Executive Summary

The ccNSO council has initiated a country-code Policy Development Process to consider recommending to the Board of ICANN changes to:

1. Article IX of the ICANN By Laws (http://www.icann.org/general/bylaws.htm#IX);

2. The ccNSO Policy Development Process (http://www.icann.org/general/bylaws.htm#AnnexB); and

3. The Scope of the ccNSO (http://www.icann.org/general/bylaws.htm#AnnexC)

to encourage ccTLD managers to join the ccNSO.

On 7 June 2005, comments and input were sought on the matters as defined in the Issues Report, in particular:

a. whether the matters raised in the Issues Report are of concern to ccNSO members, and the ccTLD community and its stakeholders generally;

b. if they are, methods of resolving the issues;

c. support for the alternative solutions throughout the relevant constituencies; and

d. the feasibility, effectiveness and proportionality of the solutions proposed.

Each of the appointed Regional Representatives solicited the views of the ccTLD managers in their Geographical Region. A public hearing was conducted by the ccNSO on 12 July 2005, in conjunction with the ICANN meeting in Luxemburg.

At the conclusion of the public comment period an Initial Report has to be produced which contains the following information:

• a Comment Report which in this case is a review of the comments and input received on the Issue Report;

• methods for the resolving matters raised under the ccPDP

• an Analysis of the methods; and

• proposal to resolve the matter

The publication of the Initial Report formally concludes Comment Period 1.

The purpose of the Initial Report is to provide a basis to discuss tentative resolutions for the matters (A-L) raised in the Issue Report.

In preparation for the Luxemburg public hearing (12 July 2005) a distinction between standalone and interrelated matters was introduced. Standalone issues are those matters raised in the Issue Report which in itself or its resolution is not dependant on the resolution of another matter raised. Interrelated Issues are those matters raised which in itself or its resolution depends upon or is conditional upon another matter or its resolution. In the Initial Report this distinction has been followed again.

The publication of the Initial Report formally commences Comment Period 2. Further comments and input of ccNSO members and other stakeholders is sought, in particular, on:

a. whether the analysis of the comments and input is exhaustive;

b. are there alternatives for resolving the matters raised which have been overlooked?; and

c. where a recommendation has been made, is it the most appropriate?

At the end of Comment Period 2, the Issue Manager shall review the comments received and may, at his reasonable discretion, add appropriate comments to the Initial Report, to prepare the "Final Report".

STAND ALONE ISSUES

A—NO BINDING POLICY FOR NON-MEMBERS OF THE CCNSO

Review of comments

The matter raised deals with two situations:

1. does a policy developed in accordance with section 4.10 apply to a ccTLD manager who has not made an application to become a member and thereby agreed to abide by policies which apply by virtue of membership; and

2. does a policy developed in accordance with section 4.10 apply to a ccTLD manager after resignation as a member.

With regard to the first situation it is clear from the discussions and input received that this not an issue. The bylaw language is clear.

However, the second situation is perceived to be more complex, in particular the issue of whether or not a ccTLD manager is bound by policy after their resignation.

Methods for resolving

Solution 1—Resignation form
Neither the ccNSO Council nor ICANN has dealt with the resignation of a ccNSO member either in clarifying the mechanism and form of notification or in practice. Therefore one possible solution is to clarify the applicability of policies in the notice of resignation.

Solution 2—Amendment of bylaws with statement
Amendment of section 4.2 of the bylaws by introducing a statement to the effect that joining or leaving the ccNSO would not change the status of a ccTLD manager.

Solution 3—Amendment/ addition to the bylaws with regard to impact of resignation
In the current bylaws the consequences of joining the ccNSO are set out (section 4.2). In the same way the consequences of resignation could also be set out in a separate paragraph.

Proposal

Solution 3   Amendment/addition to the bylaws with regard to impact of resignation.

B—IANA SERVICES

Review of comments

Among ccTLD managers there is a general understanding that, in principle, the issue is not contentious. The principle underlying the current bylaw language is accepted by members and non-members of the ccNSO who participated in the process. It was felt that the wording could be changed to better express the underlying principle.

As to the comment that this issue should be viewed in the broader context of IANA services in general and accountability frameworks is valid, however, it is outside the scope of this particular ccPDP.

Methods for resolving

Solution 1—No change of bylaw language

Solution 2—Change of wording in section 4.3
To reflect that the receipt of IANA services is not in any way conditional upon the relationship between ICANN/IANA and a ccTLD manager or membership of the ccNSO the following amendment of the section 4.3. is suggested:

Current language: Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

Suggested language: Membership in the ccNSO is not in any way contingent on any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

Proposal

Solution 2   Change of wording in section 4.3 to reflect the suggested language: Membership in the ccNSO is not in any way contingent on any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

C—AMENDMENT OF ARTICLE IX.

Review of comments

Even though Article IX section 6 does not state that possible changes to Article IX can only occur through a ccPDP, such changes are clearly considered to be within the Scope of a ccPDP (see Issue Report section 4, Opinion ICANN's General Counsel).

The core of this issue is the current ability of the Board to change parts of the ICANN bylaws which relate to the ccNSO without the explicit ability of the ccNSO and its members to influence the process and consent to the changes.

Two distinct possible situations have been raised:

1.   ensuring a change of Article IX can only occur through a ccPDP. This situation is within scope of this ccPDP; and

2.   ensuring that all amendments, changes or additions to the ICANN bylaws which may be relevant to or have an impact on the ccNSO and/or its members can only occur with some form of consent from ccNSO members. This situation is outside scope of this ccPDP. As stated in the Issues Report it is advised that this matter will be put on the agenda outside this ccPDP.

Methods for resolving the issue

Solution 1
No change actual wording of section 6

Solution 2
Change of section 6 by adding an additional paragraph: any change of this Article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Proposal

Solution 2   Change of section 6 by adding an additional paragraph: any change of this article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

E—BINDING POLICIES OUTSIDE CCPDP

Review of comments

The concern is that the ccNSO may engage in other activities to set binding policies outside the mechanism stated in section 4.10.

Methods for resolving the matter

Solution 1
No change

Solution 2
Define clearly what the ccNSO can do.

Solution 3
Clarify that binding policies can only be developed through the mechanism stated in section 4.10.

Proposal

Seek further input in comment Period 2.

F—CHANGES TO ccPDP AND SCOPE

Review of comments

The core of the concern is the use of the word "initially" in section 6. Based on the comments received there is no objections to the mechanism in section 6 to change the scope of the ccNSO (Annex C) or the policy development process (Annex B).

Methods for resolving the matter

Solution 1
No change of the bylaw language

Solution 2
Remove the word "initially" from section 6.a and section 6.b.

Proposal

Solution 2   Remove the word "initially" from section 6.a and section 6.b.

G—APPLICABLE LAW EXEMPTION

Review
The overarching principle that (national) law is paramount over a policy is undisputed. The issue raised concerns the lack of procedure in section 4.10 to determine if a policy is in conflict with applicable law. The underlying concern is that a ccNSO member could end up in a tug of war with ICANN over the non-implementation of a policy which infringes applicable law.

Methods for resolving the matter

Solution 1
No changes

Solution 2
Introduction of declaration combined with an expert legal opinion on conflict of policy with applicable law

Proposal

Solution 2   Introduction of declaration combined with an expert legal opinion on conflict of policy with applicable law.

I—MEMBERSHIP QUORUM VOTING ON PDP RECOMMENDATIONS

Review of comments

The comments received and the public hearing indicate that the introduction of a quorum for the second round of members voting (Annex B section 13) has strong support both among members and non-members of the ccNSO. It is also clear that a second round of voting is needed where less then 50 % of the members have lodged a vote in the first round of the members vote.

Methods for resolving the matter

Solution 1
No change, to avoid apathy

Solution 2
Change of Annex B section 13: introduction of a quorum of 50 % for a second round of voting, No more then two rounds of voting

Proposal

Solution 2   Change of Annex B section 13: introduction of a quorum of 50 % for a second round of voting, No more then two rounds of voting

J—REJECTION OF PDP RECOMMENDATIONS BY THE ICANN BOARD

Review of Comments

It is accepted that the Board has its own responsibility and therefore can reject a recommendation of the ccNSO. It is also accepted that the current 66% vote against is indication of widely carried opinion of the Board to reject. Thirdly transparency of the Board decision (motivation of rejection) should remain. The core issue is what are the grounds for rejecting a ccNSO recommendation or Supplemental recommendation.

