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## ICANN Transcription

### EPDP Specific Curative Rights Protections IGOs

**Monday, 28 February 2022 at 15:00 UTC**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. Attendance and recordings of the call are posted on agenda wiki page: <https://community.icann.org/x/L4H3Cg>

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the EPDP Specific Curative Rights Protections for IGOs taking place on Monday, the 28<sup>th</sup> of February 2022 at 15:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom Room. If you're only on the telephone, could you please identify yourself now? Hearing no one, we also have no received apologies for today's meeting.

All members and alternates will be promoted to panelist. When using chat, please change the selection to everyone in order for all to see the chat. Alternates not replacing a member are required to rename their lines by adding three Zs at the beginning of your name and at the end in parenthesis the word alternate, which means you're automatically pushed to the end of the queue. As a

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reminder, the alternate assignment form must be formalized by the way the Google link. The link is available in all meeting invites towards the bottom.

Statements of Interest must be kept up to date. If anyone has any update to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please e-mail the GNSO secretariat.

All documentation and information can be found on the wiki space. Please remember to state your name before speaking. Recordings will be posted on the public wiki space shortly after the end of the call.

As a reminder, those who take part in the ICANN multistakeholder process are to comply with the Expected Standards of Behavior. With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN:

Thank you, Terri. Good afternoon, good morning, good evening, everybody. Welcome to call number—what does it say on here? 42. Gosh. Yes, 42. Wonderful. Berry has of course got an emergency placeholder meeting in place. That would be a real shame. Hint, hint. Okay. Welcome, everyone. Let's get started. Good to see people here. Berry, you're first off with the review of the work plan. Off you go.

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BERRY COBB:

Thank you, Chris. The work plan was sent out with the agenda, basically a written form of what we discussed verbally on last week's call. Today, obviously, we're going to review through the recommendations package and review through the policy impact analysis, kind of the proposed measurements. We'll get into more details around that.

Shortly after today's call, we're meeting with the small team to review through some principles for the arbitral rules. Jeff did send in some material for that team to consider. Thank you, Jeff. Next Monday, hopefully we won't need it but that's the kickoff of ICANN73. And we'll know more at the end of today's call whether we're going to need that emergency meeting or not during ICANN73.

The recommendations package that we sent as part of the agenda is basically a compilation of all of the recommendations that we've preliminarily marked as stable. Of course, there'll probably be a few edits coming out of today's call. But regardless of those edits, the overall substance of or the intent of the recommendations is largely set. So that should be used as a vehicle to convey or message to your respective groups about where this EPDP is going as we move towards finalizing these recommendations. The primary aspect of this is to prepare for our consensus call process and in discussing the recommendations with your respective groups. If you think you still will have concerns with those, this is a time for you to start discussing that and prepare minority statements, if any.

The week after ICANN73 is our meeting 43. We'll review the arbitral rule principles from the small team that's meeting today,

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an overview of the final report. So hopeful that towards the end of this week, we will import the recommendations package and I'm already starting to make redline edits off of the initial report, but essentially produce and deliver the first draft of our final report so you can review that between now and the 14<sup>th</sup> of March. After the call on the 14<sup>th</sup> of March, the chair will send out an e-mail to the list with his initial consensus designations. We can talk about the consensus call process in more detail on the 14<sup>th</sup>. But in essence, there will be a level of consensus assigned to each of the recommendations for you to begin to collaborate with your groups about those proposed consensus levels.

We'll also be initiating a line numbered version of the final report to allow the team to provide input on non-substantive edits, things like grammar, or spelling mistakes, or changes to language that may help improve or sharpen the points being made. But in essence, you'll be given a PDF document with the line numbers, and we're going to have a Google sheet that will allow you to enter in the line number and your proposed edit for that.

Then, moving on to meeting 44, we'll review those non-substantive edits as required. Hopefully, we won't have any "can't live with" items but that's basically we're forming down to the conclusion of the consensus designations. So the team, through the 14<sup>th</sup> through the 21<sup>st</sup>, if you do have concern about any of the chair's consensus designations, the sooner you alert the team, the better. So hopefully you'll communicate on that over the list and not save it for the meeting. But assuming that there are any issues with those designations, we will attempt to work through those on the 21<sup>st</sup> of March.

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The 28<sup>th</sup> of March is meeting 45, where, again, just a little bit more time for a final review of non substantive edits, and where the chair will state the final levels of consensus.

Then that takes us into the first week of April. Right now, we don't think we're going to need a meeting 46. But if we hit road bumps between now and then, we have the ability. It's already on our calendars to meet if we need to. And of course minority statements will be due—about 22, 59—that day so that'll give staff enough time to append those statements to the final report and submit it to the GNSO Council.

You may be asking why the 4<sup>th</sup> of April. The 4<sup>th</sup> of April is the GNSO Council's motions and documents deadline. This date was picked a while ago. But if for any reason we need an extra day or two, it's not critical. I don't believe that there's going to be great urgency for the Council to consider the final report at its April meeting. It would more likely be May before any motion is submitted for the Council. We may append a draft motion for them to look at but I don't believe we'll be doing any formal submission of the motion for the April meeting. But that's our target.

Any questions, comments, concerns about our work plan ahead of us? Correct, Paul, yes. Okay. So that's it for the work plan. Let's move on to the substance of our agenda, which is to review the recommendations as a package.

