Agenda Item 23: Independent Review Process: Standing Panel

Issues

1. Establishment of a community procedure for selecting members of the Standing Panel for the ICANN Independent Review Process.

2. Discussion of a GAC procedure for seeking nominations of prospective Panel members and agreeing with the community on a 'slate' of seven members.

3. Timing: This is not yet determined but should become clearer following a community session on this issue at ICANN 61.

GAC Action Required

1. Note the agreed GAC comments on the process proposed by ICANN Org in January 2018 (see below) – although this may have been overtaken by further work in preparation for a community session on this matter at ICANN 61.

2. Consider a GAC process for:

   (a) Using national and international networks of GAC members to inform potential panel members of the opportunity to express interest; and

   (b) Coordinating with other SOs/ACs on an agreed "slate" of appointments, from those applicants deemed well qualified, for confirmation by the Board.

Current Position

This is an implementation issue arising from the agreed recommendations of the Cross Community Working Group on Enhancing ICAN Accountability Work Stream 1 (CCWG-Accountability WS1). It is not, under the Bylaws, an issue for the Empowered Community Administration.

Development of procedures for the new IRP, including establishment of a Standing Panel, is the responsibility of ICANN Org under the guidance of an Implementation Oversight Team (IOT).

The ICANN Bylaws[1] provide for a Standing Panel of at least seven experts. Specific disputes will be heard by three members selected from the Standing Panel.

Standing Panel members must have significant relevant legal expertise in one or more of: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration.

The bylaws provide that "Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5) [ie the current ICANN regions with countries included as decided by the Board].

There is a four-step process to establish the Standing Panel. This is described in the document at Attachment 1, prepared by the IOT, together with extracts from the relevant Bylaws. It is the proposed details of this process on which SOs/ACs are now being consulted by the IOT.

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[1] Section 4.3(j) – See Attachment 1.

GAC engagement

The GAC supported without qualification Recommendation 7 of the CCWG-Accountability WS1 Final Report that dealt with the new IRP, including the Standing Panel.[2]

There has been no subsequent GAC consensus input on this issue. Some GAC members have expressed concern at the composition of IRP panels under existing arrangements in the light of IRP declarations in the dot.Africa and dot.Amazon cases, suggesting that panel members should have at least some expertise based on relevant national or regional aspects of the case.

The IOT includes two GAC members: Argentina and Iran.

Draft GAC Response

The following draft GAC response to the questions from the IOT is submitted for discussion was agreed by the GAC in January 2018. It has not yet been forwarded to the IOT pending further discussions at ICANN 61.

1. **Attracting Qualified Candidates:** Prior to the EOI being posted, do the SOs/ACs wish to coordinate on how to attract qualified candidates? Or does each SO/AC wish to do outreach on their own?

GAC Response

If current SO/AC support arrangements can support coordination of a range of views within a reasonable timeframe then that would be preferable. In any event, GAC members will consider how to attract qualified candidates and submit their views through internal GAC processes.

2. **Evaluation of Candidates:** ICANN Org proposes that it would be helpful for the Org, Community and Board to reach some common understanding of what standards for what makes a candidate well qualified as opposed to qualified or not qualified.

    a. Do you agree that this would be helpful?

    b. Should ICANN Org prepare an initial proposal, likely in the form of a template, for consideration by the SO/ACs?

    c. How long will the SO/ACs need to reach some level of agreement?

GAC Response

This would be helpful, given that the term "well qualified" is explicitly used in the Bylaws.

It would also be helpful if ICANN Org prepared an initial proposal.

It is difficult to estimate a timeframe for agreement at this point.

3. **Evaluation of Candidates:** ICANN will need to perform interviews of candidates in order to complete the assessment of whether the candidates are well qualified.

    a. What role, if any should SOs/ACs have in the interview process? Consideration should be given to issues of efficiency, confidentiality and independence, as the broader

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[2] GAC Marrakech Communique March 2016.

the number of participants in the interview process, the more challenging it might be to achieve these objectives. Some potential considerations:

      i.   Should ICANN Org develop a proposed set of standard questions for candidates, which are agreed upon by the SO/ACs?

      ii.   Should the SO/ACs send a few representatives to attend interviews?

      iii.   Should the SO/ACs send questions in advance of interviews?

    b.   Would the SO/ACs prefer a secondary interview process over the set of well-qualified candidates?

      i.   How ICANN Org assist in the development of the interview process?