Methods for resolving the matter

Solution 1
Current wording remains.

Solution 2.
The criteria will be replaced by "exceptional circumstances" as the determining factor.

Proposal

The current proposal to simply use the words 'exceptional circumstances' is not considered to be explicit enough and input is sought during the second comment period on refining the words or providing some alternative suggestions.

INTERRELATED ISSUES

D—SETTING BINDING POLICIES

Review of Comments

In all comments received it is stressed that a policy can only be binding if and only to the extent that:

> a. the issue the policy addresses is within scope of the ccNSO (Annex C),
>
> b. has been developed by use of the ccPDP (Annex B),
>
> c. has been recommended as such by the ccNSO and
>
> d. is adopted by the Board. Condition a. needs to be added to section 4.10.

However, resolving this issue as suggested raises another: the ccNSO should at least be able to co-determine whether or not an issue is within or outside scope of the ccNSO. Currently (Annex B section 2) this is firstly determined by ICANN's General Counsel. However the ccNSO Council may initiate a ccPDP with a supermajority even if the issue is not within scope of Mission Statement or the scope of the ccNSO (Annex B section 3 b). A recommendation should resolve both matters at the same time.

Methods for resolving the matter

Solution 1
No change of the bylaws to address this issue. The other changes to the bylaws as suggested provide a reasonable protection (both at individual level and common level).

Solution 2
Firstly, change of section 4.10 to include an additional condition that to be binding, the policy needs to be within scope of ccNSO (Annex C). The relevant part of Article IX section 4.10 would read: a policy only applies by virtue of membership of the ccNSO if and only to the extent that:

> a. the issue the policy addresses is within scope of the ccNSO (Annex C),
>
> b. has been developed by use of the ccPDP (Annex B),
>
> c. has been recommended as such by the ccNSO and
>
> d. is adopted by the Board.

Secondly, to cope with the concern of determination of scope, an amendment of Annex B section 3 (b) is proposed. It should include a mechanism for the ccNSO to at least co-determine if an issue is within the scope of the ccNSO. Possible mechanisms are:

> A. Supermajority vote of the ccNSO Council (12 or more Council members) to initiate the ccPDP when the Council is of the opinion the issue is within ICANN's Mission Statement or scope of the ccNSO (Annex C) with a reasoned statement of its determination;
>
> B. Introduction of conciliation process if General Counsel is of the opinion issue is not within scope and ccNSO Council is of the opinion issue is within scope of the ccNSO or ICANN's Mission Statement.

In the event that General Council and the ccNSO continue to disagree on an issue, the ccNSO could still decide to run a PDP outside of Scope, however this would be on the understanding that any recommendation approved by the Board would be non-binding.

The issue regarding the initiation of a ccPDP (Issue H) becomes obsolete as it can only be limited to issues that are within scope.

Proposal

Solution 2   Inclusion of a. in section 4.10 as described above and the introduction of a co-determination mechanism where General Counsel and the ccNSO differ on whether an issue is within scope.

H—INITIATING A ccPDP

Review of the Comments.

The issue itself is relevant in the context of setting binding policies (issue D Issues Report).

Methods for resolving the matter

The resolutions to this issue are discussed and need to be considered in the context of Issue D.

K—ABILITY OF BOARD TO SET BINDING POLICIES ON ISSUES NOT WITHIN SCOPE.

Review of comments

The issue as raised has no merits on its own. As such it is based on a specific interpretation of the relevant section of the bylaws. Even if the interpretation is correct i.e. the Board sets a policy, this policy will not apply as it has not been proposed as such by the ccNSO. In case a ccPDP on a substantive issue (not a modification of Annex B or Annex C or possibly in future a modification of Article IX) the issue will evaporate altogether.

Method for resolving the matter

At this stage there is no solution suggested.

L—SHOULD THE SCOPE OF THE CCNSO BE REDEFINED?

Review of Comments

Most comments received indicate the current scope of the ccNSO is unclear and ambiguous. While some suggestions were made for a change it was agreed at the public hearing that this could be done at a later stage.

Method for resolving the matter

The ccNSO Council is advised to address concerns with the current scope of the ccNSO at a later stage and in a separate process. At this stage there will be no recommendations on changes of the scope of the ccNSO.

Initial Report

1. Introduction

1.1   Background

At the ICANN meeting in Mar del Plata, ICANN's Vice President Policy Development Support (Mr. Paul Verhoef) relayed a letter from CENTR, on behalf of its ccTLDs community, to the ccNSO Council and requested the Council to consider CENTR's letter. The letter identified a number of issues in relation to the ccNSO bylaws that are said to stand in the way of a number of CENTR members joining the ccNSO.

Having considered the letter, the ccNSO Council resolved to investigate whether a ccPDP (ccNSO Policy Development Process), as described in Annex B of the ICANN bylaws, is a viable route to address the expressed concerns. In accordance with Resolution of the Council at that meeting the Chair of the ccNSO Council sent out a call on 11 April 2005 to the members and non-members of the ccNSO to determine if:

a)   there was consensus in the ccTLD community for the Council to request an Issues Report as the first step in initiating a ccPDP; and

b)   there are other issues, besides those raised in the CENTR paper, that ought to be considered in this context.

The Council received positive feedback from the community to conduct a ccPDP. There was no feedback against the initiation of a ccPDP nor any suggesting limitation to or broadening of Issues.

The Council considered the matter on 28 April 2005, and resolved to call for an Issue Report on whether a PDP should be launched to consider recommending to the Board of ICANN changes to;

1.   Article IX of the ICANN By Laws (http://www.icann.org/general/bylaws.htm#IX);

2.   The ccNSO Policy Development Process (http://www.icann.org/general/bylaws.htm#AnnexB); and

3.   The Scope of the ccNSO (http://www.icann.org/general/bylaws.htm#AnnexC)..

At the same meeting Bart Boswinkel was appointed interim Issue Manager.

To seek further input the community was invited by the Chair of the ccNSO and the Issue Manager to submit comments. The comments and input received resulted in the development of the Issues Report by the Issue Manager. This report was presented to the Chair of the ccNSO on 28 May 2005.

Based on the Issues Report and in accordance with the ICANN bylaws the ccNSO Council resolved by email voting on 6 June 2005 that:

"*6.01 a ccNSO Policy Development Process (PDP) be initiated to consider changes to ICANN Bylaws Article IX (Country-Code Names Supporting Organization), Annex B (ccNSO Policy-Development Process) and Annex C (the Scope of the ccNSO) to address the matters outlined in paragraphs A to M of Section 3.2 of the Issues Report prepared by Bart Boswinkel.*

6.02 the PDP referred to in resolution 6.01 be run without a task force.

6.03 the timetable for the said PDP set out in the Issues Report be endorsed.

6.04 Bart Boswinkel continue as interim Issue Manager and that the current Council sub-committee (Members: Eva Frölich (Europe), Hiro Hotta (Asia Pacific), Paulos Nyirenda (Africa) and Patricio Poblete(Latin America) Kim von Arx (.ca and North America) and Chris Disspain (Chair) continue to assist the interim Issue Manager."

In accordance with ICANN bylaws Annex B section (8) the Chair of the ccNSO requested the Chair of the Governmental Advisory Committee (GAC) to formally offer an opinion or advice on the matters raised in the Issues Report. This opinion or advice, if any, should be submitted before the Council take a vote on the Recommendations (tentatively October 2005).

The ccNSO Chair requested the designated Regional Organizations to appoint a Regional Representative. Where a Regional Representative for a Region was not designated the elected Council members for that Geographical Region were requested to seek a representative. The (acting) Representatives are: Kim von Arx (.ca, North American Region), Patricio Poblete (Latin American Region), Ali Drissa BADIEL (African Region), Jordan Carter (Asian Pacific Region) and Giovanni Seppia (European Region).

In accordance with Annex B of the bylaws the Regional Representatives have been requested to submit a Regional statement on the matters outlined in paragraphs A to L of Section 3.2 of the Issues Report.

1.2 Process

Comment Period 1 (7 June to 16 July 2005)

According to the ICANN bylaws Appendix B, section 3, the Council resolved to initiate a PDP on the issues as defined. On 7 June comments and input were sought on the matters as defined in the Issues Report, in particular:

a.   whether the matters raised in the Issues Report are of concern to ccNSO members, and the ccTLD community and its stakeholders generally;

b.   if they are, methods of resolving the issues;

c.   support for the alternative solutions throughout the relevant constituencies; and

d.   the feasibility, effectiveness and proportionality of the solutions proposed.

