

Reviewing the CEP WS 2 Subgroup

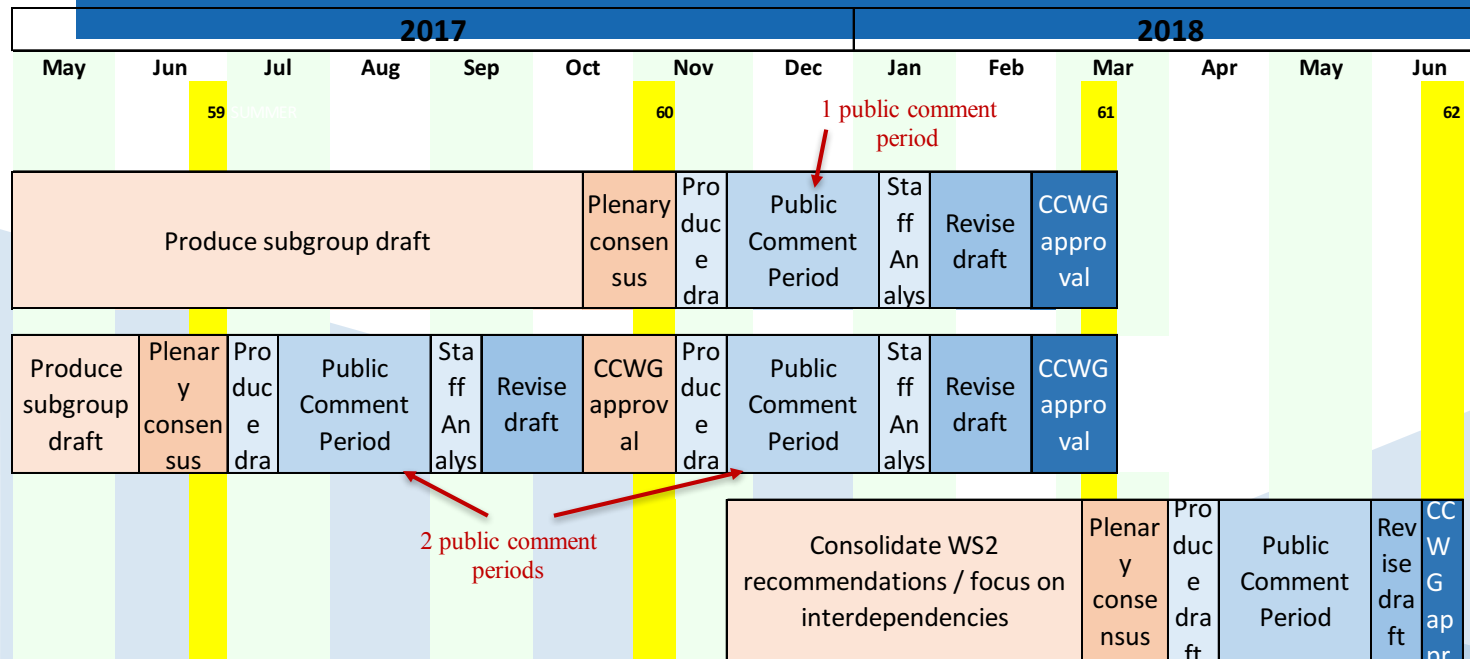
Meeting 4
June 6, 2017

AGENDA

- Introduction, Regrets, SOI's
- Timeline
- Bylaws / Mandate
- Review of Previous Work
- Interviews: Broad themes
- CEP Principles: Presentation, Deliberation, Decision
- Next Meeting

New Timeline

WS2 Revised timeline



- In order to finish the work within the FY18 timeframe:
- ICANN 61 (March 18) is the drop deadline for subgroups to complete their work
- ICANN 60 (Nov 17) is the drop deadline for subgroups to finalize their 1st draft
- Rec's drafted by ICANN 59 (Jun 16) allow for 2 public comment periods

CEP in the ICANN Bylaws

- Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS
 - (e) Cooperative Engagement Process
 - (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.