CHRIS DISSPAIN:

Super. Thank you. Who's going to take us through this?

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BERRY COBB: I think Mary will drive us.

CHRIS DISSPAIN: Mary will drive us. Excellent. Mary, just before you start, John McElwaine, if you are able to promote yourself, if Terri sent you another invitation, just to remind you to promote yourself up to panelist, unless there's a reason why you can't as an attendee. Thank you. So, everybody, here we go. Mary, over to you.

MARY WONG: Thank you, Chris. Hi, everyone. So I guess this is pretty self-explanatory. In line with what was agreed last week, we went away and we put together all of the recommendations as they are to date based on your review of the public comments, based on your discussions over the past few months into a single document, really just so that everyone can see how they flow from one to the next, see if there's anything missing, any gaps, any parts of it that don't seem to be as clear as they could be, or that don't work with some of the newer language from another recommendation.

This is particularly important because, as you see from this document and as was the assumption along that all this time with the discussions, we are presenting to the GNSO Council essentially a single, integrated, interdependent package of recommendations. And so to that end, we've done a couple of things before we go into the text of the recommendations. One, if you see these opening paragraphs—and I've annotated them with some comments to the side, which again are pretty self-explanatory—they are taken largely, I would say, 80-90% from

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what we had in the initial report, in that, first of all, it lays out some of the background for our work, which is the original Recommendation 5 from the previous Curative Rights PDP. Secondly, it also addresses or it states that we believe these recommendations address the GNSO Council's instructions to us, especially as regards consistency with the four recommendations from the prior PDP that the Council did actually approve.

So the opening paragraphs here, like I said, are substantially similar to what we had in the initial report, including the emphasis in the third paragraph, which was taken from another part of the initial report as well. So the idea, if you remember, our initial report is that there's an executive summary which basically tells the reader what we've done. And before we get into the recommendation text itself, there's some introductory text and that is what I've just described to you, which is the first three paragraphs here. As I said, the important point is that it is a single, interdependent package. The significance of this is not just obviously the flow of our recommendations but the fact that under the GNSO's own rules, the Council is strongly discouraged from picking apart a set of recommendations that a PDP working group or an EPDP team has said in its report is integrated as we've done in this case. So that's the opening and introduction.

Going into the text. None of this should really be surprising. But the text from Recommendation 1 is about the same issue or topic that we dealt with our initial report, that is that we are covering a definition of IGO complainant. This was text following the initial report that Paul, Susan, and Brian worked on over a series of weeks. So the final text is here in Recommendation A which is in

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three parts. So basically, if an IGO were to submit a complaint under either the UDRP or the URS, it would have to fulfill one of the three possible criteria here in (i), (ii), or (iii).

I'm just going to pause there for a second to see, Chris, if anybody has any questions, comments, or if you do.

CHRIS DISSPAIN: I don't. It's the text we've agreed before, so I should think it shouldn't be controversial. Thanks.

MARY WONG: I see a question from Jeff in the chat. "Are we going to explain why we changed the definition?" That's certainly up to the group. From the staff's perspective, for purposes of the final report, it seems sufficient to put in the section that we have under deliberations, which will follow this recommendations text, the usual that we did consider the public comments that a small team worked on updating it and that the final text reflects the EPDP team's agreement, assuming we have consensus. I see what you're saying, Jeff.

CHRIS DISSPAIN: Yes. Can we deal with it when we get to the part where it talks about how we got to where we got to? Well, maybe that's next. Okay. Move on, Mary.



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MARY WONG: You're right, Jeff. There were other internal discussions. And again, we can describe them briefly. We don't believe that it needs to be particularly lengthy simply based on the fact that there was work and that there was agreement ultimately as to why this worked better than the original formulation.

CHRIS DISSPAIN: Rather than try and wordsmith on the call, let's accept Jeff's point that it might be good to go into a little bit of detail. And Mary, take that away as an action item.

MARY WONG: We will do that.

CHRIS DISSPAIN: Jeff can look at it when it comes back. Thanks. Carry on.

MARY WONG: The second part of this recommendation is in B and it talks about how an IGO complainant may show rights in a mark. This is a topic that was discussed extensively in the initial report. The only substantive change, I believe, is in the last sentence which is, "Such use shall not be a token use." That was a recommendation from the small team. I don't know if anybody would like to comment or speak to that. But that is the substantive change from an early version. Seeing nothing as of yet.

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CHRIS DISSPAIN: It was agreed by the small team. So I think we're all fine with that, I think.

MARY WONG: That's right. Thank you, Chris. What we didn't want to highlight is the paragraph that follows, which is not part of the text of the recommendation. It is part of the explanatory text. This was an issue that was touched on in our initial report as to the effect of our Recommendation 1 on Recommendation 2 from the prior PDP. And the small team has agreed on the text here which was square bracketed because we think that this is something that the EPDP team should discuss and should come to agreement on as to whether to include it, not include it, or to include some version of it, because it does touch on whether Recommendation 1, as we have formulated right now, affects Recommendation 2 from the prior PDP.