Each of the Regional Representatives solicited the views of the ccTLD managers in their Geographical Region which has been documented in their respective Regional Statements. A public hearing was conducted by the ccNSO on 12 July 2005, in conjunction with the ICANN meeting in Luxemburg. The minutes of this meeting have been submitted.

At the conclusion of the public comment period the Issue Manager will produce an Initial Report which, according to the ICANN bylaws, has to contain the following information:

• a Comment Report (Annex B section 6) which in this case is a review of the comments and input received on the Issues Report;

• all Regional Statements; and

• other (relevant) information.

The publication of the Initial Report formally concludes Comment Period 1.

Comment Period 2

The publication of the Initial Report formally commences Comment Period 2. Comments and input of ccNSO members and other stakeholders is sought, in particular, on:

a.   whether the analysis of the comments and input is exhaustive;

b.   are there alternatives for resolving the matters raised which have been overlooked?; and

c.   where a recommendation has been made, is it the most appropriate?

At the end of Comment Period 2, the Issue Manager shall review the comments received and may, at his reasonable discretion, add appropriate comments to the Initial Report, to prepare the "Final Report". The Issue Manager shall not be obligated to include all comments made, nor shall the Issue Manager be obligated to include all the comments submitted by any one individual or organization. The Final Report will be submitted to the Chair of the ccNSO Council. According to the PDP time line the Final Report shall be presented to the Chair on 21 September 2005.

Council Recommendations

Upon receipt of the Final Report the ccNSO Council's Chair shall then:

1. distribute the Final Report to all Council members;

2. call for a Council meeting within the time designated in the PDP Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and

3. formally send the GAC Chair an invitation to the GAC to offer opinion or advice.

The Council is deemed to have made a recommendation on the issue (a "Council Recommendation") if 14 or more of the Council members support a recommendation. The view of the Council shall be conveyed to the ccNSO Members as the Council's Recommendation. All viewpoints expressed by Council members during the Council deliberations on the recommendations must be included in the Members Report.

Members Vote

In the event a Council Recommendation is adopted, the Issue Manager shall within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then submitted to the Members (the "Members Report"). The Members Report must contain at least the following:

a. a clear statement of the Council's recommendation;

b. the Final Report submitted to the Council; and

c. a copy of the minutes of the Council's deliberation on the issue, including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

Following the submission of the Members Report the ccNSO members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over at least a period of 21 days. In the event the Members vote is in favor of the Council Recommendation, the recommendation shall be conveyed to the Board as the ccNSO Recommendation.

ICANN Board Vote

In accordance with Annex B section 13 the Issue Manager shall within seven days incorporate the ccNSO Recommendation into a report to be approved by the Council and then submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

a. a clear statement of the ccNSO recommendation;

b. the Final Report submitted to the Council; and

c. the Members' Report.

The Board shall then meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

1.3 Initial Report

According to the ICANN bylaws Annex B section 8 d, the Issue Manager is required to produce an Initial Report which contains the following information:

a. Comment Report (Annex B section 6) which in this case is a review of the comments and input received on the Issue Report by the Issue Manager and the sub-committee of the ccNSO Council;

b. all Regional Statements; and

c. other information

The purpose of the Initial Report is to provide a basis to discuss tentative resolutions for the matters (A-L) raised in the Issue Report.

In preparing the Initial Report the following input and comments in the form of Regional Statements were received and considered:
- African Regional Representative;
- European Region Representative;
- Latin American Region Representative;
- Asian Pacific Region Representative.

No comments were received from the North American Representative

Public Hearing Comments
- Minutes of the hearing on the ccPDP conducted by the ccNSO on 12 July 2005, in Luxemburg

Individual Comments and input
- ccNSO PDP process, comments by Uninett Norid, Denic and Nominet;
- Comments and input from IIS;
- Comments and input from NIC.AC

Other information
- Clarification of Legal Issues from ccNSO Launching Group Questions by General Counsel, Dated: 28 January 2004 (www.ccnso.icann.org)
- Rules and Procedures ccNSO Council and members, Capetown, December 2004

No substantial comments were received from the Asia Pacific, Latin American and North American regions and will therefore not be discussed in the next sections of this report.

However it should be noted that according to the Regional Statement of Asian Pacific region, the members present at an APTLD meeting on 6 July 2005 felt:

"….that the issues raised could be usefully clarified in the bylaws, if doing so allay the concerns of the ccTLDs who raised the issues being considered.

Issues d) and l) were regarded as the most important among the issues raised."

Further,
"Members will consider the more refined and specified proposals put forward for consultation in the Initial Report, and may provide more feedback at that point."

It should also be noted that the Latin American region expressed as their view:
"The members of the ccNSO from the LAC region think that, in general, most of the issues being discussed do not represent serious flaws in the bylaws and that some of the changes only make more explicit something that is already there.

On the other hand, we understand that some ccTLDs may see these changes as necessary for them to feel comfortable in the ccNSO, and therefore these changes and clarifications might be the key to getting many of those ccTLDs to join the ccNSO. We, therefore, would not oppose any amendment that, without changing the substance of the ccNSO, would help lead the organization along the path of becoming something that most ccTLDs feel that they can safely join."

In the weeks following the publication of Issue Report it became clear the order in which the matters of concern were presented in the Issue report was not the optimal. Therefore, in preparation for the Luxemburg public hearing (12 July 2005) a distinction between stand alone and interrelated matters was introduced. Stand alone Issues are those matters raised in the Issue Report which in itself or its resolution is not dependant on the resolution of another matter raised. Interrelated Issues are those matters raised which in itself or its resolution depends upon or is conditional upon another matter or its resolution.

In the next sections, per matter raised, the following order will be used to present the results:

a) Relevant section of Article IX, Annex B or annex C of the bylaws;

b) Statement of the issue as raised in the Issues Report;

c) Consolidated overview of comments and input;

d) Review of comments and input;

e) Methods to resolve the issues, if any;

f) Analysis of the solutions on effectiveness, proportionality and feasibility;

g) Proposal to resolve the matter, if any.

It should be noted that the input and comments received did not address all the questions raised under Issues A- L identified in the Issues Report. In the Initial Report only the concerns reflected in the comments and input is considered and therefore the methods for resolving the matters raised only address these concerns.

Part of the analysis of the methods for resolving the matter is its feasibility. At this stage it is merely an indication of whether the proposals for changes of the bylaws may be acceptable to the Board.

N.B. Feasibility needs to be checked: feasibility test is indication of whether the outcome of the PDP is likely to result in a policy i.e. recommendations for suggested changes of the bylaws which will be approved by the ICANN Board.

STANDALONE ISSUES

A—NO BINDING POLICY FOR NON-MEMBERS OF THE CCNSO.

Relevant bylaw

Article IX Section 4.2
....The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section,.......

Article IX Section 4.10
Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies:

(a) have been developed through the ccPDP as described in Section 6 of this Article, and

(b) have been recommended as such by the ccNSO to the Board, and

(c) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

Issue

Under the conditions enumerated in Article IX section 4.10 a ccNSO policy shall apply to members of the ccNSO by virtue of their membership. Is this language sufficiently clear?

Consolidated overview of comments and input

African Regional Statement
It should be clearly stated ccNSO policies should not influence non-members of the ccNSO relationship with the ICANN and its related organisations.

European Regional Statement
No specific comments with regard to this issue. Reiteration of the statement made in the position paper: It should be made clear that ccNSO policies cannot bind non-members of the ccNSO.

NIC.AC
If a ccNSO member resigns its membership it is possible that de facto contracts that exist between ICANN and the member still has a remaining impact. In particular, with becoming a ccNSO member, the ccTLD manager concerned has recognised ICANN's overall function and its doubtful that this recognition can ever be taken back.

DENIC, Nominet & UNINETT Norid collective response
It should be clarified that global policies agreed upon by the ccNSO cannot bind non-members. It is clear that ccNSO policies apply to the members of the ccNSO.

Public hearing 12 July 2005
It is clear that the ccNSO cannot bind non-members. However the concern expressed was what is the impact is of former membership? Does a policy developed in the ccNSO apply when the ccTLD manager has decided to leave the ccNSO? For the time being it is considered not a bylaw issue but a ccNSO membership issue. However it was felt that clarification of the bylaws would be helpful. Amongst the participants of the there was no objection.

