrator within 30 days of being
350   named before it can join the proceedings. If the chosen
351   Reviewer fails to be certified prior to the deadline the
352   party may choose another if still within the original 30-day
353   limit to choose a Reviewer.
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355   •   All Reviewers will be required to formally confirm that they are
356   impartial with respect to the Claimant.
357   •   Any decision in a 3 Reviewer system will require the support of at
358   least two of the three.
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360   o   Reviewers will only consider supplementary materials from the Claimant or the IFO if
361   approved by the Administrator. All such requests to submit additional material must
362   be made using the appropriate form (implementation) and submitted to the
363   Administrator within 30 days of the request for Independent Advice being approved
364   by the Administrator. The Administrator, using his best judgement for the fair
365   administration of justice, will consider the following in determining if any new
366   material should be accepted and made available to the Panel:
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368   ▪   Is this material directly and critically relevant to the case?
369   ▪   Why was this material not included in the original request to the IFO?
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371   o   Can hold individual teleconference hearings with all the involved parties.
372   o   Can request a presentation by the IFO on the matter under review. The Panel, at its
373   discretion, can also request answers to its questions from the IFO which must
374   respond promptly to these (2 business days (TBD at implementation with the IFO)
375   California time following the day of the request – this should be included in the IFO
376   SLE process statistics).
377   o   Definition of Significant Issues – Any clearly demonstrable inconsistency or deviation
378   by the IFO of properly following its procedures and applying these fairly or how the
379   IFO complied with the requirements of RFC 1591, the CCNSO FOI for RFC1591 as
380   adopted by the ICANN Board as well as any other policies developed through a
381   ccNSO policy development process and adopted by the ICANN Board in making its

382		Decision which, in the opinion of the Reviewer(s), could have significantly impacted
383		the IFO Decision.
384	o	The Reviewer(s)' Advice will explain in detail their decision.
385	o	The Administrator will review the Advice from the Reviewers to ensure it meets all
386		the requirements prior to publishing it. The Administrator may work with the
387		Reviewer(s) to amend the Advice to ensure it meets the requirements:
388		
389		▪ The Advice provides all the relevant administrative and background
390		information.
391		▪ The Advice will clearly indicate if there were any significant issues or not.
392		▪ If there were issues the Advice clearly indicates what the issues are as
393		well as why they are issues.
394		▪ Formal sign-off of the Reviewer(s) on the final Advice and a statement of
395		majority opinion if necessary.
396		
397	o	Final Independent Advice from the Reviewer(s) cannot be appealed.
398		
399	•	**IFO - details not included in the process overview:**
400		
401	o	Will maintain a good working relationship with the Administrator.
402	o	Must amend its procedures to allow concerned parties sufficient time to file for an
403		IAR or other official IFO review mechanisms prior to the IFO implementing or making
404		a recommendation to the ICANN Board regarding the decision which is being
405		challenged (implementation). As such the IFO will advise all directly involved parties
406		of any decisions which can be reviewed under this Policy. Such decisions will be
407		labelled Preliminary Decisions and will advise the concerned parties of their options
408		for Reviewing such decisions.
409	o	After reaching a decision on a ccTLD request which can be Reviewed, the IFO will
410		advise those parties who could apply for an IAR of the Decision and of their options
411		for Reviewing the Decision as well as the timeline for doing so.
412	o	If a Decision is being Reviewed by the Administrator, the IFO cannot make a
413		recommendation to the ICANN Board on the matter being reviewed prior to the
414		Administrator confirming it can do so.
415	o	Will make all relevant internal materials available to the Reviewer(s) who will be
416		under a formal confidentiality agreement. These will include all internal emails on
417		the matter and all communications from all the relevant parties but does not include
418		formal legal advice to the IFO.
419	o	Will make itself available to the Reviewer(s) to present details of the case or answer
420		questions.
421	o	If the IFO fails to comply with the requirements of the Review policy the
422		Administrator will advise the ICANN CEO and the ccNSO Council of the situation and