CHRIS DISSPAIN: I don't want to spend hours down this particular rabbit hole. But is it not correct that one of the requirements of our work was that we wouldn't consider the other recommendations? So I'm not sure that it is for us to say that this is the case but rather for the Council to reach its own conclusion. Am I wrong about that, Mary?

MARY WONG: No, Chris. That's precisely why we bracketed this for the team because the Council's instructions were that any solution this team comes up with should be generally consistent with the recommendations the Council had already previously adopted,

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which of course includes the Recommendation 2 that's highlighted in this sentence.

CHRIS DISSPAIN: My feeling is that it's not for us to say. And if we do say it, then we run the risk of simply being dealt with by saying, "Well, it's out of scope, you shouldn't have done it." I think it stands alone as a sensible recommendation. I don't think it's necessary for us to say anything about Recommendation 2. Although, Jeff, you've made a point in the chat. So do you want to just address that?

JEFF NEUMAN: Yeah. I think whether it goes as an official recommendation or just in the deliberations or not, my comment is that the Council is going to look to us for pointing this kind of stuff out. So perhaps it goes in a cover note to the Council explaining it. But yeah, we shouldn't just assume that the Council is going to figure this out on its own.

CHRIS DISSPAIN: So as a principal, I don't have a problem with making the point in some sort of note in the sense—this is just off the top of my head and I'd like the team to think about this—but it seems to me that we could say something like this recommendation is critical to the weave of all of these recommendations. Whilst we could say something like, it may have an effect on the Council and the Board's consideration Recommendation 2 rather than the Board no longer needs to consider it, which I think is a bit of a bold and probably unnecessarily adversarial statement. Jeff, does that

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make sense to you? If we agree, we can bounce some wording around offline to go into the—

JEFF NEUMAN: Yeah, that's fine. Thanks.

CHRIS DISSPAIN: Okay. Cool. Unless anyone has a strong objection to that, I think we're going to take that under advisement, Mary, when that comes out of this section, but we're going to put it to one side and take it under advisement that some wording needs to be worked on by the team to come back at our next call to deal with that particular point. Fair enough?

MARY WONG: Sure, Chris. I did raise my hand to follow up on Jeff's comment. I don't know if Steve or other members of the staff have spoken with the Council leadership to plan this out in April. I believe that typically, at least recently, when PDP groups have concluded their work, there's usually a small presentation, sometimes a webinar, for the Council so that they understand the recommendations and why they were made. I see Steve has said, "Not yet," which doesn't surprise me because obviously we're only in February at this point. That may be a good place to point out to them, the reasoning that you and Jeff just discussed.

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CHRIS DISSPAIN: It will be. And I think something still needs to go into the document at some point. But let's not spend any more time. Let's take that one there.

MARY WONG: Okay. I did have one other comment about this, though, Chris, if you'll indulge me.

CHRIS DISSPAIN: Yeah, please.

MARY WONG: I would think that the small team chose that the language here deliberately—this is not to say that Recommendation 1 obliterates or reverses the old Recommendation 2. What the effect would really be that the previous Recommendation 2 would really have not much of a practical use for IGOs if they can use, in fact, the definition that we've come up with.

CHRIS DISSPAIN: So I think that the key point here is you are quite correct. And I think the key point here is thus, the ICANN Board no longer needs to consider it is definitely not something we shouldn't be saying. But I do think that the point we should be making is exactly what you just said, which is that in essence it means that whilst Recommendation 2 can stand, it's not overturned by this, it just becomes redundant.

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MARY WONG: Exactly.

CHRIS DISSPAIN: I just think if we say that separately somewhere else, then that's the key. But the Board no longer needs to consider it is not the right thing to say. But to say that it effectively means that whilst Recommendation 2 can remain, it may be seen to be redundant is fine because that's not overturning it, it's not changing it, you can still stay there. Okay?

MARY WONG: Thank you, Chris. I just wanted to make sure that the team understood that and was in agreement with that view. So now we're at Recommendation 2, which, again, topic was talked about extensively, which is exempting IGO complainants as defined—so not necessarily all IGOs, just IGOs that meet the definition and who can file under this process—that they are exempt from the requirement that speaks to mutual jurisdiction under the respective sections of the UDRP and the URS rules.

So this has been fairly stable text for the last couple of weeks. The change that we made recently is in B. I can pause here for a second just to let people read it. But we actually have not changed this text since the last time that the group saw it, I believe. And really what it does is that it simply says that the provider has to provide the respondent at the time it notifies the respondent that a complaint has been filed of certain information that's laid out in (i), (ii), and (iii).

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CHRIS DISSPAIN: We discussed this at some length last week and this is the text that we settled on. It makes it abundantly clear that you can still go to court, makes it abundantly clear that you can agree to arbitration, and everybody seemed to be happy about that last week because it simply means that all it's doing is saying, "These are your rights. This is a statement of what you're entitled to do." It makes sense from the point of view of providing information. So yes, that looks fine.

MARY WONG: Similarly, we have not changed the explanatory text, which, to your point, Chris, was also reviewed and discussed and, I believe, agreed on by the team a couple of weeks ago.

CHRIS DISSPAIN: Yes. Hang on. Just go back for a bit and let people read it. Yeah, certainly makes sense to me anyway.

