

Unintended Consequences of SO/AC Election Processes on NomCom Selections and the Potential for Adverse effects on Board Diversity

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Summary

This paper examines how Supporting Organization/Advisory Committees' (SO/AC) elections/selections may impact upon the NomCom Board member selection process due to Bylaw mandated citizenship/domicile limitations. Additionally, it examines possible adverse effects on gender diversity resulting from the Bylaw mandated interaction of Supporting Organization/Advisory Committee (SO/AC) elections with the Nominating Committee (NomCom) selection processes. This paper uses a current real-world example to illustrate how the coming ccNSO election for Board Seat 11¹ could constrain the NomCom's ability to fulfill their responsibilities with regards to their selections for Board Seats 7 and 8². This paper also highlights the unintended consequences of a possible outcome from the ccNSO Members' election for Board Seat 11, to the NomCom's ability to re-appoint current Board members to Board seats 7 and 8 (should it choose to do so) and the Board's current gender/regional balance requirements. Note that although the focus here is on possible effects on NomCom selection based on whom the ccNSO elects for Board Seat 11, both the ALAC and GNSO have elections in the same election cycle, and they too may impact the NomCom selection process in a manner similar to what is described here for the ccNSO.

1 Introduction

The ccNSO members elect two Board Members to seats 11 and 12 of the ICANN Board³ through a one-ccTLD-one-vote Members' Election, the result of which is confirmed by

¹For a three-year term beginning at the ICANN 22nd AGM (Hamburg, scheduled for 17 – 20 October 2020).

²Three-year terms also scheduled to begin at the ICANN 22nd AGM. The argument presented here is based on the assumption that both current Board members holding seats 7 and 8 have intentions to be considered for re-appointment to their seats by the NomCom.

³Section 7.2(a)(iii) <https://www.icann.org/resources/pages/governance/bylaws-en/#article7>

the ccNSO Council and the Empowered Community Administration (ECA) as per ccNSO Guidelines and the Bylaws⁴.

The incumbent of Seat 11 (Chris Disspain) is term-limited⁵, having commenced his Board service at the ICANN AGM in October 2011⁶.

His term of office will conclude at ICANN's 22nd AGM in October 2020⁷.

Per the Bylaws, the ccNSO is currently engaged in commencing the process of electing Chris's successor⁸.

Taking the current makeup of the Board into consideration (see below), the eventual outcome of the election for Seat 11 appears to have a significant potential to constrain the NomCom's ability make their desired choices for Board Seats 7 and 8⁹.

By way of example, this paper suggests that the interplay between

1. The ccNSO Board Member elected to Board Seat 11
2. The NomCom's selections for Board Seats 7 and 8

needs to be carefully reviewed.

2 Current Board Composition

To understand the issue set out in this paper, the current composition of the Board must be borne in mind.

This is presented in tables 1, 2, and 3.

⁴The relevant ccNSO Guideline for Board election procedures can be found at <https://ccnso.icann.org/sites/default/files/file/field-file-attach/2016-12/ccnso-nominations-icann-board-guideline-01sep16-en.pdf>; the relevant Bylaw is Section 7.2(a)(iii): <https://www.icann.org/resources/pages/governance/bylaws-en/#article7>.

⁵Section 7.8(e) <https://www.icann.org/resources/pages/governance/bylaws-en/#article7>.

⁶ICANN42, 13th AGM (Dakar) – Held 23–28 October 2011.

⁷ICANN69, 22nd AGM (Hamburg) – Scheduled for 17 – 22 October 2020.

⁸Section 7.8(d) <https://www.icann.org/resources/pages/governance/bylaws-en/#article7>; also, see <https://ccnso.icann.org/sites/default/files/file/field-file-attach/2016-12/ccnso-nominations-icann-board-guideline-01sep16-en.pdf> for specific ccNSO procedures regarding the selection for Board Seats 11 and 12.

⁹Section 7.8(a)(iii) <https://www.icann.org/resources/pages/governance/bylaws-en/#article7>.

Name	Position	Start	End	Origin	Seat #	Gender	Region	Committees	Term Limit
Botterman, Maarten	Director	2016	2019	NomCom	Unknown	M	EU	Board Governance; Finance; Compensation	2025
Burr, Becky ¹⁰	Director	2016	2022	gNSO	12	F	NA	Accountability Mechanisms; Board Governance (Chair) Executive; Compensation	2025
Chalaby, Cherine	Chair	2010	2019	NomCom	Unknown	M	AF	Compensation (Chair); Executive (Chair)	2019
Deutsch, Sarah	Director	2017	2020	NomCom	8	F	NA	Accountability Mechanisms; Audit (Chair); Anti-Harassment WG (Chair)	2026
Disspain, Chris	Vice Chair	2011	2020	ccNSO	11	M	AP	Accountability Mechanisms; Compensation; Executive; Audit	2020

¹⁰Initial term expires at the AGM at ICANN66; re-appointed by the Empowered Community Administration per correspondence from the GNSO and subsequent correspondence from the ECA to the ICANN Corporate Secretary. See <https://mm.icann.org/pipermail/ecadmin/attachments/20190314/83368d74/Boardseat13notification-14March2019-0001.pdf> and <https://mm.icann.org/pipermail/ecadmin/attachments/20190314/2a60dc3c/NotificationofBoardSeat13Selection-20190314-0001.pdf> respectively.