423   request that the ICANN CEO promptly correct the situation. In cases where the IFO
424   fails to respond to a request by the Administrator within the ~~delays~~ time period
425   specified in the policy the review process will be suspended[7] until such time as the
426   IFO properly responds to the request.
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428   • **Applicant and Claimant - details not included in the process overview:**
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430   o Must be a ccTLD Manager except in the case of the delegation of a new ccTLD where
431   any applicant for that new ccTLD is eligible.
432   o To launch an IAR, the Claimant must submit an application (Application) via the IAR
433   website to the Administrator (in English[8]) within 30 days[9] of the Decision being made
434   except if the Applicant has requested an IFO internal review or IFO Mediation. If the
435   Applicant has used these other mechanisms, within 30 days of the Decision being
436   made, it will be granted 30 days to apply for an IAR after these processes are
437   completed. ~~The Application must also include payment of the Application Fee.~~
438   o The evaluation criteria for an IAR Application are:
439

440   ▪ Be on the properly completed form/contract (TBD)
441   ▪ Be received prior to the 30-day deadline[10].
442   ▪ Clearly indicate which IFO Preliminary Decision is being Reviewed.
443   ▪ Not be for an IFO decision for which the Manager has applied for an IFO
444   Internal Review or for IFO Mediation.
445   ▪ Not be for an IFO decision which is the subject of an active IFO Internal
446   Review or IFO Mediation.
447   ▪ Not be for an IFO Preliminary Decision which has been accepted for an
448   IAR ~~Review~~, is currently being Reviewed or has already been Reviewed.
449   ▪ Have paid the required fees (fees and details to be finalized at
450   implementation).
451   ▪ Be a party listed in the IFO Decision that is a ccTLD manager listed in the
452   IANA database or in cases related to the delegation of a new ccTLD any
453   parties who applied to be the Manager for that ccTLD.
454   ▪ Clearly indicate the individual the Applicant has delegated to be
455   responsible for the Application including all relevant contact information.

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[7] Suspension of the review process does not modify any other obligations of the IFO with respect to the IAR policy. As such the IFO cannot proceed with any actions regarding the IFO decision being reviewed.

[8] All requests, templates, and documentation required for an IAR must be in English. Where accuracy is essential, English documentation and/or English translations of key documents (such as governmental decrees relating to the request) must be notarised or certified as official translations,

[9] 30 days to be calculated as follows – The IFO publishing its Initial Decision will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0. The opportunity to submit an application for an Independent Advice Review will expire on Day 30 at one minute past 23:59 UTC.

[10] With the stated exceptions regarding the IFO Internal Review and IFO Mediation.

- Clearly state why the Claimant believes that:

  - That the IFO did not properly follow its procedures or applied these fairly in arriving at its preliminary decision; or
  - The IFO decision being reviewed is inconsistent with RFC 1591, the CCNSO FOI for RFC1591 as approved by the ICANN Board, as well as any other policies which apply to CCNSO members and is approved by the ICANN Board.

- For cases where there is a potential for more than one Claimant[11]. Should there be more than on application for the same IFO Preliminary Decision the Administrator will accept the first application which meets all the eligibility criteria. Should there be a tie the Administrator will choose which application will be accepted. In all such cases where the Administrator has approved an Application for a Review, the Reviewer(s) will consider all elements of the IFO Decision for all potential Claimants.
- By submitting an Application, the Claimant will agree to the rules for the Independent Advice Review, which will include a clause preventing the Applicant from taking the Administrator, Reviewers, the CCNSO, or ICANN to court with respect to the Independent Advice Review. This in no way prevents the Claimant from taking the IFO or ICANN to a relevant court of relevant jurisdiction regarding the Decision by the IFO and any approval of such recommendation this Decision by the ICANN Board.
- The Administrator may interact with the Claimant's contact person to obtain clarifications on the application (and may allow the Applicant to resubmit).
- If the Administrator rejects the application for an Independent Advice Review the Claimant's payment will be refunded minus administrative costs (implementation). There is no mechanism to appeal the Administrator's decision to reject an application however the Administrator will be required to publish theits reasons for rejecting the application.

- Reviewing and updating the policy

  - Should the ccNSO Council decide that there have been significant changes to ccNSO policies which are covered by this policy or to the ISO 3166 standard, the ccNSO will launch a formal review of the IAR policy to assess if it needs to be modified to align with any such changes. If the review of the IAR policy finds that it needs to be modified, the Council will launch a process to accomplish this.

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[11] e.g. a Decision regarding the delegation of a new ccTLD which had three applicants – if the ccTLD is allocated to one of the three, the two others could appeal – obviously a corner case

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