MARY WONG: And it may be that in reading it a couple of times more that someone might find something. Maybe from the staff side, we've read it quite a few times so we might need to give it a break for a week or so and come back to it. But as you'll see, basically, the recommendations continue to follow the sequence that we try to follow for the initial report. What happens when you file from the complainant's perspective? So you're an IGO complainant, Recommendation 1 says, "You've got to fulfill that criteria." After you file, the notice goes to the respondent. And Recommendation 2 does say you don't have to agree to the mutual jurisdiction

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clause if you're an IGO complainant and the respondent gets notified with all of this additional information.

I'll say here that in our initial report, we did break out these recommendations a little bit. So we actually had a separate Recommendation 2 that talks about interdependencies. But given how we've laid this out, we've essentially been able to do away with that separate recommendation saying that it's interdependent and simply putting actual recommendations text in as numbered recommendations. So, if anyone is wondering why we had six recommendations and ended up with five in the draft final report, it's not because we took away a topic or an issue. It's simply because the discussions played out in such a way that we could present all of the five proposed final recommendations as one package.

CHRIS DISSPAIN: Thanks, Mary. Let's go on to 3.

MARY WONG: All right. Again, 3 and 4 are topics and texts that this group has discussed quite extensively in the last few weeks. They deal with a similar issue, which is the arbitration option. Once a UDRP proceeding or a URS proceeding is concluded and the panel's initial decision was in favor of the complainant.

As with the initial report, the reason why we're dealing with this same issue in two separate recommendations is that Recommendation 3 deals with arbitral review following a UDRP proceeding, whereas Recommendation 4 deals with the topic



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following a URS proceeding. This is what we did in the initial report. And while much of it follows the same text and language, there is one difference, for example, in a URS that seemed to be neater and clearer if we did it separately. And that is because under the URS, there is a built-in internal appeal mechanism. And it was just too messy to try and deal with both types of proceedings in one. Berry has highlighted that part, I think. So we go back to 3, Berry.

CHRIS DISSPAIN:

Back to the beginning. So just to be clear then, whereas we've previously been talking about Recommendation 3 and 4 as being the main one. We are now saying 3 has become 3 and 4, and what was 4 has become 5.

MARY WONG:

What was 4 and 5 became 3 and 4, and what was 6 became 5.

CHRIS DISSPAIN:

Yeah, sorry. Yes. That's what I meant. Okay. Sorry, you guys for the first blue, and then I want to talk about B. So you want to just deal with A first?

MARY WONG:

Certainly. And again, I've put in the comment balloons here to let you know what we changed from the last text that this group saw. From our perspective, the changes are not necessarily substantive in nature. They're more textual in nature. So, for

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example, for A, there is no change to the requirement. The recommendation is simply a textual change where rather than saying “in the event the registrant also agrees,” we simply just made it easier and simpler and said “if the registrant also agrees”.

CHRIS DISSPAIN:

Okay, good. On B, I'd like to suggest that we take that whole paragraph that's marked currently highlighted out and replace it with a paragraph that refers to rather than goes into detail of the guidelines that we're going to put together, can we have an annex that has the guidelines in it, Mary? Does that make sense? Or an appendix, whatever the right expression is in this document. So the B would say, “Guidance is provided for the Implementation Review Team in Appendix A or Appendix B in respect to overarching arbitral rules,” something like that. Does that make sense?

MARY WONG:

We certainly can, Chris. As Berry is saying in chat, we can do it as implementation guidance. Typically, we just have the implementation guidance in the text somewhere here following this recommendation, and it can point to an annex. We can simply say, “Please find implementation guidance in the annex.”

CHRIS DISSPAIN:

Yeah. I don't want you to break up the flow of the reading the recommendations. I think it becomes incredibly complicated to do that. So I'm happy for it to refer to, I guess, as you've said, implementation guidance referring to an annex, if that works,

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unless anybody has any objection to that. But it just seems to me a sensible way forward. Thanks.

MARY WONG: Thank you, Chris. The main point is really just to make sure that we capture in this particular flow that the annex with the principles, it flows from or is part of the recommendations that we're making.

CHRIS DISSPAIN: Absolutely. I just don't think it's necessary to break up the flow of the recommendations with that. I know you mentioned, but just so that everyone knows, there is a meeting of the small group following this call. We do have some text to look at to go through. I'm hopeful that we'll be able to knock that into shape for consideration by everybody. I don't think it's particularly controversial for consideration by everybody on the list in the next few days so that we can address it formally on our call whenever it is, 14<sup>th</sup> of March. Thanks, Mary, back to you for the next changes or wordsmith. Oh, Justine's hand is up. Justine, go ahead.

JUSTINE CHEW: Thank you, Chris. Are we moving on to C?

CHRIS DISSPAIN: We are moving on to the next bit, yes, if you want to. Did you want to talk to C?

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JUSTINE CHEW: Yes, please.

CHRIS DISSPAIN: Go ahead.

JUSTINE CHEW: Okay. This is probably just a wordsmithing thing. The challenge is many, if not all, of these sentences are very long. You really need to pay attention to the punctuation to understand it. I guess us being the group that's been looking at this for a long time, we understand what we're saying, but I think it helps to provide clarity as much as possible for people who are not in the group and are reading this too. Just to cut a long story short, if Part C references two parties basically, if I understand it correctly, which is the registrar and the registrant. I mean, obviously, it also mentions the IGO complainant, but if you look at the fourth line where it says it receives official documentation, so forth, so we know that it there is referring to the relevant registrar, right? And then it goes on to the next slide where it says in either its location or the location of the other. Now the second, it's become quite confusing as to which party is referring to. So if I could just substitute and put in the actual party, that would be lovely. Thank you.

