Independent Review Process Standing Panel

Summary of Comments Received from Supporting Organizations and Advisory Committees, and Next Steps

ICANN organization
31 March 2020

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Independent Review Process Standing Panel: Summary of Comments Received from Supporting Organizations and Advisory Committees (SO/ACs), and Next Steps

Summary of Comments Received from SO/ACs

Six sets of comments were received from the Country Code Names Supporting Organization (ccNSO) Council, Generic Names Supporting Organization (GNSO) Council, Intellectual Property Constituency (IPC), Registry Stakeholder Group (RySG), Noncommercial Stakeholder Group (NCSG), and Security and Stability Advisory Committee (SSAC). All commenters welcome the idea of moving forward to select the omnibus Standing Panel. The commenters' responses to the questions posed by ICANN org regarding the establishment of the Standing Panel process varied and are summarized below.

Qualifications for Standing Panelists
Are there specific qualifications that should be included? If so, what are they? Anything disqualifying? Should the SOs and ACs recommend qualifications? And if so, how?"

Qualifications/Disqualifications

- ⊙ Overall, the commenters support the qualification set forth in the Bylaws.[1] There was an emphasis among several commenters that independence and neutrality should be considered as qualifying and disqualifying factors. All commenters state that conflicts of interest (actual or perceived) should be a basis for disqualification. Some commenters provided detailed lists that aligned with the Bylaws.

- ⊙ The ccNSO Council suggests that any person who has been a 'party' to an IRP should not serve as a panelist, and that panelists should be completely independent of ICANN, including any perception of conflict of interest. The NCSG comments that a panelist should have no financial interest in the dispute and the result of the case will not benefit the panelist and there should be no material relationship or connection to either of the parties. The NCSG notes that there is a difference between issues that impact neutrality generally (which should disqualify a candidate from service on the Standing Panel),

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[1] Article 4, Section 4.3(j)(i) of the ICANN Bylaws state: "There shall be an omnibus standing panel of at least seven members (the "Standing Panel") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures."

which is separate from the need to evaluate neutrality and potential conflicts of interest as it relates to any specific dispute before the Standing Panel. The ccNSO and GNSO Councils also note the importance of monitoring for issue specific conflicts for each dispute.

- ⊙ The SSAC suggests that a basic level of understanding of security and stability issues should be included as a desirable criterion.

- ⊙ The NCSG suggests that a good understanding of the IRP's mandate as a qualifying criterion.

- ⊙ The RySG identifies a list recommended disqualifying factors beyond the general financial interest and professional conduct rules, including service as a former or current employee, officer, Board member, consultant, or external legal to ICANN, as well as a five-year disqualification period for leadership of ICANN SOs or ACs (or components) or working groups, review teams, or both. Other community-related disqualifying factors could also include those who have received travel funding from ICANN or pursued an accountability mechanism against ICANN in the prior five years. The RySG suggests the use of a certification from the candidates to affirm compliance with the disqualifications.[2] The IPC also highlights the need for observance to guidelines on conflicts of interest once the panel is seated.

Methodology

The RySG suggests developing a list of potential qualifications or disqualifications and skills matrix to track the qualifications. The RySG also recommends that ICANN org conduct a thorough review of the panelists on IRPs to date to compile a list of general background qualifications, supplement that list with general background qualifications of panelists from new gTLD objection proceedings, and make that list available. The GNSO Council and RySG note that the SOs and ACs should recommend qualifications prior to a call for statements of interest and the RySG further urges ICANN org to conduct a formal public comment period on the results of this exercise to allow SOs and ACs to recommend qualifications.

Identifying a Slate of Well-Qualified Panelists
Should the community rely on expertise to help vet and recommend a final slate for the Standing Panel?

- ⊙ The RySG notes that there needs to be a process to vet the slate of candidates at appointment.

- ⊙ Many commenters (RySG, ccNSO Council, SSAC) support the idea of obtaining outside expertise, but believe that the SOs/ACs should not be required to rely on it. The use of experts should be a support for the SOs/ACs in exercising their responsibility, and not a replacement for them.

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2 The RySG also makes suggestions in how to enforce the continued adherence to these factors through ongoing proactive disclosure processes for Standing Panel members as well as through the contracts that panelists will have to enter into for their service on the Standing Panel.

- Some commenters (RySG and ccNSO Council) support the creation of a steering committee of SO and AC representatives with relevant expertise, acting on behalf of their SOs and ACs, to be responsible for managing the slate selection, rather than an unspecified "community" (a Nominating Committee-like structure). The NCSG supports the creation of a representative group of the community to decide on which experts should be consulted with about the selection of the panelists, and that the community group should be responsible for the identification of the final slate of panelists for Board consideration. The NCSG suggests that because the role of the IRP is to determine if ICANN Board or org actions are in violation of the Bylaws, the ICANN org should not have sole responsibility for selecting the experts that will assist the community in any of this vetting work. The RySG also supports the community having a role in removing or replacing experts retained. The GNSO Council supports having the SOs and ACs involved in all parts of consultations to support making an informed decision on a slate for Board consideration.

- SSAC supports idea of interviews being conducted by experts and does not support direct community selection.

