

Reviewing the Cooperative Engagement Process
CCWG-Accountability work stream two subgroup
Discussion paper for the CCWG-ACCT Johannesburg plenary

The Reviewing the CEP subgroup of CCWG-Accountability will be asking the CCWG plenary for guidance during the CCWG meeting on June 25th in Johannesburg, South Africa. This brief paper is designed to summarize the subgroup's work to date and highlight potential issues for discussion during the plenary session.

What is the CEP?

The Cooperative Engagement Process (CEP) is contained in §4.3(e) of the ICANN Bylaws. It is important to note that §4.3 itself concerns the Independent Review Process (IRP). The CEP is designed to be the first step towards an IRP and is not conceived of as a wholly independent accountability mechanism.

The specific and complete Bylaws reference is as follows:

- (i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("CEP") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.*
- (ii) The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*
- (iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("IRP Mediator") after at least one CEP meeting.*
- (iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.*

The purpose (resolution of and/or narrowing of the area of dispute) of the CEP and the economic incentive for participating in this voluntary process remains largely unchanged from the pre-October 2016 Bylaws. The concept of an independent dispute resolution facilitator is new and is the result of work done during the CCWG-Accountability work stream one process.

Task of this subgroup

Section 27.1(b)(ix) of the ICANN Bylaws calls for the CEP to be "reviewed and developed" as part of work stream two. Recommendation #7 of the CCWG-Accountability work stream one report tasks the wider CCWG group with developing an IRP process, specifically citing the CEP, that is "governed by clearly understood and pre-published rules applicable to both parties and subject to strict time limits".

Development of the initial set of CEP Rules, and/or principals thereof, with reference to the material cited above, is the principle task of the Reviewing the CEP subgroup.

Work to date

One of the challenges initially confronting the subgroup was the opaque and confidential nature of the current version of the CEP.

ICANN currently publishes a table noting active CEP actions, along with a brief note concerning the subject matter at dispute (see, for example: <https://www.icann.org/en/system/files/files/irp-cep-status-14apr17-en.pdf>). Although a welcome change from earlier practice, simple notification was of limited value to our Review. At the request of the subgroup, ICANN Legal did provide additional archival data allowing for greater review of the timelines of previous CEPs. (<<http://mm.icann.org/pipermail/ws2-cep/attachments/20170301/a25a228f/ALLCEPRequests-0001.doc>>).

Faced with a lack of readily available data concerning past practice, the subgroup chose to conduct a series of interviews with community members, staff members and Board members with experience in or an expressed interest in the CEP. These interviews were conducted by subgroup members between 10 March and 1 June. Eleven interviews were conducted, with those participating promised anonymity in order to engender candid responses. Notes from all eleven interviews may be found in the Document section of the subgroup wiki page (<https://community.icann.org/pages/viewpage.action?pageId=59643292>).

During our past two meetings the subgroup has analyzed interview responses. Questions and concerns emanating from these interviews form the basis of that which we turn to the plenary for guidance.

Issues Under Consideration

As with other areas in the Accountability effort, the lack of trust between community members and ICANN permeates conversation concerning the CEP. It became apparent during the interviews that most respondents believed that one or more parties involved did not participate in good faith in past CEP's. The subgroup wanted to overtly recognize this fact and express the hope that a revised CEP will help improve trust levels between involved parties.

I. Purpose

The ICANN Bylaws state that the purpose of the CEP is the resolution and/or narrowing of the issues at dispute prior to the filing of an IRP petition. The concept of the CEP as a gatekeeper to the IRP is not something overtly mentioned in the Bylaws yet is something that repeatedly was mentioned or suggested as a concept during our interviews.

IRP's are notoriously expensive. Cost has been reduced as an initial barrier of entry to the IRP for aggrieved parties through work stream one reforms, leading to the concern that there will be a dramatic increase in the number of IRP filings. This would represent a major expense for ICANN. To what extent should the subgroup consider building the CEP Rules in a way that emphasizes resolution of the underlying dispute, obviating the need for an IRP, as opposed to identifying and narrowing the issues for an IRP?

II. Structure / Derogation

The need for flexibility in the CEP was emphasized by many interviewees. The value of the CEP was said to be heightened if flexibility was built into the Process.

One idea with significant support among interviewees was for there to be a variation of the CEP that excluded lawyers. ICANN Legal and the complainant's counsel would be excluded from the process; Instead, the complainant and the relevant ICANN staff members involved in the dispute at issue, along with a neutral third party, would participate in the CEP.

Should the CEP subgroup pursue the creation of this sub-version of the CEP? If so, what should be the trigger for establishing this version of the CEP and what other concerns should the subgroup consider in it's creation?

III. Third Party Neutral

ICANN's new Bylaws allows for the inclusion of an independent dispute resolution facilitator in the CEP. The facilitator is to be selected from the IRP Standing Panel.

The plenary has previously given the subgroup guidance that a form of structured negotiation was the preferred format for the CEP. It has been suggested by some interview respondents that the skill set for a third party convener focusing on negotiation is different than that required for an arbitrator or mediator under the IRP.

Should an alternative be considered for the CEP neutral other than that of utilizing the services of those already on the IRP Standing Panel?

IV. Timelines

The timeline relationship between the IRP and CEP, as well as internal CEP timelines, are issues the subgroup would like to bring to the attention of the plenary for consideration and guidance.

The subgroup understands that the IRP-IOT group has spent considerable time debating variations of IRP timelines, including a statute of limitations for commencing actions. Should filing for a CEP toll any such IRP commencement timeline requirement? If not, how do we ensure that parties filing for an IRP can take full advantage of the CEP, including the economic incentive for CEP participation, without endangering their ability to timely file for an IRP?

Under current practice, the duration of CEP's varies widely. For those CEP's for which we have timeline data the average CEP duration is 290.65 days, ranging from 22 days at the minimum to 1,150 days at the maximum. Recommendation #7 of the work stream one report calls for "strict time limits" for the CEP, yet interview respondents, particularly those from the community, expressed a desire for a more flexible timeline approach. Does the CCWG plenary have any guidance to give to the subgroup in this area?

V. Transparency

The current CEP structure is opaque. The negotiations themselves are private, transcripts and recordings are neither made nor released. The subgroup received disparate views from interviewees about the issue of transparency. There was the belief of some that opening up the CEP's for public view would eliminate much of the benefit of the Process as parties would be less interested in settlement and more interested in public posturing. On the other

hand, there were calls for complete transparency with respondents citing the interest of the community and other parties in CEP negotiations and outcomes. Any guidance the plenary would like to give the subgroup on the issue of transparency would be most welcome.

VI. Discovery

A number of community respondents expressed the view that ICANN Legal used the CEP to engage in pre-IRP discovery without divulging any information to the complaining party themselves. There were some calls for formal discovery procedures to be drafted for the CEP. Others felt that anything that would take away from the informal nature of the CEP, such as formal discovery rules, would be counterproductive. Any guidance the plenary would like to offer the subgroup on this matter would also be most welcome.

The Reviewing the CEP subgroup looks forward to discussing our work with the CCWG plenary in Johannesburg and to receiving input that will better inform our work going forward. Thank you for your consideration of the issues we will be bringing to you at that time.