Other input
Clarification of Legal issues from ccNSO Launching Group Questions by General Counsel
7) What is the implication of termination (voluntarily or forcefully) by a ccTLD, i.e., what legal obligations, in ICANN's views will remain?

A—The ccNSO is not beholden to, or controlled by, any one group, industry, government, business entity, or viewpoint. If a ccTLD leaves the ccNSO, it is treated like any other ccTLD that is not a member of the ccNSO.

Joining the ccNSO does not create a contractual relationship with ICANN, and thus there are no doctrines or other aspects of California or US law that will impose any associated burden.

8) What is the difference between a ccNSO member and a non-member (former or never been member) when dealing with the applicability of the general ICANN by-law clauses, terms, and conditions, paragraphs, etc?

A—There is no difference; the main reason to become a ccNSO member is simply to stand together with your fellow ccTLDs to have a voice in developing and/or changing policy that effects ccTLDs.

Review of Comments

The matter raised deals with two situations:

1.   Does a policy developed in accordance with section 4.10 apply to a ccTLD manager who has not made an application to become a member and thereby agreed to abide by policies which apply by virtue of membership; and

2.   Does a policy developed in accordance with section 4.10 apply to a ccTLD manager after resignation as a member.

With regard to the first situation it is clear from the discussions and input received that this not an issue. The bylaw language is clear.

However, the second situation is perceived to be more complex, in particular the issue of whether or not a ccTLD manager is bound by policy after their resignation.

Methods for resolving

Solution 1. Resignation form
Neither the ccNSO Council nor ICANN has dealt with the resignation of a ccNSO member either in clarifying the mechanism and form of notification or in practice. Therefore one possible solution is to clarify the applicability of policies in the notice of resignation.

Solution 2. Amendment of bylaws with statement
Amendment of section 4.2 of the bylaws by introducing a statement to the effect that joining or leaving the ccNSO would not change the status of a ccTLD manager.

Solution 3 Amendment/ addition to the bylaws with regard to impact of resignation
In the current bylaws the consequences of joining the ccNSO are set out (section 4.2). In the same way the consequences of resignation could also be set out in a separate paragraph.

Analysis of (alternatives) resolutions

Effectiveness and proportionality

In order to address the issue one should distinguish between the applicability of policies developed during a ccTLD manager's membership and those policies developed after the manager has resigned.

A policy developed after a manager resigns can not apply to that manager.

However, the issue of whether a ccTLD manager is, following resignation, bound by policies developed during their membership of the ccNSO is not clear. The ICANN bylaws do not constitute a bilateral legal relation, rather they provide the mechanism by which a ccTLD manager can join the ccNSO i.e. by a unilateral application. Further, in the opinion of ICANN's General Counsel, membership of the ccNSO does not create a contractual relationship between a ccTLD

manager and ICANN and *"thus there are no doctrines or other aspects of California or US law that will impose any associated burden."*

Changing the bylaws by the introduction of a statement to the effect that joining or leaving the ccNSO would not change the status of a ccTLD manager (solution 2) does not resolve the issue. From a practical point of view it is a reiteration of the statement of section 4.3. Secondly, from a principle point of view, the proposed statement does not resolve the underlying concern. The bylaws govern the participation of a ccTLD manager in ICANN. A change in the political or legal status of a ccTLD manager as a result of a policy does not only concern ICANN and the members of the ccNSO but also other stakeholders like the Local Internet Communities of the ccTLD manager and its Government.

Solution 3 Amendment of the bylaws by setting out general aspects of resignation.
Under the current bylaws the core aspects of joining the ccNSO are set out, in combination with the method of joining (application form). Although ICANN is not a membership organization, in section 4.2 it is stated that a member of the ccNSO can resign by sending a written notice at any time. From a logical point of view the core effect of resignation could be set out as well. This could be combined with providing a template for resignation (solution 1) in a similar way as is done with regard to the application for membership.

Proposal
Solution 3   Amendment/addition to the bylaws with regard to impact of resignation.

B—IANA SERVICES

Relevant bylaw
Section 4.3
Neither membership in the ccNSO nor membership in any Regional Organization described in Section 5 of this Article shall be a condition for access to or registration in the IANA database. Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

Issue

At article IX section 4.3 it is stated that a ccTLD's manager's receipt of IANA services is independent of membership of that ccTLD manager in the ccNSO Is this language sufficiently clear?

Consolidated overview of comments and input received

African Regional Statement
Membership or non-membership should not influence the relationship of a ccTLD manager with IANA. ccNSO members and non-members should receive same level of service from IANA.

DENIC, Nominet & UNINETT Norid collective response
The language is clear regarding the situation while a ccTLD manager is member of the ccNSO, it should also clearly express that receipt of IANA services should not be contingent upon membership of the ccNSO.

Public Hearing
The issue as such should be viewed in the broader context of the debate about IANA services and accountability frameworks. Those who attended the meeting did not express any objections to a resolution of the issue as it was raised.

Review

Among ccTLD managers there is a general understanding that, in principle, the issue is not contentious. The principle underlying the current bylaw language is accepted by members and non-members of the ccNSO who participated in the process. It was felt that the wording could be changed to better express the underlying principle.

As to the comment that this issue should be viewed in the broader context of IANA services in general and accountability frameworks is valid, however, it is outside the scope of this particular ccPDP.

Methods for resolving the issue

Solution 1
No change of bylaw language

Solution 2
Change of wording in section 4.3 to reflect that the receipt of IANA services is not in any way conditional upon the relationship between ICANN/IANA and a ccTLD manager or membership of the ccNSO the following amendment of the section 4.3. is suggested:

Current language:	Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.
Suggested language:	Membership in the ccNSO is not in any way contingent on any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

Analysis of solutions

Effectiveness and proportionality

The solution proposed seeks to clarify the wording.

Proposal

Solution 2	Change of wording in section 4.3. Suggested language: Membership in the ccNSO is not in any way contingent on any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

C—AMENDMENT OF ARTICLE IX.

Relevant bylaw

Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall initially be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall initially be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Issue

Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws.

Should the ICANN Board only be able to change or amend Article IX, Annex B and Annex C after consultation and the consent of the members of the ccNSO?

Consolidated overview of comments and input received

African Regional Statement
Changes and amendments should be able only through a PDP. If not, there should be a better way for the ccNSO members to do so.

European Regional Statement
Reiterates the statement in the CENTR position paper. The ICANN Board cannot amend the ccNSO related parts of the ICANN bylaws without the explicit consent of the ccNSO, expressed by a two-thirds majority of ccNSO members.

NIC.AC
Under the current bylaws the Board can amend the bylaws unilaterally without input from the ccNSO representatives.

DENIC, Nominet, UNINETT Norid comment
The ICANN Board should not be able to change or amend any ccTLD/ccNSO related part of the ICANN bylaws without the explicit consent of a super majority of two thirds of the ccNSO members. The concern is that the carefully defined safeguards for ccNSO members in the bylaws can be changed i.e. weakened or abandoned unilaterally

ICANN's General Counsel clarification of Legal Issues from ccNSO Launching Group Questions, Question 1)

Public Hearing
The arguments in the regional statements and individual comments were reiterated. Discussion focused on the aspects of this issue which are within outside the scope of ccPDP. Within scope is an amendment of Article IX section 6. Those present at the meeting had no objections to change Article IX section 6. Outside scope is an amendment of Article XIX.

Review

Even though Article IX section 6 does not state that possible changes to Article IX can only occur through a ccPDP, such changes are clearly considered to be within the Scope of a ccPDP (see Issue Report section 4, Opinion ICANN's General Counsel).

The core of this issue is the current ability of the Board to change parts of the ICANN bylaws which relate to the ccNSO without the explicit ability of the ccNSO and its members to influence the process and consent to the changes.
2 distinct possible situations have been raised;

1. ensuring a change of Article IX can only occur through a ccPDP. This situation is within scope of this ccPDP; and

2. ensuring that all amendments, changes or additions to the ICANN bylaws which may be relevant to or have an impact on the ccNSO and/or its members can only occur with some form of consent from ccNSO members. This situation is outside scope of this ccPDP. As stated in the Issues Report it is advised that this matter will be put on the agenda outside this ccPDP.