CHRIS DISSPAIN: Thanks, Justine. You're right. Actually, to be honest, that really should be two sentences. Mary, I don't want to get into it now but it's an incredibly long, convoluted sentence with far too many commas and things. But I think Justine is right. So just have a play with that. But I also think if you can break it into two sentences, if

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we break it after “rendered in the IGO complainants favor,” full stop, and then “The registrar will stay implementation if within that period.” And then that makes it two sentences which is much easier to read. And then it just needs to be clear, as what Justine has said, which its location is. But if you can take that offline and deal with it for us, that will be great. Okay?

MARY WONG:

Absolutely. Thanks so much, Justine. It was a very long sentence and now rereading, I was thinking, “Why didn’t I even think about that?” So thank you for that.

In terms of again sequentially, as you said, Justine, C speaks to what the registrar has to do. If it does get noticed that there is court proceedings or arbitration commenced, D then speaks to the situation where indeed there is a request or notice of arbitration. And again, this is where the notice is given to the registrar and it simply continues the stay that the registrar would have implemented in the first place. Taken together and if you look at the totality of our recommendations, it all this makes quite clear that the registrant can indeed commence court proceedings at any time, obviously, but also that it can first go to court before initiating arbitration, if it so chose.

CHRIS DISSPAIN:

Okay. Do you want to take us to E now?

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MARY WONG: Yes. So no change to C. Then E is okay. So, the registrant goes to court. The first change here is very, very minor. You might recall that there was a discussion as to whether we want to say with the result and the result. It just seems easier to say “and the court declines”. So that seems quite simple to us.

The second one is at the end. It’s the blue comment box. All we’ve done really is just rephrased it to hopefully read more clearly in a way that C probably did not up to this point.

CHRIS DISSPAIN: Yeah, that makes sense to me. That’s much clearer.

MARY WONG: Okay. Finally, here’s where the less wordsmithy and somewhat more substantive changes, although not entirely were made. There was some discussion last week about the wording. Everyone agreed with what F was supposed to say, but the wording seemed clunky, so we’ve essentially rephrased it to simply again require that the registrant notify the registrar before it starts in an arbitration proceeding. And again, the registrar has to notify the IGO complainant. The change in the second sentence is that where previously we had “The registrar shall promptly notify,” we’ve removed the word “promptly,” again in response to last week’s discussions. We think that the two sentences here read more clearly now.

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CHRIS DISSPAIN: They certainly read more clearly to me and I don't think there's any substantive changes, just much clearer text and far less wordy.

MARY WONG: Right.

CHRIS DISSPAIN: Okay. So then 4 now is exactly the same.

MARY WONG: It is exactly the same.

CHRIS DISSPAIN: So two things. One is obviously make sure that any changes you make to B. In the previous one, I made to it in this one. Just go back to the previous one for a second. So it's not exactly the same as it because if you—D is different, right?

MARY WONG: In respect of the in-built appeal under the URS it's—

CHRIS DISSPAIN: Come back down to the URS again, please. Okay. So A, B, and C are the same. Are they?

MARY WONG: Yes, they are.

CHRIS DISSPAIN: Right. And then D is not.

MARY WONG: Right. In fact, D and E are not because of the effect of the URS proceeding. One is that the domain name gets suspended, and so the registrar is no longer in the picture. Secondly, there is the possibility of an in-built appeal that the registrant can use under the URS.

CHRIS DISSPAIN: Just leave that text there and let people read it for a bit and see if anyone has an issue with it. It makes sense to me. Just to be clear to everybody, no need to necessarily deal with this today in a sense, as long as nothing leaps out at you. But you will have a chance to consider it online. And yes, Justine, you're right. C is different too because of the suspension. But all of that said, it seems to me it makes sense. I don't see any hands at the moment. Have a couple of minutes for people to read it. Okay. I think we're fine, Mary. Let's move on to 5.

MARY WONG: Fifth and final recommendation. It's been a while since we looked at this. No change here from the last table text. Again, the first option or the choice is that the party should mutually agree to the applicable law for the arbitration, if there is one. And the rest of the recommendation goes to dealing with a situation where the parties do not, in fact, reach such mutual agreement, and then what

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happens. Also, the case where neither law provides for a suitable cause of action, then it reverts to the tribunal to make the determination. And I believe this was agreed several weeks ago.

CHRIS DISSPAIN: Okay. So just to be clear, Berry, what happens next? Everyone gets to look at this for the next two weeks, right?

BERRY COBB: Kind of, sort of, but not really. No. So Mary will make the suggested edits that we just talked about to this particular document. And in parallel, as I noted, at the beginning of the call, I'm updating the final report or redlining the initial report, making it ready for the final report. And the next version you're going to see is this whole document imported into the first draft of our final report for you to consider the text.

CHRIS DISSPAIN: When will we get that?

BERRY COBB: No later than Friday.