Name	Position	Start	End	Origin	Seat #	Gender	Region	Committees	Term Limit
Doria, Avri	Director	2017	2020	NomCom	7	F	NA	Organizational Effectiveness (Chair); Technical; Audit	2026
Ibarra, Rafael Lito	Director	2015	2021	NomCom	1	M	LA	Organizational Effectiveness; Risk (Chair); Technical	2024
Jevtovic, Danko	Director	2018	2021	NomCom	2	M	EU	Finance; Organizational Effectiveness	2027
Koubaa, Khaled	Director	2016	2019	NomCom	Unknown	M	AF	Finance; Organizational Effectiveness (Chair); Board Governance	2025
Maemua, Akinori ¹¹	Director	2016	2022	ASO	10	M	AP	Audit; Risk; Technical (Chair)	2025
Roberts, Nigel	Director	2018	2021	ccNSO	12	M	EU	Accountability Mechanisms; Audit	2027
Sanchez Ambia, León Felipe	Director	2017	2020	ALAC	15	M	LA	Accountability Mechanisms; Organizational Effectiveness	2026

¹¹Initial term expires at the AGM at ICANN66; re-appointed by the Empowered Community Administration per correspondence from the ASO and subsequent correspondence from the ECA to the ICANN Corporate Secretary. See <https://mm.icann.org/pipermail/ecadmin/2019-March/000145.html> and <https://mm.icann.org/pipermail/ecadmin/attachments/20190329/3f345fb8/NotificationofBoardSeat10Selection-20190328-0001.pdf> respectively.

Name	Position	Start	End	Origin	Seat #	Gender	Region	Committees	Term Limit
Shears, Matthew	Director	2017	2020	gNSO	14	M	EU	Board Governance; Risk; Organizational Effectiveness	2026
da Silva, Ron	Director	2015	2021	ASO	9	M	NA	Board Governance; Finance (Chair); Compensation	2024
Sinha, Tripti	Director	2018	2021	NomCom	3	F	NA	Finance; Risk; Technical	2027

Table 1: 2019 ICANN Board (excluding liaisons and members ex-officio)

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ICANN Region	Count	Percentage
AF – African Region	2	13.3%
AP – Asia Pacific Region	2	13.3%
EU – Europe Region	4	26.7%
LA – Latin America Region	2	13.3%
NA – North America Region	5	33.3%

Table 2: Citizenship/Domicile of the 2019 ICANN Board¹²

Gender	Count	Percentage
Women	5	33.3%
Men	10	67.7%

Table 3: Gender of the 2019 ICANN Board¹³

¹²excluding liaisons and members ex-officio

¹³excluding liaisons and members ex-officio

3 Relevant ICANN Bylaws¹⁴

- Section 7.2(a)(i-v)* Composition of the ICANN Board;
- Section 7.2(b)* Requirements on the Nominating Committee for Board seats 1 – 8;
- Section 7.2(c)* SO/AC responsibilities in respect to the diversity of citizenship for Board seats 9 – 16;
- Section 7.8(a)(iii)* Terms of ICANN Board seats 7 and 8;
- Section 7.8(a)(vi)* Terms of ICANN Board seats 11, 14, and 15;
- Section 7.8(c)* NomCom notice of their selection of Board members;
- Section 7.8(d)* SO/AC notice of their election of Board members;
- Section 7.8(e)* Three consecutive term limit for Board members.

4 The Issue at Hand

The outcome of the Board Seat 11 election may compel the Nominating Committee to *fire* a currently serving Board member irrespective of that person’s merits and value on the Board.

This refers to the incumbents of Board Seats 7 and 8, whose terms end at the same AGM as the current holder of Board Seat 11, and who will both be eligible for re-appointment¹⁵. In the eventuality that this situation comes about, the NomCom will have no discretion, and cannot take the suitability of the candidate into account, nor take into account any adverse effect on diversity.

Per Section 7.2(b)¹⁶

At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five...

As seen in Table 2 on the preceding page, the Board currently consists of five members with citizenship of a country within the North America region; thus should the upcoming ccNSO membership election for Seat 11 result in the election of someone with the citizenship of a country in the North America region, the NomCom would have no choice but to *fire* one of the incumbents of Seat 7 or Seat 8.

With the current composition of the Board, this will occur if the ccNSO membership elects a candidate holding citizenship within the North America region. It should be noted however that this situation can occur at any time in the future with any SO/AC and any Geographic region.

¹⁴<https://www.icann.org/resources/pages/governance/bylaws-en/#article7>

¹⁵Avri Doria and Sarah Deutsch, both holding citizenship of a country within the North America region.

¹⁶<https://www.icann.org/resources/pages/governance/bylaws-en/#article7>

As can also be seen in Table 2 on page 5 no other ICANN Geographic Region is *maxed out*, indeed, several are currently seriously underrepresented.