Methods for resolving the issue

Solution 1
No change actual wording of section 6

Solution 2
Change of section 6 by adding an additional paragraph: any change of this Article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Analysis of solutions

Effectiveness and proportionality

In considering the suggested solutions one needs to take into account the following arguments:

1. The ccNSO is the organization under the ICANN umbrella that deals with ccTLD issues (see Clarification General Counsel, Question 1). The ccPDP is an open and transparent process designed to deal with ccTLD policy issues. A change to the process itself or the scope for setting policies, both part of the bylaws, can only be made by using the ccPDP. It is only consistent to use the same mechanism for modifying the bylaws on the ccNSO itself.

2. As Article IX relates to the ccNSO and its members, a modification of this Article should for that reason involve the ccNSO and its members.

3. As to the consent of 66% of the ccNSO members this will be achieved if for all modifications of article IX , Annex B and Annex C because the ccPDP is used (Annex B section 13).

Proposal

Solution 2   Change of section 6 by adding an additional paragraph: any change of this article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

E—BINDING POLICIES OUTSIDE CCPDP

Relevant bylaw

Article IX Section 1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (ccNSO), which shall be responsible for:

1. developing and recommending to the Board global policies relating to country-code top-level domains;

2. Nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and

3. Coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN.

In addition to the above core responsibilities, the ccNSO may also engage in other activities authorized by its members, including: seeking to develop voluntary best practices for ccTLD managers, assisting in skills building within the global community of ccTLD managers, and enhancing operational and technical cooperation among ccTLD managers.

Article IX Section 4.2
...The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules......

Issue

Can the ccNSO potentially set binding policies on its members on activities not defined in Article IX section 1 but authorised by its members? If so, is this an issue? If not, should the ccNSO be able to do so?

Consolidated overview of comments and input received

African regional Statement
Some activities not defined in Article IX section 1 can be of great interest for the ccNSO and therefore require consensus among its members. This could be determined by a supermajority of members of the ccNSO council.

NIC. AC
Article IX Section 1 of the bylaws provides the possibility for the ccNSO to "engage in other activities authorized by its members".
According to NIC.AC one has to wonder if the ccNSO really needs to engage in any "Other Activities" considering its members are already responsible at the local level and that the ccNSO scope is already quite broad.

DENIC, Nominet, UNINETT Norid
According to Article IX section 1 the ccNSO can, in addition to its function according to the bylaws, engage in any other activities authorized by its members, and obviously, this could include the creation of binding policies.

IIS
A member of the ccNSO should never be bound by a decision of the ccNSO or by ICANN itself that falls outside the scope of the ccNSO or of ICANN . The advantages and disadvantages that follow from the membership of the ccNSO must be foreseeable.

Public Hearing
Reiteration of the concern that "engaging in other activities" could result in the developing its own binding policies.

Review of comments

The concern is that the ccNSO may engage in other activities to set binding policies outside the mechanism stated in section 4.10.

Methods for resolving the matter

Solution 1
No change

Solution 2
Define clearly what the ccNSO can do.

Solution 3
Clarify that binding policies can only be developed through the mechanism stated in section 4.10.

Analysis of (alternatives) resolutions

Effectiveness and proportionality
It should be noted that policies can only bind members by virtue of their membership if the policy has been developed through a ccPDP, was recommended as such by the ccNSO and adopted by the Board.

It is not clear from the comments and the discussion on this issue if and to what extent the issue raised actually is an issue. Accordingly further input and explanation is sought in the second round of comments.

Proposal

Seek further input in comment Period 2.

F—CHANGES TO CCPDP AND SCOPE

Relevant bylaw

Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall initially be as stated in <u>Annex C to these Bylaws</u>; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall initially be as stated in <u>Annex B to these Bylaws</u>; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Issue

The use of the word "initially" in Article IX section 6 implies the scope for setting binding policies (and the ccPDP) will change over time. Should the ccNSO be able to change the Scope and the ccPDP over time? Should the ccNSO be able to change Article IX over time?

Consolidated overview of comments and input received

African Regional Statement
Article IX, the scope and all other bylaws are not static and therefore may change from time tot time. A period for revision is necessary (for instance 1 year). Exceptionally, if a bylaw requires an urgent amendment, the ccNSO council can for instance make a decision by a supermajority vote.

NIC.AC comment
The "initially" in section 6 gives a level of uncertainty which is not desirable for members willing to join. They need to know what they commit to at any specific time.

DENIC, Nominet, UNINETT Norid comment
As this ccPDP clearly demonstrates it should be possible to change the ccNSO's scope, ccPDP and Article IX as well as any other ccTLD /ccNSO related part of the ICANN bylaws. The word "initially" is however unfortunate as it implies that scope and ccPDP are fairly temporary.

Public Hearing
The use of the word "initially" implies the current scope is tentative and a change of the scope of the ccNSO over time is inevitable. There was no objection from those present at the meeting to remove the word "initially"

Review of comments

The core of the concern is the use of the word "initially" in section 6. Based on the comments received there is no objections to the mechanism in section 6 to change the scope of the ccNSO (Annex C) or the policy development process (Annex B).

Methods for resolving the matter

Solution 1
No change of the bylaw language

Solution 2
Remove the word "initially" from section 6.a and section 6.b.

Analysis

Effectiveness and proportionality

The discussion regarding this matter focuses on the use of the word "initially". The principle that the ccPDP and scope of the ccNSO can be adjusted is accepted by all who participated in the discussion so far.

The use of the word "initially" is perceived to indicate a necessary change of the ccPDP and scope of the ccNSO (Annex C) over time. The particular concern is that the scope will be broadened.

The question is whether it is necessary to indicate the scope of the ccNSO at time of incorporation (similar to "initial capital" of a company in first annual account)?

Proposal
Remove the word "initially" from section 6.a and section 6.b.

G—APPLICABLE LAW EXEMPTION

Relevant bylaw

Section 4.10

Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies (a) have been developed through the ccPDP as described in Section 6 of this Article, and (b) have been recommended as such by the ccNSO to the Board, and (c) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

Issue

Where a policy developed through a ccPDP conflicts with the law applicable to the ccTLD manager, the policy does not apply to the manager. The law applicable shall always remain paramount.

Should a process be inserted into Article IX section 4.10 that sets out how a decision should be made as to whether a ccNSO policy does conflict with the national law of a ccNSO member?

Consolidated overview of comments and input received

African Regional Statement
A process to should be inserted in section 4.10. That process should clearly specify that members should give evidence that the ccNSO decision conflicts with national law.

DENIC, Nominet, UNINETT Norid comment
In the ICANN bylaws it should be clarified that to be exempt from a policy on the grounds of conflicting law, it is sufficient for the concerned ccNSO member to declare that there is a conflict of law. The goal is to avoid the risk of unnecessary and potentially costly legal disputes.
Public Hearing
The basic concept that applicable law remains paramount is not under debate. Participants were made aware of the involvement of the GAC in the original drafting of the wording and its intention.

The basic issue is when a conflict is claimed between a ccNSO policy and applicable (national) law who decides the legitimacy of the claim that there is a conflict? As the bylaws are silent on this issue, a dispute may arise between ICANN and the member whether there is indeed a conflict of rules (policy and law) over which they could potentially end up in court.

The discussion focused on the different modes for resolving the issue. Some suggested the introduction of presumptive language, others a declaratory mechanism similar to the one in section 4.11 for exemptions on grounds of public policy, religion or custom.

Accepted is the suggestion to further investigate and seek expert advice.

Review

The overarching principle that (national) law is paramount over a policy is undisputed. The issue raised concerns the lack of procedure in section 4.10 to determine if a policy is in conflict with applicable law. The underlying concern is that a ccNSO member could end up in a tug of war with ICANN over the non-implementation of a policy which infringes applicable law.

Methods for resolving the matter

Solution 1
No changes

Solution 2
Introduction of declaration combined with an expert legal opinion on conflict of policy with applicable law

Analysis of solutions

Effectiveness and proportionality
One should be aware of the fact that in this case an exemption mechanism as some have suggested, is senseless. One can not exempt oneself from a policy that already does not apply when it is in conflict with applicable law. A policy developed in a corporate environment and through private mechanisms, such as ICANN policies, can not replace law and therefore does not apply to the extent the matter is considered under applicable law.

In considering the methods for resolving this matter one should therefore take into account the following elements: burden of proof, enforcement mechanism when it should come to a court case between ICANN and the ccTLD manager involved and transparency in order to avoid a possible conflict.