CEP in the ICANN Bylaws

- (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.

CEP in the ICANN Bylaws

- (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.

Bylaws Concepts

- Cost incentive to encourage participation
- Mediation provision (note timing and provider)
- CEP Rules (to be developed by the community)

WS2 CEP Scope

- In Recommendation #7 of the CCWG Accountability Work Stream 1 report, the group describes the independent review process, and under Settlement Efforts, paragraph 50, cites the following:
- The process must be governed by clearly understood and prepublished rules applicable to both parties and be subject to strict time limits. In particular, the CCWG Accountability will review the CEP as part of Work Stream 2. This is currently listed in the new ICANN Bylaws at page 135 item (b) (ix) as “Reviewing the CEP (as set forth in Section 4.3).”

WS2 CEP Charge

- Review the CEP
- Develop the CEP Rules

Previous Direction from Plenary

- Suggestion from plenary that we pursue some sort of “structured negotiation” (Shatan / McAuley)
- Review past CEP decisions (Greenberg / Best practices)

CEP Principles

- Guidance for CEP Rules
- Conceptual
- Final output / preliminary work of sub-group

CEP Principles

- Purpose of the CEP
- Commencement of Action / Variation / Structure
- Neutral Third Party
- Other participants/case merger
- Timelines
- Transparency
- Discovery

Interviews

- Eleven interviews conducted by Edward and Anna Loup
- Nine in Copenhagen; Two post Copenhagen
- Seven community members interviewed. All had previously participated in at least one CEP. All responded to calls in the plenary for assistance.
- Four Board / staff members with knowledge of / responsibility / interest in the CEP.

Interviews: Broad Themes / Consensus

- Has some positive purpose: No one interviewed would abolish the CEP provided certain aspects were not changed.
- Flexibility : one size does not fit all. The CEP should be designed so that parties are free to adapt the procedure to fit the needs of a particular case / situation.

Purpose of the CEP

- Why have it?
- Bylaws function

Purpose of the CEP: Interviews I

- The CEP was initially designed for and by ICANN legal to benefit them. If it is to be kept, it must be more neutral (SB)
- Question: What are we hoping to accomplish with the CEP?: 1) Settle disputes, or 2) Issue definition for an IRP? 1. The objective needs to be clearly defined (SB)
- Do we still need a CEP with the new IRP? (SB)
- In the best sense the CEP could be a fact sharing exercise (SB)
- First thing to do with CEP: create a statement of purpose (SB)
- With the CEP there is “no real there, there” (C)
- IRP is ridiculously expensive. If done properly CEP can reduce exposure and costs (C)
- Should lean towards informal on the formal / informal continuum, needs to be balance (SB)
- Believes CEP serves a purpose, don't blow it up, redefine it (SB)
- Principle purpose of the CEP is as a gatekeeper to the IRP (C)
- CEP is not an independent mechanism. It must serve the needs of the IRP (SB)

Purpose of the CEP: Interviews II

- Anything that can de-rail litigation or the more expensive IRP is to be favoured (C)
- Need to more clearly define link between CEP and IRP (C)
- Believes CEP is just a means of ICANN legal to figure out the other parties case; uses it for discovery (C)
- One problem of CEP: no real rules. That gives advantage to ICANN legal as they tend to dictate things (C)
- Keep goals, purpose as broad as possible, in keeping with flexibility goal (SB)
- Need to ensure this remains pre-irp, pre-litigation. We don't need to create an arbitration before an arbitration procedure (SB)
- CEP has utility as a turning point, where dispute is formalized, trajectory takes shape. This is one of it's principle values. (SB)
- Other principle value is it gets issues on the table (SB)
- You do it because you have to: economic incentive (C)
- CEP lacks standards: discovery, timeline, parties (C)

