

# Standing Panel issues

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Dear members of the IRP IOT,

If time permits on tomorrow's call, let's get back into the issues surrounding service on the Standing Panel. We have already discussed much of this, but we have not closed the discussions.

We segmented the comments into two areas - one on panelists' possible conflicts of interest and the other on panelists' renewal of terms of service.

My email of May 3rd summarizes much of this - it is forwarded below.

It essentially recommends that on conflict of interest we adopt a portion of the International Bar Association Guidelines, tailored to IRP, to add this language to the rules:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final decision has been rendered or the proceedings have otherwise finally terminated.

On renewal terms for panelists, we had a vigorous discussion on list in May. Checkout the May 2017 list archives by subject<<http://mm.icann.org/pipermail/iot/2017-May/subject.html>> and you can see the mails lined up under the subject line 'Some IRP comments treatment for First Reading'.

I like Malcolm's suggestion in his May 18 email <<http://mm.icann.org/pipermail/iot/2017-May/000238.html>> of a five-year term, automatically renewed for a second five year term if the panelist should apply for renewal, and not renewable any further.

But let's pick these up and finish them off - if not enough time tomorrow then on list and next call.

Best regards,  
David

From: [iot-bounces at icann.org](mailto:iot-bounces@icann.org) [mailto:[iot-bounces at icann.org](mailto:iot-bounces@icann.org)] On Behalf Of McAuley, David via IOT  
Sent: Wednesday, May 03, 2017 12:09 PM  
To: [iot at icann.org](mailto:iot@icann.org)  
Subject: [EXTERNAL] [IOT] Another comment treatment (Panel Conflict of Interest)

Dear members of the IRP IOT:

Here below is my suggestion for handing comments listed in our summary table as "Panel Conflict of Interest".

The public comments repository for the proposed rules can be accessed here<<https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>>.

This suggestion deals with these specific comments:

1. From the Centre for Communication Governance at National Law University, Delhi (CCG comments<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfWir0kzWAv3.pdf>>);
2. From DotMusic (DotMusic comments<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfzqApbhRMhH.pdf>>); and
3. From Dot Registry (Dot Registry comments<<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfYWMiLvnODO.pdf>>).

Summary of Comments:

1. The CCG comment points to the provisions of Bylaw section 4.3(q). It then goes on to state, among other things (footnotes omitted):

The USP in Section 3 addresses the issue of independence. But it merely echoes Section 4.3(q) (i) (A) of the ICANN by laws in requiring the disclosure of material relationships. It does not address the issue of term limits raised in the CCWG-Accountability proposal. The USP also does not contain any new independence requirements as per the mandate of the ICANN Bylaws. In the absence of such recommendations, it is useful to look at internationally accepted standards on the independence of arbitrators.

.... The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration is a useful, internationally accepted standard that can be applied to the IRP. ...

Instead of sending the USP back to the IOT on this issue, we recommend that the USP make a reference to the IBA Guidelines so it may be applied on a case to case basis.

2. The DotMusic comment says that the draft rule calls into question the standing panel's impartiality because it is subject to confirmation by the ICANN board. "This is problematic because ICANN -the organization that

confirmed the IRP Panelists- will be a party before the same Panelists," it says.

DotMusic goes on to say, among other things:

ICANN's May 2016 Bylaws commits ICANN to respect internationally recognized human rights. With such right, due process provides for "a competent, independent and impartial tribunal." Furthermore, the Council of Europe Report stresses that "ICANN needs to guarantee there is no appearance of conflict of interest:"

DotMusic recommends that an independent, experienced party like ICDR appoint neutral, independent Panelists that have no ties with ICANN or the ICANN community.

3. The Dot Registry comment says, among other things:

Constructing a "Standing Panel" of ICANN insiders or having an "Ombudsman" perform an IRP review when the Ombudsman is reviewed and compensated by the ICANN Board, will only lead to bias, impartiality, conflicts of interest, corruption, and/or discrimination. To date, there is no viable outside independent check on the ICANN Board, including IRP Declarations due to the litigation waiver contained in the Application and Applicant Guidebook. ...

... there must be a viable mechanism in place for an independent review of IRP Declarations so that the review is applied neutrally and objectively and with fairness and integrity. Dot Registry's position is that any challenge or review related to an IRP Declaration should only be made in a court of competent jurisdiction.

Draft USP Rule:

The draft rule being commented upon is section 3. Composition of Independent Review Panel (footnotes omitted):

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

Our IRP IOT role:

As we do our work we are instructed by the bylaws, among other things, to provide rules that will facilitate the "just resolution of disputes" (Bylaw Section 4.3(a) (vii)) and ensure "fundamental fairness and due process" (Bylaw Section 4.3(n) (iv)).

My recommendations (as participant, not as lead):

1. With respect to the CCG comment, it essentially raises two concerns on panel impartiality.

First, it implicitly argues that the rules should address term limits for panelists. It correctly notes that the CCWG Accountability Final Report (Annex 07, para 42) says this, in part, of panelist terms: "To ensure independence, term limits should apply (five years, no renewal), ..."

The phrase "no renewal", however, did not make it into the bylaws.

Bylaw section 4.3(j) (iii) provides: "Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team."

On the other hand, bylaw section 4.3(q) (i) (B) provides: "Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN positions."

CCG raises a fair point for discussion. In my view, rules regarding term limits are not essential in the first set of updated rules as the bylaws clearly anticipate amendments over time, including participation in rule-making by the standing panel once it is brought into existence (see, e.g., bylaw section 4.3(n) (i)).

However, we may wish to address an issue such as terms limits for panelists before a standing panel participates, to avoid appearance of conflict in deliberations over that issue.

I tend to think term limits might be appropriate after two five-year terms to allow for appropriate development of panelist understanding of the DNS and ICANN's mission, work, policies, practices, and procedures (see bylaw section 4.3(j) (i)). But I could imagine reasonable arguments for no term limits, or term limits after one five-year term - what do you think? I recommend we discuss and decide this issue now and will bring this up on call.

Second, CCG also says that we must have new panel independence requirements, citing bylaw section 4.3(q) (i) (B) quoted above. It suggests that we refer to International Bar Association Guidelines<[file:///C:/Users/dmcauley/Downloads/IBA%20Guidelines%20on%20Conflict%20of%20Interest%20NOV%202014%20FULL%20\(1\).pdf](file:///C:/Users/dmcauley/Downloads/IBA%20Guidelines%20on%20Conflict%20of%20Interest%20NOV%202014%20FULL%20(1).pdf)> on Conflicts of Interest in International Arbitration to be applied on a case-to-case basis.

These guidelines may prove a good reference in the next iteration of rules but for purposes of getting a satisfactory set of rules in place I suggest we consider these guidelines once the standing panel is in place and we can take advantage of their insights. However, the guidelines have a general principle that I recommend we do place in the rules, and I have tweaked it here to tailor it to IRP (by replacing the word "award" with the word "decision"):

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final decision has been rendered or the proceedings have otherwise finally terminated.

2. With respect to the comments of both DotMusic and Dot Registry, they appear, in my opinion, to seek action beyond the terms of the bylaws and I recommend that we decline their suggestions.

Differing views:

If you have a concern with what I propose or have another suggestion, please make it on list as soon as possible and as specifically as possible. Please couch it in terms/language that can be acted upon as a decision if adopted (i.e. in language that would be a sufficient instruction to our outside lawyers that they could draft appropriate language).

Best regards,

David