Burden of proof concern—
When a member can not apply a policy because the policy is in conflict with applicable law and considering the current language in section 4.10 the burden to proof otherwise is on ICANN. Therefore the introduction of presumptive language does not shift the burden of proof.

Enforcement of implementation policy–
Even if ICANN is able to prove the member of the ccNSO had intentionally misrepresented a conflict between a policy and applicable law then it has no legal means to force the member to implement the policy. To force an individual member to implement a policy crucial adjudication parts and consequence parts are missing in the bylaws. One could argue therefore there is no need to introduce additional safeguards. However the introduction of a declaration supported by external legal opinion that the policy is in conflict with applicable law is in itself valuable to avoid a possible conflict.

For reasons of transparency the second solution (introducing a declaration combined with legal opinion) may offer some comfort. One could argue this is already implicit in the current wording. Nothing stops the member from making a declaration which is supported with an opinion. This in itself would raise the threshold and burden of proof on ICANN, but to avoid confusion and to improve the transparency - one of the core values of ICANN according to its bylaws - it also makes sense to introduce such a mechanism.

As this issue involves not only the position of ccNSO members and ICANN, but also the GAC, and it touches on politically sensitive issues currently under debate in other for a it is advised to seek explicitly the opinion of the GAC on this issue to ensure the basic concept that applicable (national) law remains paramount and at the same time avoid possible conflict over interpretation of applicability of law and scope of a policy.

Proposal
Introduction of declaration combined with an expert legal opinion on conflict of policy with applicable law

I—MEMBERSHIP QUORUM VOTING ON PDP RECOMMENDATIONS

Relevant bylaw

Annex B section 13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP Time Line, the ccNSO members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO members lodge votes in the first round of voting, the first round will not be employed and the results of a second round of voting, conducted after at least thirty days notice to the ccNSO members, will be employed irrespective of whether 50% of the ccNSO members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO Recommendation.

Issue

According to the current bylaws (Annex B section 13) a vote of the members is valid without a quorum. Should a vote of ccNSO members only be valid if at least 50% of the members have lodged a vote irrespective of the round of voting?

Consolidated overview of comments and input received

African Regional Statement
Comment deals with the votes in favour of recommendation not with quorum of such a vote

European Regional Statement
Reiteration of the concern expressed in the CENTR position paper that a small minority may set a policy. A quorum of 50 % should be required in every round of voting.

NIC.AC
At least 50 % of the members should cast a vote in every round of voting. The risk being that a small minority could pass a decision

DENIC, Nominet, UNINETT Norid Comment
It is imperative that a quorum of 50 % of the ccNSO members have lodged a vote to avoid a small minority could set a binding policy.

IIS Comment
At least a certain number of members need to participate to make a vote/referendum binding

Public Hearing
The concept of introducing a quorum of 50 % of the ccNSO membership in a second round of voting was supported. There was also consensus that a second round of voting is needed where the quorum is not met in the first round.

Review of comments

The comments received and the public hearing indicate that the introduction of a quorum for the second round of members voting (Annex B section 13) has strong support both among members and non-members of the ccNSO. It is also clear that a second round of voting is needed where less then 50 % of the members have lodged a vote in the first round of the members vote.

Methods for resolving the matter

Solution 1
No change, to avoid apathy

Solution 2
Change of Annex B section 13: introduction of a quorum of 50 % for a second round of voting, No more then two rounds of voting

Analysis of solutions

Effectiveness and proportionality
The current bylaw language is a compromise. It is an attempt to balance the role of active members of the ccNSO versus apathy. The perception is that apathy among ccNSO members has in the past determined the outcome of a vote. Under the current bylaw language, in the second round of voting, those members who do not vote are effectively not counted.

The past experience is grounded on the voting behaviour in the former ccTLD constituency and other loose ccTLD associations. This behaviour should not be compared with the potential voting behaviour of ccNSO members. First of all one has to take into account the fact that in order to be eligible for voting a ccTLD manager needs to be a member of the ccNSO. To become a member a ccTLD manager is actively engaged in the ccNSO (pay a fee to the ccNSO, abide by the rules of the ccNSO and apply policies by virtue of membership). In other ccTLD constituencies a ccTLD manager was and is part of the constituency automatically. Secondly, the issues to be voted upon will probably deal with substantial issues which will have an impact on the ccTLD manager. Experience with this ccPDP shows a policy development process will not be initiated light heartedly.

As to the substantive matter itself, if a ccPDP is on an issue that is of importance to the membership and the broader community - running the ccPDP is already an indication - a reasonable quorum like 50 % as suggested should not be too high a threshold. It is also an indication of the support of a policy in the ccTLD community if a recommendation will be passed to the Board with at least a substantial part of the ccNSO members actively in favour of such a recommendation.

Proposal

Solution 2   Change of Annex B section 13: introduction of a quorum of 50 % for a second round of voting, No more then two rounds of voting.

J—REJECTION OF PDP RECOMMENDATIONS BY THE ICANN BOARD

Relevant bylaw

Annex B section 15. Board Vote

a.   The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b.   The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

1.   In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

2.   The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

3.   At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

Issue

Under the current bylaws the Board can reject a recommendation of the ccNSO where the Board determines by a vote of more than 66% that such policy is not in the best interest of the ICANN community or of ICANN (Annex B section 15).

Should the ICANN Board only be able to reject a Recommendation or Supplemental Recommendation as the case may be in 'exceptional circumstances'?

Consolidated overview of comments and input received

African regional Statement
The vote is certainly suitable method to reject a recommendation so is the current percentage for rejection (66% of the Board votes). In case a recommendation is rejected the Board should argue why the recommendation is not in the best interest of the ICANN community or ICANN.

DENIC, Nominet, UNINETT Norid Comment
There should be a presumption that the ccNSO policy recommendation that have properly been developed through the policy development process, will only be rejected by the ICANN Board in exceptional circumstances and the policy, if implemented, would place the directors of ICANN in breach of their fiduciary duties to the company.

Public Hearing
Replacing the criteria for rejection was discussed. The basic mechanism, rejection by a vote of 66% of the Board members was not discussed. Using exceptional circumstances as criteria for rejection raises the issue that the Board will have the power to determine what are exceptional circumstances. Using exceptional circumstances as the criteria would raise the threshold for rejection, but also lowers it because of an introduction of more subjective elements.

Review of Comments

It is accepted that the Board has its own responsibility and therefore can reject a recommendation of the ccNSO. It is also accepted that the current 66% vote against is indication of widely carried opinion of the Board to reject. Thirdly transparency of the Board decision (motivation of rejection) should remain. The core issue is what are the grounds for rejecting a ccNSO recommendation or Supplemental recommendation.

Methods for resolving the matter

Solution 1
Current wording remains.

Solution 2.
The criteria will be replaced by "exceptional circumstances" as the determining factor.

Analysis of resolutions

Effectiveness and Proportionality
A recommendation submitted to the Board would be the result of a long and tedious policy development process including all stakeholders. The reasons for rejection of a recommendation should therefore be limited to exceptional circumstances. The concern is that the standard for the Board to reject a recommendation (not in the best interest of the ICANN community or of ICANN) is currently too low.

The proposed solution tries to reflect this by the introduction of a standard for rejection only in 'exceptional circumstances'. This might include a circumstance where accepting the recommendation would lead to a breach of fiduciary duty but would also include other circumstances. Therefore as it does not list the circumstances which should be considered exceptional, it may include the current criterion (the best interest of the ICANN community or ICANN).

Further, the proposed criterion introduces additional subjective and non-verifiable elements in the decision making process of the Board. The assessment of whether circumstances are exceptional shall be up to the Board.

Proposal

The current proposal to simply use the words 'exceptional circumstances' is not considered to be explicit enough and input should be sought during the second comment period on refining the words or providing some alternative suggestions.

INTERRELATED ISSUES

Introduction

Interrelated issues are defined as any matter raised which in itself or in its resolution depends upon or is conditional upon another matter or its resolution.

The items in the Issue Report considered to be interrelated are:

D—setting binding policies—should a policy only be binding on members if and only to the extent the policy is on an issue that is within Scope and has been developed through the ccPDP and is adopted by the Board?;

H—initiating a ccPDP—should it only be possible for the Council to initiate a ccPDP on matters that are within the Scope of the ccNSO?;

K—Ability of Board to set binding policies on Issues not within scope—if the Council will remain able to initiate a ccPDP outside the Scope pursuant to the opinion of the General Counsel and in case the Supplemental Recommendation is rejected by the Board?; and

L—should the scope of the ccNSO be redefined?