Purpose of the CEP: Bylaws

- Resolve or Narrow the Dispute

Commencement of Action/ Variations/Structure

- Independent filing
- File for an IRP with option of CEP
- “Small Claims” concept

Commencement of Action/ Variations / Structure: Interviews I

- The CEP should be optional, not required (SB)
- Needs better notification requirements; didn't know I was in one until it started (C)
- Must be a "continuous stream" CEP to IRP (SB)
- Went through one because if you don't you are on the hook for ICANN legal fee (C)
- Should eliminate economic incentives for participation: might work better if claimant was there because he wanted to be there. (C)
- If you have CEP it should be done in person not on phone: too artificial (C)
- Should be limits on number of people in room. Always felt outnumbered by ICANN staff (C)
- Need to limit number of reps in room. In the interviewees case two members of ICANN legal plus two staff were present on phone as opposed to the interviewee alone. (C)

Commencement of Action/ Variations / Structure: Interviews II

- One version of the CEP should be based on a small claims procedure: if the complainant is not an attorney and chooses not to be represented by one than the ICANN party should be the staff member(s) involved, not ICANN legal (SB)
- Hired counsel should not be allowed (C)
- Lawyers should always have a right to appear (C)
- Small claims concept” (non lawyers only, if situation allows) “makes sense”; good if ICALL Legal is not always the party on the other side of the table (SB)
- The lawyer excluded / mall claims proposal, as part of a flexible CEP, makes sense (C)

Neutral Third Party

- Bylaws
- Who?
- How?
- Opinion / Guidance

Neutral Third Party: Interviews I

- Third party should be in room. Not sure who. There should be an option for the third party to give an opinion on the strength / lack of of the claim, if requested by claimant. This opinion would not be released without the consent of all and should not be used in an IRP. (SB)
- There should be a third party in the room. Initial thought was the Ombudsman but upon further reflection no: should be someone else, but who? (C)
- Should there be a third party in the room?: 1)Who would it be 2) Would need independent judgement, 3) Fear is the addition of a 3rd party would inhibit the ability of parties to talk candidly and reach agreement (SB)
- Third party: Yes. Standing panel (C)
- Third party in room is a good idea; should be selected from a standing panel as “newbies” would complicate things – need to have knowledge of ICANN: structured mediation (SB)

Neutral Third Party: Interviews II

- Third party: 1) should be paid by ICANN, 2) should be allowed to examine facts, 3) should be “soft mediator” “structured negotiation”, 4) Mediator should be allowed to make statement at end of CEP: Does the case have legs or is it frivolous? (SB)
- Having a third party in the room: possibility in bylaws, probably doesn't matter much but if there is a third party in the room that person MUST know the issues involved. Getting a subject matter novice up to speed would be both costly and time consuming (SB)
- Opposed to having third party render any sort of decision or end of cep advice on strengths/merits of positions (SB)
- If third party needs to be a mediator, not arbitrator (SB)
- Does not like the idea of third parties. Why have a mediation before a mediation? (C)

Neutral Third Part: Bylaws

- (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.

Other Participants/ Case Merger

- Why?
- Right / Invite
- Merger of cases

Other Participants/Case Merger: Interviews I

- No 3rd party participation or notification: problem (C)
- 3rd parties with interest in proceedings must have notification and standing (C)
- When dispute involves a challenge to a policy or procedure developed by an AC/SO, WG or other community based policy development process, that SO/AC/group must be notified and have a right to participate in the CEP (C)
- Parties may bring in “material and relevant” 3rd / 4th parties, all of whom are bound by confidentiality (SB)
- Need CEP mechanism that may “throw back” issues to community groups who may have promulgated the dispute at issue. (SB)
- CEP just between parties involved; not necessary to bring anyone else into the room (C)
- third parties should not have right of access: would create an entirely different type of procedure (SB)
- If both parties agree, though, that a third party can be invited in then that is OK (SB)

Other Participants/Case Merger: Interviews II

- Should be able to merge multiple cases and engage in “horse trading” (C)
- My case concerned merged claims, multiple parties (C)
- Consolidation, joinder of related cases should be possible (C)
- Should allow for merger of different disputes and negotiation ('horse trading') that includes other issues. (C)

Timelines

- Deadlines: Hard, Soft, None
- If soft, how to extend?

