

**IPC Comments on “Issues for Consideration Regarding Establishment of Standing Panel for the Independent Review Process (IRP)”**

Date: 15 May 2019

The GNSO Intellectual Property Constituency (IPC) appreciates the opportunity to provide comments on the Issues for Consideration Regarding Establishment of Standing Panel for the Independent Review Process (IRP).

**I. Preliminary comment**

The IPC wants to draw ICANN’s attention to two important issues that were raised with regard to the establishment of a Standing Panel for the Independent Review Process (IRP) as proposed by ICANN. One is of a substantive nature, the other one of a procedural nature.

On the substance, the IPC is aware of the continued discussions that have been held on the topic since 2015. However, the question was raised whether problems with the implementation of specific principles in past IRPs could be first addressed through the transparent development of implementation guidelines for IRP panel members?

Procedurally, the question was raised whether the abandonment of the *ad hoc* approach is possible in IRPs initiated by parties that have not been able to participate in the selection and nomination process as currently envisaged. In other words, is the establishment of an omnibus standing panel as conceived by ICANN in the context of IRP proceedings compatible with the rule of due process and the equality of arms of both parties in IRP proceedings in all possible IRP proceedings? The question is of particular importance given the fact that in the past decade, all IRPs were initiated by specific entities or organizations.

Therefore, in the best interests of the Internet community as a whole, the IPC requests that ICANN examines (i) whether the community would prefer to prioritize the transparent development of implementation guidelines for panel members in IRPs, and (ii) how it proposes to avoid that affected parties are disadvantaged by ICANN’s selection and training of members to the IRP standing panel.

**II. Qualifications for Standing Panelists for IRP**

1. Specific qualifications that should be included

What	Mandatory requirement	Nice to have
A. Participated as counsel in a certain number of international disputes	Mandatory, unless requirement B is fulfilled.	
B. Served as a neutral in a certain number of international disputes	Mandatory for the presiding panelists. Also mandatory for the other panelists, unless requirement A is fulfilled.	
C. Have a certain number of years of experience	A minimum of five years of relevant experience should be mandatory.	
D. Participation in a certain type of case/dispute	Experience in international arbitration should be mandatory.	
E. Experience or expertise in public international law	Mandatory.	
F. Understanding or involvement in ICANN, its mission and policy development processes		Nice to have. Experience from IRPs shows that open-minded panelists can quickly make up for an initially limited knowledge of the DNS and ICANN's processes.
G. Understanding of both common law and continental law systems	Mandatory. While ICANN is incorporated in a common law jurisdiction and IRPs are meant to have precedential effect, ICANN's activities are global in nature and must serve the global	

	<p>public interest. It is therefore imperative that IRP panelists have an understanding of different legal cultures and traditions.</p>	
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2. Items that should disqualify a candidate from serving on the IRP Standing Panel

Failure to meet any of the abovementioned mandatory requirements should be a ground for disqualification.

To ensure the impartiality and independence of panelists and avoid the appearance of bias, members on the IRP Standing Panel should adhere to the IBA Guidelines on Conflicts of Interest in International Arbitration<sup>1</sup> (the ‘IBA Guidelines’). To avoid the unwarranted exclusion of duly qualified panelists who are knowledgeable about the workings of ICANN, ICANN should agree in advance not to challenge the panelists on the basis of a situation mentioned in the IBA Guidelines’ Orange List.

3. Should the Supporting Organizations (SOs) and Advisory Committees (ACs) have a formal opportunity to recommend qualifications prior to the release of a call for statements of interest from applicants?

Yes.

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<sup>1</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on Thursday 23 October 2014 and updated on 10 August 2015 ([https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#Practice%20Rules%20and%20Guidelines](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines)).

### III. Identifying a Slate of Well-Qualified Panelists

1. Who should be involved to the selection?

Who	Level of involvement (None; Low; Medium, High)	Decision making power (yes/no)
SOs and ACs	Medium	No
Board	Low	No
ICANN org.	Medium	No
External experts (recruitment firm) assist in recruitment and vetting	None	No
External experts (recruitment firm) recommend final slate	None	No
One or two noted and respected jurists perform vetting and recommendation of final slate	None	No
Creating a Nominating Committee-like structure to perform the evaluation and recommendation of final slate	None	No
Other recommendations: Arbitral institutions (such as the ICDR (AAA), the ICC's International Court of Arbitration, or WIPO) should be invited to become active in the recruitment and vetting and recommend final slate.	High	Yes

2. Do you agree that using experts to propose a slate is preferable to SOs and ACs trying to reach agreement on a slate?

Yes, if experts are experienced and from reputable arbitral institutions such as the ICDR (AAA), the ICC's International Court of Arbitration and WIPO.

3. If you'd prefer to see SOs and ACs perform this slating work directly, what process do you see them following, and how long do you think it would take to reach consensus on a proposed slate?

N/A

4. Should representatives of SOs and ACs have a role in interviewing candidates?

Yes

5. If yes, how do you see that working?

SOs and ACs should be invited to participate in interviewing candidates to vet the candidate's understanding of their role, e.g., by having them explain how they expect to contribute in improving ICANN's accountability mechanisms. On the basis of these interviews, the SOs and ACs could create a report with non-binding recommendations to the arbitral institution.

6. Should they help identify interview questions?

Yes, see response to Question 5.

7. Should a group of people participate in the actual interviews?

Interviews should be led by experts from the reputable arbitral institutions. Interviews should be performed in a public setting with the SOs, ACs, ICANN org and experts from reputable arbitral institutions asking questions. To streamline the process, SOs and ACs should be invited to appoint representatives that will ask the questions on behalf of their stakeholder groups, constituencies or AC.

8. If experts are appointed to perform the vetting and slating roles, would the community support having these experts run the interview process?

Yes, if they are appointed by reputable arbitral institutions and not from a recruitment firm.

#### **IV. Board Approval of Panel Slate – Further Questions**

1. After there is a slate of well-qualified applicants, the Board must confirm the panel. The Bylaws say that the confirmation should not be “unreasonably withheld.” If the Board has questions that might impact its confirmation, to whom should those questions be addressed?

These questions should be addressed to the arbitral institutions that are commissioned to nominate the candidates and to create a slate of well-qualified applicants. These questions should be addressed in an open and transparent fashion.

2. If experts are used to develop the slate, should the experts, the SOs and ACs, or some combination thereof be part of that conversation?

The SOs and ACs should be given an opportunity to express their recommendations. These recommendations should be considered by the arbitral institutions.

#### **V. Future Selections**

1. Do you prefer that 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?

Yes. Such a review should be standard procedure with a view to improving ICANN’s processes. However, the review of the effectiveness of the selection process should be part of a larger process reviewing the effectiveness of the IRP standing panel in general.