CHRIS DISSPAIN: Okay. That will include the amendments to the main text that we've discussed today, which will be marked as amended and will include the rest of the text.

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BERRY COBB: Correct.

CHRIS DISSPAIN: The idea is that—can you go back to your chart of events, please? The next few days, once you get the document, really, is the time to start thinking about if anyone really does have any redlines on this, anyone can't live with, because that's when we're going to need to talk about passing consensus and minority reports and stuff like that. So, think about that. Mary, go ahead.

MARY WONG: I was just going to say that obviously the final report will have to be in a particular format. But in terms of substance, we're not anticipating major changes from what you saw, so hopefully it won't be too tough to get through it. But in addition to the updates to take into account, this group's review of public comments, and obviously attendance and so forth, I don't have the actual wording in front of me but I think we are making an update to the section where we talk about metrics or how to look at the effectiveness of the policy. That was based on this group's discussions as well. So I believe that may be the only or one of the very few substantive changes.

CHRIS DISSPAIN: Sure. Okay. So by the end of this week, this document, what we've seen today, slightly amended pursuant to the discussions we had, wrapped up in the full report, the first draft to the final

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report will come out. I'm hopeful that what will also come out by the end of the week, if it doesn't come out at the end of the week, so by the beginning of next week will be the arbitral rules, principles from the small team. And there will be a placeholder in the final draft document where those in addendum thingy where those will sit. That means that on our call on the 14<sup>th</sup>, if anyone's got any real issues with the arbitral rules, if you could bring it up on the list, that would be really helpful at least so that we don't get surprised at the call on the 14<sup>th</sup>. We go through them on the 14<sup>th</sup>, we do an overview of the final report, and then we move on from there with the consensus designation and so on.

So that's the goal. Those are our goals and hopefully everybody will be comfortable with that. Now, Berry, you had other stuff on the agenda that you wanted to go to. So do you want to take us to that now and then we can come back after you've finished and take any comments or questions? There you go. Over to you, Berry.

BERRY COBB:

Thank you, Chris. So you'll recall from our initial report after the recommendations. This is a required portion of any final report of consensus recommendations. I believe this came out of a working group from several years ago called the data and metrics for policy making. The intent of this requirement is to try to understand how the changes of how the consensus recommendations will impact or change the existing environment market place, market conditions, those kinds of things. I think for the purposes of this particular policy topic, it's a lot more elusive to predict the future, as opposed to something like the expiration of

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domain names or transferring of domain names. But at any light, what staff had tried to produce here is that at some point in the future, assuming that these consensus recommendations are adopted by the Council, by the Board, and implemented, at some point in the future, this policy will be reviewed. We can't say when if the group wanted to suggest when. That's certainly within your scope. But as part of the bylaws and what has tried to improve in GNSO policy making over the years is fact-based information to help inform any future policy decisions. So the attempt here was at least as try to start to identify what quantitative types of metrics may be useful for that future review.

I know several of you were involved in the RPM Phase 1, the review of the URS and other RPMs related to new gTLDs. And you're also aware that Phase 2 will kick off sometime in the near future. But the Phase 1 and it's anticipated in Phase 2 that there are sets of quantitative metrics to help understand the environment and the policy issues that are being discussed. So this particular list here was a first attempt to try to identify the quantitative components that would help a future review of this policy.

So the first bullet number one I think it's pretty clear. We need to review this policy in the future. We need to understand how many complaints are being filed by IGOs. And this is probably something more for the Implementation Review Team to get into specifics. But is it possible as an example that when this is implemented by the UDRP, URS providers that an additional flag can be added to the cases that will quickly indicate that this is indeed a case filed by an IGO?

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Secondly, we want to know the outcomes of them. I think it's pretty clear that any review of this policy does not want to get into the merits of the decisions made. But we need to understand from a quantitative perspective how many of the cases, I guess, basically passed admin check, went through the dispute itself, and what was the outcome? How many cases did the IGO prevail? How many cases did the respondent prevail? And understanding what the output or the end state mechanism here is, which is essentially the second bullet and third bullets. How many cases did the respondent not respond to any of the complaints? Those kinds of things.

Then finally, the fourth and fifth bullet kind of gets more in the elusive part of attempting to quantify the outcomes, but it would be helpful to know what the core of the recommendation here is, of X number of complaints that were filed, how many complaints did the IGO prevail? And then how many of those complaints resulted in either going to a court or to arbitration or to both? Maybe something that we need to talk about, is it even possible for the ICANN community to acquire that information? If so, how would we do that? But the idea is to at least try to get some kind of indication of how many of these types of complaints traversed the full path of our little flowchart where we get to a point of understanding that less than 1%, greater than 1%, less than 5% of these actually went to court or to an arbitration. Again, not necessarily needing an analysis of the decision or the outcome of those types of things, but how could that be tracked so that we are informed when this policy is reviewed down the road?

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So that's kind of the intent of this section. We haven't really talked about it much before. Most definitely as part of review of the first draft of the final report, it'd be helpful to get some input here. I see hands, so I'll turn it back to you, Chris. Thanks.

CHRIS DISSPAIN: Thanks, Berry. Brian, hi. You're up next.

BRIAN BECKHAM: Hi, everyone. Apologies if I didn't hear correctly, Berry. But I wasn't sure if the idea was that we kind of fine tune this or give broad brushstrokes to an IRT. I raised that only to mention that can kind of inform how much we want to fine tune or wordsmith this.