Timelines: Interviews I

- There should be no hard deadlines. One of the benefits of the CEP is it allows parties the time to resolve differences. (C)
- Found CEP was good for stalling while waiting for other events that impact the claim external to the claim to take place (C)
- What are the appropriate timelines? A balance needs to be struck: need end point deadlines but perhaps flexibility to waive with consent of all parties. Do not want any party to use the CEP as a “perpetual settlement phase” (SB)
- Recognize that ICANN has the fear of being declared in bad faith if it forces a CEP to close. (SB)
- Principle value of CEP was delaying things while other proceedings occurred that had an impact on the dispute this complainant was involved with (C)
- Timeline: flexibility encouraged but should have a firm deadline by which complainant should have to request an IRP (C)

Timelines: Interviews II

- Statute of limitations / deadlines are necessary so parties don't prolong the dispute (C)
- Timing needs to be considered to prevent sbuse (SB)
- Time frame completely ignored by ICANN legal (C)
- Deadlines have value in that they can defeat delaying tactics. Sometimes delay is good, sometimes bad (SB)
- Have deadlines, can shift if both parties agree (SB)

Transparency

- Notification of proceedings
- Notification to parties (community and / or other)
- Notification of Outcome (how / who)

Transparency: Interviews I

- Need to notify the world of the the parties who are in the CEP, not necessarily the topic of dispute (C)
- Needs better notification requirements; didn't know I was in one until it started (C)
- Notification of any agreement made through a CEP should be made public (C)
- Confidentiality of proceedings: standards? (SB)
- The more formality the greater the need for formal transparency (SB)
- No 3rd party participation or notification: problem (C)
- 3rd parties with interest in proceedings must have notification and standing
- Does NOT want proceedings to be public: notification of proceedings, fine for notification, proceedings should be private although not secret (to avoid public posturing) (SB)

Transparency: Interviews II

- Need data on both CEP and IRP. Data collection should be built into the system if it is not already (SB)
- Any agreement that comes out of a CEP should be made public (SB)
- All parties need to be bound by confidentiality (SB)
- Lack of recording / transcript makes it difficult to hold anyone to anything. Felt had “understanding”, only to be told misunderstood. (C)
- If CEP is to be continued needs: 1. Transparency, 2. Clear rules, particularly regarding discovery, 3. Transcripts must be made and distributed to all involved. (C)
- Too much transparency would defeat the purpose: informality, openness key as a pre-litigation device. (SB)
- Transcripts should be made with confidentiality guarantees required (C)

Discovery

- Formal / Informal
- Request for Documentation

Discovery: Interviews I

- Felt that ICAN Legal used the CEP for discovery purpose (C)
- Needs to be some sort of disclosure procedure short of full discovery (C)
- Formality versus informality: fear that formal rules for informal process will hurt the informality (which is considered a positive) (SB)
- CEP could be more useful if there were formal discovery requirements (C)
- Was never asked for documents by ICANN (C)
- CEP lacks standards: discovery, timeline, parties (C)

Discovery: Interviews II

- CEP should not be allowed to be used for purposes of discovery (SB)
- There must be discovery rules for the CEP (SB)
- Believes CEP is just a means of ICANN legal to figure out the other parties case; uses it for discovery (C)
- If CEP is to be continued needs: 1. Transparency, 2. Clear rules, particularly regarding discovery, 3. Transcripts must be made and distributed to all involved. (C)
- Should have some formal rules of discovery / non discovery (C)

Next Meeting

- Tuesday June 13, 2017
- 13:00 UTC