Under the current bylaws a policy is binding by virtue of membership of the ccNSO when a) it has been developed by use of the cc policy development process, b) has been recommended to the Board as such and c) is adopted by the Board. Of concern is that the issue which the policies address should be within the scope of the ccNSO (Issue D).

Currently, the ccNSO Council may initiate a ccPDP, through a vote of 12 or more members, if General Counsel is of the opinion the subject matter is not within ICANN's mission Statement or not within the scope of the ccNSO. This is interpreted as an ability of the ccNSO to make recommendations on any issue. Directly related is the question of who determines what is in scope or ICANN's Mission Statement. Currently this is determined by the ICANN General Counsel. As already stated the Council may with a supermajority initiate a ccPDP (Issue H).

Directly related to items D and H is item K and the presumed ability of the Board to set binding policies on Issues which are not within scope. According to those who have raised the issue, the Board can set binding policies in instances where a Supplemental Recommendation has been rejected and the ccPDP has been initiated on an issue which in the opinion of General Counsel is not within the scope of the ccNSO. The resolution of this matter depends on the resolution of issues D and H. However it has merits of its own which will be discussed in section 4.3.

The last matter raised is on the scope of the ccNSO as defined in Annex C of the bylaws. If the scope were to be redefined as part of this ccPDP this will have an impact on most of the other matters that have been raised in this ccPDP.

D—SETTING BINDING POLICIES

Relevant bylaw

Article IX section 4.10

Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies

(a)   have been developed through the ccPDP as described in <u>Section 6 of this Article</u>, and

(b)   have been recommended as such by the ccNSO to the Board, and

(c)   are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

Issue

Under the current bylaws (Article IX section 4.10) a member of the ccNSO shall be bound by an ICANN policy if, and only to the extent that this policy (a) has been developed through the ccPDP and (b) has been recommended as such by the ccNSO to the Board, and (c) is adopted by the Board as a policy.

Should a policy only be binding on members if and only to the extent the policy is on an issue that is within Scope and has been developed through the ccPDP and is adopted by the Board?

Consolidated overview of comments and input received

African Regional Statement
It is necessary to specify clearly "ICANN policies relative to ccTLD's" to avoid confusion. As to setting only policies within scope there may be a need to have an exemption on this rule since there may exist some ICANN policies that can be of interest to ccNSO members although they are beyond scope.

European Regional Statement
Reiteration of statement in CENTR position paper.
According to CENTR a policy should only be binding on members if it is on a matter that is within Scope and has been developed through the ccPDP and is adopted by the Board.

NIC.AC
The main point of criticism for the By-laws relate to the scope of the policies that can be developed by the ccNSO. In the Bylaws specifically in section 4.10 there is no referral to the scope of the ccNSO (Annex C).

DENIC, Nominet, UNINETT Norid comment
Binding policies should only be made on issues within the ccNSO's scope. In the view of DENIC, Nominet and UNINETT Norid that the conditions for a policy to be binding on a member it should: be within scope, go through a PDP, be recommended by the ccNSO membership as a result of a membership vote and be adopted by the Board. It should be clear that both members and ccTLD managers who consider joining the ccNSO have a clear understanding and appreciation of what they may be binding themselves to. There is no need to be able to create binding policies outside the ccNSO's scope. As stated in the revised GAC principles, subsidiarity is the key concept. It is necessary that binding policies be limited to those within scope, as most issues should be dealt with locally.

IIS
A member of the ccNSO should never be bound by a decision of the ccNSO or by ICANN itself that falls outside the scope of the ccNSO or of ICANN . The advantages and disadvantages that follow from the membership of the ccNSO must be foreseeable. It also is necessary that a policy needs to fall within the scope of the ccNSO, according to the bylaws, in order to become a binding policy and that no binding policy can have retroactive effects.

Public Hearing
Concern was raised among participants that a member of the ccNSO can be bound, by virtue of their membership, by a policy that has been developed through a PDP and subsequently approved by the Board, but is outside the scope of the ccNSO and ICANN's mission statement. The core issue is which policies apply to a member by virtue of its membership of the ccNSO. Do they apply because they have been developed through a ccPDP or because they are within scope and have been developed through a ccPDP. The non-members who participated in the discussion are of the opinion that binding policies should only be those which are within the scope of the ccNSO and within ICANN's mission statement.

Presuming that an issue must be within the Scope to result in a policy which applies to members (by virtue of their membership), the underlying concern would be who determines if an issue is within the scope of the ccNSO. According to the current bylaws this is determined by General Counsel. There was rough consensus that determining whether or not an issue is within scope should at least be co-determined by General Counsel and the ccNSO. How this can be achieved is something to be looked into in the next comment round.

All present at the public hearing were not opposed to considering a change to section 4.10 of the bylaws to include the condition that an issue has to be within the scope of the ccNSO (Annex C) in order to apply by virtue of membership of the ccNSO.

Review of Comments

In all comments received it is stressed that a policy can only be binding if and only to the extent that:
> a. the issue the policy addresses is within scope of the ccNSO (Annex C),
>
> b. has been developed by use of the ccPDP (Annex B),
>
> c. has been recommended as such by the ccNSO and
>
> d. is adopted by the Board. Condition a. needs to be added to section 4.10.

However, resolving this issue as suggested raises another: the ccNSO should at least be able to co-determine whether or not an issue is within or outside scope of the ccNSO. Currently (Annex B section 2) this is firstly determined by ICANN's General Counsel. However the ccNSO Council may initiate a ccPDP with a supermajority even if the issue is not within scope of Mission Statement or the scope of the ccNSO (Annex B section 3 b). A recommendation should resolve both matters at the same time.

Methods for resolving the matter

Solution 1
No change of the bylaws to address this issue. The other changes to the bylaws as suggested provide a reasonable protection (both at individual level and common level).

Solution 2
Firstly, change of section 4.10 to include an additional condition that to be binding, the policy needs to be within scope of ccNSO (Annex C). The relevant part of Article IX section 4.10 would read: a policy only applies by virtue of membership of the ccNSO if and only to the extent that:
> a. the issue the policy addresses is within scope of the ccNSO (Annex C),
>
> b. has been developed by use of the ccPDP (Annex B),
>
> c. has been recommended as such by the ccNSO and
>
> d. is adopted by the Board.

Secondly, to cope with the concern of determination of scope, an amendment of Annex B section 3 (b) is proposed. It should include a mechanism for the ccNSO to at least co-determine if an issue is within the scope of the ccNSO. Possible mechanisms are:

A. Supermajority vote of the ccNSO Council (12 or more Council members) to initiate the ccPDP when the Council is of the opinion the issue is within ICANN's Mission Statement or scope of the ccNSO (Annex C) with a reasoned statement of its determination;

B. Introduction of conciliation process if General Counsel is of the opinion issue is not within scope and ccNSO Council is of the opinion issue is within scope of the ccNSO or ICANN's Mission Statement.

In the event that General Council and the ccNSO continue to disagree on an issue, the ccNSO could still decide to run a PDP outside of Scope, however this would be on the understanding that any recommendation approved by the Board would be non-binding.

The issue regarding the initiation of a ccPDP (Issue H) becomes obsolete as it can only be limited to issues that are within scope.

Analysis of proposed methods

Effectiveness and Proportionality

Solution 1—No changes
The current wording in the bylaws is the result of long and intense discussions undertaken during the formation of the ccNSO. It has resulted in the ability of the ccNSO to develop binding policies which apply to members by virtue of their membership, and at the same time introduce safeguards for the ccNSO membership as a whole and as individual members. It is also intended to empower the ccNSO (the Council and the members) to set policies for the ccTLD community on issues which they consider relevant. For this reason the ccNSO Council is empowered to initiate a PDP on an issue with a supermajority in instances where ICANN's General Counsel considers the issue to be outside ICANN's Mission Statement or outside the scope of the ccNSO (Annex B section 3 b). Depending on one's interpretation of Annex B section 3(b) the issue to be addressed should be within ICANN's mission or within the scope of the ccNSO (Annex C) according to General Counsel and only with a supermajority vote of the ccNSO Council. The core concern expressed however is not addressed. The substantive issues for which a policy can be developed have to be within the scope of the ccNSO.