Lastly, it should be noted that per the Bylaws (Section 7.8(d) for SO/ACs, and Section 7.8(c) for the NomCom), the names of successful candidates from SO/AC's must be formally transmitted to the Empowered Community Administration and the ICANN Corporate Secretary six months prior to the AGM at which the Board member-elect is due to take their seat. The names of successful candidates from the NomCom must be formally transmitted to the Empowered Community Administration and the ICANN Corporate Secretary two months prior to the AGM at which the Board member-elect is due to take their seat¹⁷.

5 Impact on the NomCom's Freedom of Action

The first significant issue under consideration here is the potential impact of what the ccNSO membership does in the election for Board seat 11 in 2019/2020.

No Geographic region may have more than five of its citizens on the Board. Further, per Section 7.2(b), the NomCom has to "give way" to the SO/ACs.

Because of the current Board composition, the ccNSO membership is in the odd situation of being able to choose to limit the NomCom's ability to act freely and independently.

The author doubts that the ability of an SO/AC to limit the NomCom's ability to act freely and independently was the intention of the framers of the current Bylaws. Nonetheless, this is the situation that the ccNSO Community finds itself in at the moment.

It seems that the ccNSO members will be confronted with an unanticipated burden as a result. The ccNSO can either act purely in its self-interest, ignoring any consequence that their action to electing a successor for Board seat 11 might have on the NomCom's ability to carry out its work, or it can acknowledge the unique situation it finds itself in, and act in a way that does not diminish the NomCom's ability to carry out its work during its 2020 selection cycle.

There is nothing in the Bylaws, nor in the ccNSO Election Guidelines, that addresses this particular issue. Nothing is preventing an eligible ccNSO Community member from the North America region from standing for election. However, in order not to adversely impact on the NomCom's obligation to select Board Members with ability and experience who can best serve the interests of the corporation and the whole Community, the reality for any aspiring candidate in the upcoming election for Board Seat 11 seems unambiguous; any community member seeking to run for Board Seat 11 and who is a citizen of a country in the North America region, should think long and hard about whether they believe they can better serve the Community than Sarah Deutsch or Avri Doria.

¹⁷For reference purposes, this is 22 April 2020 for the ccNSO, and 22 August 2020 for the NomCom.

6 Impact on Gender Diversity

The gender balance of the Board as of the conclusion of the AGM at ICANN69 is quite impossible to estimate, since at the time of writing the NomCom has not announced their selections for Board seats 4, 5 and 6 – the terms for which will commence this year¹⁸.

All three seats are currently held by men¹⁹, but two at least will be replaced due to term-limitation and non-application.

Edge-conditions with regards to Board gender diversity may be estimated however. If the ALAC and GNSO replace their current (both men) members by voting for women, and if the ccNSO elects a woman, and the NomCom selects three women for Board seats 4, 5, and 6, then the number of women on the Board would increase from five to eleven.

The other extreme would be if ALAC, the ccNSO, and the GNSO all selected men, and if two of those men are resident in the North America geographic region, it appears that the NomCom will have no choice but to *fire* both women Board members who are currently serving as Directors in Board seats 7 and 8. This would reduce the number of women Directors from the current five to three.

In the author's view, the best outcome for the ccNSO would be for the ccNSO members to elect a Board member who does not come from the North America geographic region, thus permitting the NomCom to act in an unfettered matter with regards to their (re-)selection process regarding Board seats 7 and 8. Further, it is the author's view that the ALAC and GNSO should also bypass potential Directors resident in the North America geographic region when filling their upcoming Director vacancies.

This section will be updated once the outcome of the 2019 NomCom selections become available.

7 Conclusions

Given that the North American region is currently *maxed out* with regards to Board representation, should the ccNSO members choose a Board Director (of either gender) from the North America region, this will compel the NomCom to *fire* one of the two current Board members serving in Seats 7 and 8, irrespective of whether this is in the interests of the corporation.

It should also be noted that the two at-risk Directors hold the following ICANN Board Committee Positions:

Board Member	ICANN Board Committee Assignments
Sarah Deutsch	Accountability Mechanisms; Audit (Chair); Anti-Harassment WG (Chair)
Avri Doria	Organizational Effectiveness (Chair); Technical; Audit

¹⁸ICANN66 21nd AGM (Montréal) – Scheduled for 17 – 22 October 2019.

¹⁹Maarten Botterman, Cherine Chalaby, and Khaled Koubaa.

The author submits the loss of either of these Directors would be a substantial loss to the Board, ICANN, and the Community²⁰.

Thus the author believes that it would be in the best interests of ICANN that the ccNSO not consider anyone resident in the North America geographic region for their upcoming election for Board Seat 11, and that ALAC and the GNSO adopt a similar policy for their upcoming elections as well.

²⁰Self-evidently, should the ccNSO Members select a Director who does not hold citizenship from the North America region, then the NomCom will be able to freely exercise its judgement in the best interests of the Community, and there will be no impact with regards to the selections regarding Seats 7 and 8.