I just wanted to point out, on the one hand, the first bullet there, I think as you get towards the end, we're getting really more relevant to the work that's in front of us. When we look at the number of complaints filed by IGOs, I think we have to bear in mind—I don't know. The reason I asked the first question about whether it's for us or an IRT to work on the fine points of language here is because unlike the UDRP where you've got a universe of tens or hundreds of thousands of brand owners who have access to this, the IGO universe is really contained. So, somehow putting context on that. In other words, if it was like three, then that would be different than three brand owners failing under the UDRP versus a large number, etc. But I think really, the one thing that I would like to put a flag down for is that whatever—sorry, one other thought was that probably the number of cases is more relevant

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toward there could be a threshold of cases versus a time period because, again, going back to the number of IGOs versus brand owners, it may be that there are five IGOs that would use this in the first year, it may be that it doesn't get used for three years. A time threshold might be somewhat artificial. But what I really wanted to mention is that where I think we really might put a flag down for future policy work, if ever, on this would be really the threshold question we asked at different points along the work here, which is should there be these different forks in the road of the options of going to court versus arbitration? If we see that, for example, there are defaults and that's never used, or the court option doesn't work out and the parties find themselves always 100% of the time back in arbitration or they go straight to arbitration. That might answer the question. We've been thinking about this hypothetically but that might help us answer the question going forward of should there be this fork in the road? Thanks.

CHRIS DISSPAIN:

Thanks, Brian. I mean, that fact finding that you refer to, of course, is relevant for any review of this policy. Because clearly, one would look at the policy and say, "Well, Corridor B is never used, has never been used, is never used, whatever." So collecting that data is obviously relevant and matters for them for future reviews. Mary, go ahead.

MARY WONG:

Thanks, Chris. This is the section of the document I referred to earlier as well. Steve and Berry are probably better positioned to

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answer the question of what happens with the implementation phase. But I did want to follow up on Brian's comment about the heart of the work. And indeed, if we have these statistics coming in, then we are able to see that the level of use, if nothing else, of our recommendations. The only point I wanted to make in addition to that is obviously then in terms of reporting, there will be obligations on the registrar and/or on both sets of parties for these numbers to be reported to ICANN.

CHRIS DISSPAIN: Thanks, Mary. Berry?

BERRY COBB: I had two, now three points. One aspect of this is tied to our Recommendation 1. What if as part of an analysis that the providers are having issue determining whether the IGO or the complainant that submits this fits in with that particular definition, and thereby nothing gets through the whole funnel of this process? I'm not saying that will happen. What if?

Secondly, just for a sense of clarity about what the future from a policy perspective would look like, again, assuming that this gets implemented after Board adoption and those kinds of things. And I think that that's a fair point that Brian makes that maybe it's 1,000 cases or 500 cases versus some timeframe. Whatever that trigger mechanism is, what will happen is not us going directly into another PDP to do this review. What it means is that other part of ICANN staff will basically respond to a decision made by the Council requesting a policy status report. And what will happen is



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that staff will reach out to the providers or to whoever they need to acquire this type of quantitative data but produce a status report to inform the Council about at least the preliminary findings based on actual data and information. Then based on that particular status report, then the Council would make any particular decision about whether additional policy work is needed or not.

My final point, which is to what Mary mentioned, this was what was in the back of my mind, but I think it's something that's very important here, especially based on prior sections of this. Mary used the word obligation. I think the group should consider about actually making part of this a recommendation. Not necessarily the details of the metrics here but for there to be an obligation and for ICANN Org to "enforce" that obligation, then perhaps a recommendation in two parts are required is that the providers will provide this information and/or where we need to, perhaps registrars since they seem to be the key focal point after any kind of court or arbitration type path is chosen, that they also provide this information. Exactly what that would look like, I don't think we need to get into the details of it. But the way this particular section of the report is presented, this is not a recommendation but really just general information as a starting point to figure out what types of data we might want to collect.

CHRIS DISSPAIN:

Thanks, Berry. My initial response to that was I'd be extremely uncomfortable making policy recommendations regarding what arbitrators should or shouldn't be doing. It seems to me it's a contractual issue. When you put out your call for your arbitrators, you say that information should be provided. It would be perfectly

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normal for that to happen. And I'm also uncomfortable with this working group making all this PDP making recommendations in respect to what registrars should be required to do because registrars are not here and there was no intention of producing a policy that required them to do anything in respect to additional matters. That said, I just want to go back to the beginning of this because I fear sometimes the danger of getting lost in these areas.

The top of the page it says, "The EPDP team proposes the following metrics as useful starting points for measuring the effectiveness of its recommendations over time." So what are we making these recommendations for? Because that is what we should be measuring effectiveness against. And the answer is we're making these recommendations so that IGO claimants can have some corrective rights and can use the existing system—albeit slightly altered—the existing system to make a claim if they believe that their name or acronym is being wrongly used by someone else. That is what we should be measuring against. Therefore, I wonder whether the number of complaints isn't desperately relevant. What's relevant is the point you made about are IGOs able to be identified as IGOs through Recommendation 1 is very relevant. Whether or not bits of the pathways that we've put in place are being used is relevant, not so much in respect to the effectiveness of what we set out to achieve, but certainly in respect to reviewing it in the future, that sort of stuff. But I'm not sure that we really need all of this detail. Why does it matter, for example, the number of panel decisions in favor of an IGO? Why does that matter? Why does it matter whether the registrars or IGOs have won? I don't see the relevance of that sort of stuff. If

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you want sensible, serious metrics, that sheet that point home to the reasons why we set out on this path in the first place, surely it has to do with IGOs being able to use the mechanism, not what the outcomes are. Or have I completely misunderstood? Brian?