By changing the bylaws the current system of empowerment and safeguards is changed. Not changing the bylaws (solution 1) is therefore an option to maintain the current balance of powers.

Solution 2—Changes in the bylaws to reflect Annex C as condition for a binding policy.
Both in the submissions and at the public hearing the discussion focused on the "scope of the ccNSO" i.e. which issues can be resolved by developing a policy by use of the ccPDP.

Taking into account the objective of this ccPDP, the comments and input received and the long and intense discussions particularly on the development of the scope of the ccNSO (Annex C) in the past, more emphasis on Annex C as a condition to set a binding policy is indicated.

Solution 2 is a straightforward method to resolve issue D and H.

The second element in the debate over Issue D, in particular at the public hearing, was the concern that the ccNSO should at least co-determine whether or not an issue is within scope. Currently this is determined by the ICANN General Counsel. This matter has to be addressed in conjunction with the other change suggested in order to maintain a balanced system. If not some of the current members of the ccNSO will object to a change, and during the public hearing it became clear potential members understand this concern.

Given the concern expressed 2 possible resolutions are:

A. The ccNSO Council determines with a supermajority the issue is to be considered within scope, including a reasoned statement of its opinion;
B. A reconciliation mechanism between ICANN's General Counsel and the ccNSO Council to determine if an issue is within scope or within ICANN's mission statement.

Should the ccNSO Council decide to initiate a PDP without reaching agreement with General Counsel on whether an issue is within scope, they do so on the understanding that even if the Board approves any recommendation/s, the policy would be non-binding. This is on the basis that the suggested amendment to section 4.10 takes precedence over the co-determination issue.

However it may be that neither of these 2 methods is entirely satisfactory and so it is recommended that proposals for appropriate mechanisms be put forward during the second comment period.

H—INITIATING A CCPDP

Relevant bylaw

Annex B section 3. Initiation of PDP

The Council shall decide whether to initiate the PDP as follows:

a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP. Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.

b. A vote of ten or more Council members in favor of initiating the PDP shall be required to initiate the PDP provided that the Issue Report states that the issue is properly within the scope of the ICANN mission statement and the ccNSO Scope. In the event that the Issue Report states it is not properly within the scope of the ICANN mission statement or the ccNSO Scope, then a vote of twelve or more Council members in favor of initiating the PDP shall be required to initiate the PDP.

Issue

Under the current bylaws the ccNSO Council can initiate a ccPDP on matters which are within Scope and outside of Scope (Annex B section 3.b.

Should it only be possible for the Council to initiate a ccPDP on matters that are within the Scope of the ccNSO?

Consolidated overview of comments and input received

African Regional Statement
The ccNSO council may initiate a ccPDP if it demonstrates the need to initiate a ccPDP on matters which are beyond scope; this is demonstrated for instance when the decision is taken by a supermajority.

European Regional Statement
Reiteration of the comments made in position paper on the ccNSO. Under the current bylaws the ccNSO Council can initiate a ccPDP on matters which are within Scope and outside of Scope (Annex B section 2.b) According to CENTR a ccPDP should only be possible on matters that are within the Scope of the ccNSO

DENIC, Nominet, UNINETT Norid
A ccPDP should only be possible to initiate a ccPDP on an issue that is within scope of the ccNSO. This is not to say that the process of a ccPDP could not be used for other issues, however without the consequence of resulting in a binding policy.

Public Hearing
The concern is not that a ccPDP can be initiated but that it can result in a binding policy even though the issue is not within the scope of the ccNSO. As this issue was extensively discussed in the context of item D it will not be further discussed here.

Review of the Comments.

The issue itself is relevant in the context of setting binding policies (issue D Issues Report).

Methods for resolving the matter

The resolutions to this issue are discussed and need to be considered in the context of Issue D.

K—ABILITY OF BOARD TO SET BINDING POLICIES ON ISSUES NOT WITHIN SCOPE.

Relevant bylaw

Annex B section15. Board Vote

a.   The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b.   The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

1.   In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

2.   The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

3.   At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

4.   In the event that the Board does not accept the ccNSO Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("Supplemental Board Statement").

5.   In circumstances where

(i)   the Board determines not to accept a ccNSO Supplemental Recommendation, and

(ii)   the opinion of the General Counsel pursuant to Item 2.e. was that the issue was within the scope of the ccNSO pursuant to the ccNSO's Scope,

then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

Issue

Under the current bylaws an issue outside of scope can be considered in a PDP. In a case where the final recommendation to resolve the issue is a Supplemental Recommendation (Annex B section 15) and the issue is within scope according to General Counsel pursuant to Annex B section 2, the Board may not set a policy and the status quo remains.

If the Council will remain able to initiate a ccPDP outside of Scope, is the ICANN Board able to set its own policy, if the issue is not within scope pursuant to the opinion of the General Counsel and in case the Supplemental Recommendation is rejected by the Board? If so, should this remain the case? If not, should this be introduced?

Consolidated overview of comments and input received

African regional Statement
If the ccNSO is allowed to initiate a ccPDP outside scope of the ccNSO, the Board should not be able to reject its policy without making that it has good reasons to do that. If proof is given, the Board has to decide with a majority of a least 66 %.

NIC.AC
According to an a contrario interpretation of the relevant section of the bylaws the Board is allowed to disregard a ccNSO Supplemental recommendation and to set a policy on the issue, provided it is out of the ccNSO scope. The result would be that this would be a binding policy.

DENIC, Nominet, UNINETT Norid comment
If ICANN's General Counsel is of the opinion an issue is outside the ccNSO's scope the Board could potentially replace any ccNSO recommendation on an issue with the Board's own policy. However, this issue would be resolved if binding policies are limited to resolve issues which are within the scope of the ccNSO.

Public Hearing
The issue is closely connected to issue D. The concern results from a contrario interpretation of the relevant section in the bylaws. At the hearing participants agreed that even in the case where a contrario interpretation of the relevant section is correct, the Board policy that would result would not be applicable as it does not meet the current conditions of section 4.10, in particular the condition that the policy has not been recommended as such to the Board.

Review of comments

The issue as raised has no merits on its own. As such it is based on a specific interpretation of the relevant section of the bylaws. Even if the interpretation is correct i.e. the Board sets a policy, this policy will not apply as it has not been proposed as such by the ccNSO. In case a ccPDP on a substantive issue (not a modification of Annex B or Annex C or possibly in future a modification of Article IX) the issue will evaporate altogether.

Method for resolving the matter
At this stage there is no solution suggested.

L—SHOULD THE SCOPE OF THE CCNSO BE REDEFINED?

Relevant bylaw

Annex C (Scope of the ccNSO)

Issue

Should the scope of the ccNSO be redefined?

Consolidated overview of comments and input received

African Regional Statement
Taking into account the changes proposed throughout the different articles amended above, it may be necessary for the ccNSO council to review the scope of the ccNSO since it will probably be affected by the changes proposed.

European Regional Statement
Reiteration of CENTR position paper. According to CENTR the scope of the ccNSO's global policy responsibility should be limited to making policy for the operation of the IANA function as it relates to ccTLDs. This may comprise IANA procedures (including those related to IANA in the event of a registry change), and fees to IANA.

NIC.AC
The scope is ambiguous and leaves room for interpretation when the desire is to bring clarity. Clarity is necessary to ensure that neither the ccNSO nor ICANN can impose policy directly on the ccTLD manager. Consequently Annex C should be modified.

DENIC, Nominet, UNINETT Norid comment
The scope should be clarified and limited to making policies for the IANA function as it relates to ccTLD's. It also state clearly as an introduction the principle of subsidiarity; the fact that most ccTLD policies are local and should be set locally, unless it can be shown that the issue at hand can only be solved within an international framework.

Public Hearing
The scope of the ccNSO is the result of long and intense debate in the ccTLD community and with other stakeholders. While there is some agreement for redefining the scope, this should be cross referenced to other discussions concerning the scope.

Review of Comments

Most comments received indicate the current scope of the ccNSO is unclear and ambiguous. While some suggestions were made for a change it was agreed at the public hearing that this could be done at a later stage.

Method for resolving the matter

The ccNSO Council is advised to address concerns with the current scope of the ccNSO at a later stage and in a separate process. At this stage there will be no recommendations on changes of the scope of the ccNSO.