GAC Response

ICANN Org should develop a proposed set of standard questions for candidates, which are agreed upon by the SOs/ACs.

For reasons of transparency and accountability, there may be merit in SO/AC representatives attending interviews if they are able to ask questions and provide some oversight of the process. Questions in advance from SOs/ACs should be encouraged, but representatives should be able to seek clarification from candidates on any relevant issue raised during the interview process.

4. **Nomination of Slate:** ICANN Org recommends that the SOs and ACs begin discussions now on how the nomination process will work once the well-qualified applicants are identified. The skills and diversity of the panel should be evaluated as a whole, so there will be a need for coordinated vetting across the community, as opposed to relying solely on individual SO/AC nominations.

    a.   How can ICANN org support this work?

    b.   Is 30 days long enough to reach a nomination? If no, how long is needed?

GAC Response

The GAC wishes to participate in the recommended discussions and agrees with the need for coordination among SOs and ACs so that panelist skills and diversity are evaluated as a whole.

There are a number of existing staff-supported forums through which this could be done including:

- The Implementation Oversight Team.

- The Empowered Community Administration (This is not a specified EC function but the communications infrastructure exists).

- SO/AC leadership list, possibly amended to increase transparency and workability.

5. **General:** For items where the community is involved, are the timeframes realistic as proposed? If not, how should they be adjusted?

GAC Response

Identification and solicitation of applications: 30 days seems insufficient for expressions of interest. ICANN work is specialised and generally not well known outside a limited range of immediate stakeholders.

Further Information

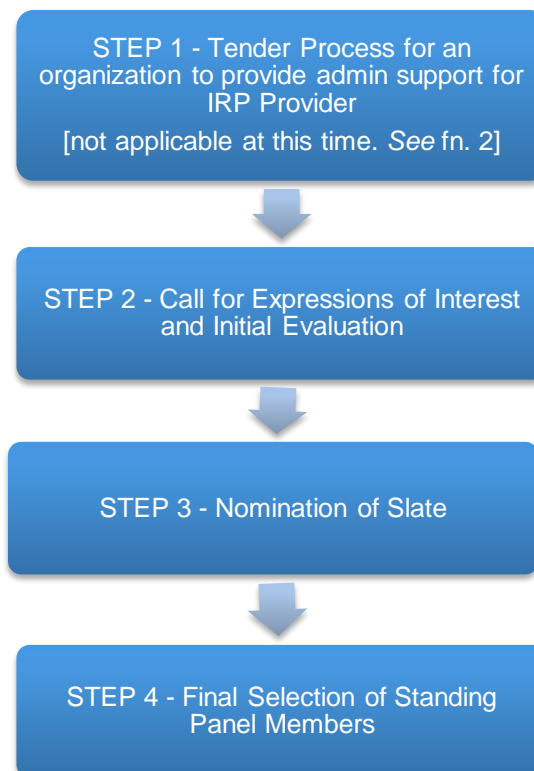Implementation Oversight Team: https://community.icann.org/display/WEIA/WP-IOT+-+IRP+Implementation+Oversight+Team

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ATTACHMENT 1: Process Roadmap re Establishment of Standing Panel: Prepared by ICANN Org

ESTABLISHMENT OF THE INDEPENDENT REVIEW PROCESS (IRP) STANDING PANEL PROCESS PURSUANT TO ARTICLE 4, SECTION 4.3(J) OF THE ICANN BYLAWS

PROCESS FLOW FOR ESTABLISHMENT OF IRP STANDING PANEL[3]

STEP 1 - Tender Process for an organization to provide admin support for IRP Provider

[not applicable at this time. *See* fn. 2]

STEP 2 - Call for Expressions of Interest and Initial Evaluation

STEP 3 - Nomination of Slate

STEP 4 - Final Selection of Standing Panel Members

PROPOSED ACTIONS AND TIMING ESTIMATES RE ESTABLISHMENT OF IRP STANDING PANEL PROCESS

I.   Step 1 – Tender Process for an organization to provide admin support for IRP Provider - Not applicable at this time[4]

II.   Step 2 – Call for Expressions of Interest (EOI) and Initial Evaluations

   A.   Development of Call for EOI **-** Expected time frame: nearly complete

      1.   ICANN Org Role: Develop Call for EOI in line with Bylaws.

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[3] This process flowchart does not include the recall process for the Standing Panel, which is being developed by the IRP Implementation Oversight Team (IRP IOT) as set out at 4.3(j)(iii).