BRIAN BECKHAM:

Sorry. It's slow coming off me. Sorry about that. Chris, it's a really fair point. I would only say that in big picture terms, I wholeheartedly agree with you. I would only question, if only a footnote, it may be relevant to—if you recall our earlier phases of work, we had discussed whether there should be, for example, a really streamlined process to really take some bad actor website down in a more expedited fashion than is possible under the UDRP or URS. That question might help inform that, again, if we ever get to that type of a question. So I guess I would say maybe casting a wider net here, if nothing else, give information that may be thrown in the bin or maybe useful. I agree with you in principle, but I just wonder if having the information even if it's not used may or may not be relevant but no harm in touching it.

CHRIS DISSPAIN:

Thank you. I'll get to Mary in a second. I don't disagree with that. The overarching principle of collecting what information is available to be collected to help inform any future review makes perfect sense to me. It's when you start to get into detail about what you might use it for a while and stuff like that that I worry. Emphasis on the number of complaints, for example, implies that that matters, whereas actually that doesn't, it seems to me. But that said, I take your point completely. I think saying a catch-all

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paragraph that says keeping data on number of complaints, pathway used and that sort of thing would be helpful in respect to any future review would be perfectly fine by me. I have no problem with that at all. Mary?

MARY WONG:

Thanks, Chris. Not much to add to that. But I'm certainly collecting the numbers and the data if it's there without opining on the reasons for necessarily doing so. Obviously, we have to update the bullet points, but the way we've written in terms of how we open this section is basically these are metrics that are useful starting points for future work. The background here that may be helpful is that, obviously, with the UDRP, the URS and a number of other procedures and policies, there's been some sense that the data either hasn't been available or has been difficult to collect or is not available in a uniform format. So these bullet points try to go towards that to the extent that data is going to be collected.

CHRIS DISSPAIN:

Thank you for that. It seems to me that there are two distinct reasons to collect stuff. Whether or not they both sit under this or not, I don't know, but there are two. One is, are our recommendations effective? And that goes to can IGOs be recognized? Are they able to use the pathways that we put in place? It doesn't matter whether the registrants go to court or don't go to court, etc., to establish whether our recommendations are effective in the sense of providing the IGOs with curative rights. That's the first point.

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Second point is there's a bunch of other stuff, which is data to be collected to help inform a future review. And that is not necessarily data that measures the effectiveness of the recommendations but rather just general data seems could be covered by a catch-all point. Does that make sense?

MARY WONG: Chris, it's Mary.

CHRIS DISSPAIN: Sorry. I muted myself and then said, "Mary, does that make sense to you?" rather carefully. Mary, does that make sense to you?

MARY WONG: It does. And I think the distinction that you just made really goes to exactly what we're trying to do here, what we should be trying to do. I think given the background that I mentioned earlier, the assumption probably has been that any future review or any future policy work on this topic will involve measuring effectiveness. But as you said, one is not necessarily the same as the other. So I think it's for this team to decide what are the metrics that they think is most useful that we can include here and to be clear about the reason why we're including them, which may be one or the other or both.

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CHRIS DISSPAIN: Okay. How do we take this forward without A, getting stuck in the weeds, and B, blitzing our timeframe? I think that might be a question for you, Berry.

BERRY COBB: I'll take a review to the transcript and try to extract some of your thoughts about this that Paul seemed to agree with as well. To make it, I guess, less specific and maybe about principles, about what data might be useful for a future review, and try to lighten up on the specifics of what data might be in review.

CHRIS DISSPAIN: Give that a go and see where you get to. And if you get stuck, let me know. But I think if you do that, that would make sense. In the way you've just described it, if you've managed to capture it in a few bullet points, that's going to give Brian what Brian quite rightly says might be useful for future looking at stuff, but also capture separately the key metrics to measure our work, as opposed to just generally help with a review in the future. Because I do think those two things are slightly separate. Give it a go and see where you get to. It's all right. I'm guessing that's all right. Cool.

All right. I think we can wrap the meeting now subject to anyone having any last minute comments. I think everyone, hopefully, is clear on what needs to happen next, what their homework is on receipt of documentations. The small team is convening in 20 minutes' time. We will meet again on the 14<sup>th</sup> of March. Unconscious that many of us will have the joys of a full week's worth of ICANN meeting next week. I hope it all goes well,

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everybody. I will see you all on the other side of ICANN73. We can stop the recording and close the meeting now. Thanks very much, everybody.

MARY WONG: Thanks, Chris. Thanks, everyone.

TERRI AGNEW: Thank you, everyone. Once again, I will stop recording and disconnect all remaining lines since the meeting has been adjourned.

**[END OF TRANSCRIPTION]**