- IPC suggests that experts from reputable arbitral institutions could be used. The IPC also believes that the SOs and ACs should have a role in interviewing candidates and the opportunity to express recommendations on how the panel slate should be comprised. The SOs and ACs should have an opportunity to participate in candidate interviews for the purpose of vetting the candidates' understanding of the role. The SOs and ACs could provide non-binding recommendations to the expert or expert group running the selection process on behalf of the community.

- The RySG also had specific recommendations regarding coordination with the current IRP provider in their panel development process so that we do not lose the benefit of experience. The GNSO Council also encourages coordination with the entity that ICANN org has previously worked with on the IRP.

Board Approval of Panel Slate

After there is a slate of well-qualified applicants, the Board must confirm the panel. If the Board has questions that might impact its confirmation, to whom should those questions be addressed? If experts are used to develop the slate, should the experts, the SOs and ACs, or some combination thereof be part of that conversation?

RySG and ccNSO Council recommends that the Board should direct questions to the SO/AC Steering Group recommended above, which could consult with any experts involved in the selection of panelists put forward to the Board.

SSAC recommends that it is reasonable for the Board to determine the appropriate group to consult, whether they be the experts developing the slate or the community.

The IPC states that the questions should be directed to the entity commissioned to nominate the candidates, and should be done in an open and transparent fashion.

The RySG also notes the need for a mechanism to remove or replace panelists for unavailability, incompetence, or development of a conflict of interest (after appointment to the Standing Panel).

The NCSG notes that because ICANN itself is a party to the IRP, the Board should not have the sole responsibility of asking questions to the experts, as the Board needs to act objectively and without bias. Otherwise, the NCSG is concerned of the potential for the community to file an IRP regarding how the Board considered the panelist selection. However, the NCSG also reflects that all processes as it relates to the formation of the Standing Panel should be as lightweight as possible, so that a Standing Panel can be convened as quickly as possible.

The GNSO Council suggests that questions should be directed to ICANN org and the representatives of the SOs and ACs, and outside experts could be consulted. Questions must be presented and addressed in an open and transparent fashion.

Future Selections

Should the process being designed today be reviewed for effectiveness after the first slating is completed, prior to making it standard operating procedure for future selection rounds?

- The NCSG notes that the process should be reviewed both for effectiveness and whether the factors of neutrality and independence of the arbitrators were upheld through the process. The RySG and GNSO Council also confirmed a review of the effectiveness of the process.

- The RySG also recommends a review, a few years down the road, on whether there were any key experience gaps among the panelists selected. The SSAC also supported that there should be both a review of the process and of the effectiveness of the panelist in performing their function.

- The ccNSO Council and IPC also supports such a review.

- The SSAC suggests that the selection criteria, selection process, and Standing Panel performance could all be mandatory items assigned to the Accountability and Transparency Review Team.

Other Comments

- The IPC notes an overarching concern that the process used for the establishment of a Standing Panel and the training of the panel could create impacts on the due process of claimants in those IRPs, and the purposes of due process and equality of parties to IRPs must be upheld.

- A frequent practitioner as counsel to claimants in IRPs, Arif Hyder Ali, also provided inputs from his view. Mr. Ali highlights the need for independent, neutral, and experienced international arbitration specialists; and specifically addresses the need for experience in international law. He recommends that such international law expertise be required to consider a candidate as "highly qualified".

Next Steps

Call for Expressions of Interest

ICANN org will issue the Call for Expressions of Interest by potential Standing Panel members along with the release of this summary. While some commenters wished for ICANN org to do additional vetting of the qualifications prior to a call being issued, but many of the qualifications are grounded in the Bylaws and there does not seem to be a need to delay the issuance of a call.

The community inputs on what facets of qualifications should be given more weight in the selection process can still continue while Standing Panel applicants are submitting their interests.

Community Organization

Working through ICANN org's Policy Development Support function, ICANN org will work with the SOs and ACs to develop a small, representational group to further the Standing Panel selection effort (the "Community Representatives"). The Community Representatives will initially be responsible for coordinating with ICANN org to have appropriate SO/AC involvement in the selection of an expert to assist the ICANN community in finalizing a desired skills matrix, interview preparation, and recommendations for potential Standing Panel members.

The specifics of how the expert will coordinate with the Community Representatives on interviewing, panel recommendations, and subsequent clarification questions from the Board could be dependent upon the type of expert retained, and should be part of a workplan developed by the expert after retention.

ICANN org considers that the work of the Community Representatives can be conducted virtually. ICANN org will provide the necessary secretariat and substantive support.

Identification of Expert Support

ICANN org will coordinate with the Community Representatives to identify the primary needs for an expert to guide a selection effort for that expert support. Some commenters highlight the potential for using arbitration providers as the expert, and the feasibility of that suggestion needs to be balanced among the potential for conflict of interest or other considerations as it relates to the candidates serving on the rosters of arbitration providers. There are likely other types of expert assistance that could be engaged that would not raise the same issue.

As noted above, the specifics of how the expert will coordinate with the Community Representatives on interviewing, panel recommendations, and subsequent clarification questions from the Board could be dependent upon the type of expert retained, and should be part of a workplan developed by the expert after retention.

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