[4] Because ICANN already has a third party provider to administer IRP proceedings, ICANN and the IRP IOT have agreed that this step is not necessary at this time.

2.   SOs/ACs Role: The IRP IOT has been consulted and has provided feedback on the call for EOI.

3.   ICANN Board Role: Preview prior to posting.

B.   Identification and Solicitation of Applications - Expected Timeframe for EOI: Open for approximately 30 days.
1.   ICANN Org Role:

a.   Post Call for EOI;

b.   Circulate Call for EOI among networks to encourage applications;

c.   If low return, consult with Board and SOs/ACs on extension of call and further ideas to increase visibility;

d.   Receive EOIs;

e.   Answer questions, if any, regarding EOI process;

2.   SOs/ACs Role:

a.   Circulate Call for EOI among membership and connected organizations to encourage applications; and

b.   If low return, provide input to ICANN org on extension of Call for EOI and further ideas to increase visibility.

3.   ICANN Board Role:

a.   Circulate Call for EOI among networks to encourage applications; and

b.   If low return, provide input to ICANN org on extension of Call for EOI and further ideas to increase visibility.

C.   **Initial Review and Vetting of Applications** - Expected Timeframe: up to 30 days as needed
1.   ICANN Org Role:

a.   Perform initial review of applications;

b.   Coordinate/conduct interviews as agreed upon; and

c.   Circulate EOI and evaluation materials5 on well-qualified candidates to SOs/ACs and Board, taking conflicts of interest considerations into account.

2.   SOs/ACs Role:

a.   [As agreed upon during consultation discussions]

3.   ICANN Board Role:

a.   [As agreed upon during consultation discussions]

III.   Step 3: Nomination of Slate

A.   Nomination of Slate - Expected Timeframe: up to 30 days

1.   ICANN Org Role: Support SOs/ACs.

2.   SOs/ACs Role:

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5 ICANN will also maintain records that can be shared with SOs/ACs and Board on applicants that do not achieve well-qualified status, respecting applicant confidentiality as appropriate.

a.   Taking conflicts of interest concerns into consideration, provide ICANN Board with a slate of proposed panel members with appropriate diversity of skills, expertise and other diversity factors important to the ICANN Community;

b.   Maintain transparent records of process, as appropriate; and

3.   ICANN Board Role: Receive slate from SOs/ACs in accordance with the process.

IV.   Step 4: Final Selection of Standing Panel Members

A.   Final Selection of Standing Panel Members - Expected Timeframe: 30 days

1.   ICANN Org Role:

a.   Scheduling of a Board Meeting at the next feasible opportunity upon receipt of slate recommendations;

b.   Communication of Board action on proposed slate to SOs/ACs and IRP IOT; and

c.   After Board action, coordination with IRP Provider to notify selected panelists[6] and begin contracting and training process.

2.   SOs/ACs Role: Remain available to ICANN Board if questions arise on nominated slate.

3.   ICANN Board Role: Action on proposed slate in accordance with the process, confirmation of which shall not be unreasonably withheld

RELEVANT BYLAWS PROVISION REGARDING THE ESTABLISHMENT OF THE IRP STANDING PANEL (ARTICLE 4, SECTION 4.3(J) OF THE ICANN BYLAWS)

(j)   Standing Panel

(i)   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. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii)   ICANN shall, in consultation with the Supporting Organizations and Advisory Committees, initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A)   ICANN, in consultation with the Supporting Organizations and Advisory Committees, shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)),

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[6] ICANN Org will always hold primary responsibility, collectively with the IRP Provider as appropriate, for communication with applicants about the status of their EOIs, scheduling and notifications.

beginning by consulting the "**IRP Implementation Oversight Team**" (described in Section 4.3(n)(i)) on a draft tender document.

(B)   ICANN shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations and Advisory Committees and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C)   The Supporting Organizations and Advisory Committees shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D)   Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii)   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.

(iv)   Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5).