

ICANN | GNSO

Generic Names Supporting Organization

Final Report of the Expedited Policy Development Process on Specific Curative Rights Protections for International Governmental Organizations (IGOs)

Status of this Document

This is the Final Report containing final recommendations from the GNSO's Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for International Governmental Organizations (IGOs). This Final Report has been prepared for the GNSO Council's consideration of the EPDP recommendations, in accordance with the ICANN Bylaws and the GNSO's Policy Development Process Manual.

This Final Report will be translated into different languages; please note that only the English version is authoritative.

Preamble

This Final Report is part of broader work that has been undertaken by the ICANN community to facilitate the protection of IGO identifiers in the domain name system (DNS). The scope of work described in this report is limited to the topics and considerations outlined by the GNSO Council in its instructions to the EPDP team, via a motion proposed and carried during the GNSO Council teleconference meeting on 23 January 2020. This report describes the EPDP team's deliberations and sets out its final recommendations on specific policy issues arising in cases where, following an initial decision in favor of an IGO in a proceeding under either the Uniform Domain Name Dispute Resolution Policy or the Uniform Rapid Suspension procedure, the losing registrant seeks a review of the merits of the case in court and the court declines to proceed on the basis of IGO privileges and immunities. Following its review of all Public Comments received on its Initial Report, the EPDP team has finalized its policy recommendations and now submits this Final Report to the GNSO Council.

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1 Executive Summary

1.1 Introduction

On 23 January 2020, the GNSO Council approved an [Addendum](#) to the Review of All Rights Protection Mechanisms (RPM) Policy Development Process (PDP) Charter that created an IGO Work Track. The GNSO Council initiated this work to consider “*whether an appropriate policy solution can be developed that is generally consistent with [the first four recommendations from the GNSO’s IGO-INGO Access to Curative Rights PDP]* and:

- a. *accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;*
- b. *does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;*
- c. *preserves registrants’ rights to judicial review of an initial [Uniform Domain Name Dispute Resolution Policy or Uniform Rapid Suspension decision]; and*
- d. *recognizes that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction.”*

Following the GNSO Council’s [appointment](#) of Chris Disspain as the IGO Work Track Chair and confirmation of their representatives by interested GNSO Stakeholder Groups, Constituencies, Advisory Committees, other Supporting Organizations and IGOs in accordance with membership requirements outlined in the Addendum, the IGO Work Track commenced its work in February 2021.

The GNSO Council’s decision to create the IGO Work Track followed from its 18 April 2019 [resolution](#) to approve only the first four recommendations from the IGO-INGO Access to Curative Rights PDP, which had submitted its [Final Report](#) to the GNSO Council in July 2018. The GNSO Council had elected not to approve Recommendation #5 from the PDP, preferring to refer the matter at the time to the RPM PDP for its Phase 2 work.

In August 2021, the GNSO Council made the [procedural decision](#) to continue the work of the IGO Work Track via an Expedited Policy Development Process, since Phase 1 of the RPM PDP had concluded but Phase 2 had not yet been initiated, pending a review of the PDP Charter by the GNSO Council. The GNSO Council confirmed that the scope of work for the EPDP team was not affected in any way by this procedural change, as the original Addendum became in effect the EPDP team Charter.

Recommendation #5 from the IGO-INGO Access to Curative Rights PDP attempted to address a situation where an IGO has prevailed in a Uniform Domain Name Dispute

42 Resolution Policy (UDRP) or Uniform Rapid Suspension (URS) proceeding, following
43 which the losing registrant files suit in a court and the IGO asserts immunity from the
44 jurisdiction of that court. Recommendation #5 provided that, in such a situation and
45 where the court declines to hear the merits of the registrant’s case, the original UDRP or
46 URS panel decision is to be set aside. The effect of implementing Recommendation #5
47 will be to put the parties to the dispute in their original situations, as if the UDRP or URS
48 proceeding in which the IGO had prevailed had never been commenced.
49

50 During the GNSO Council’s deliberations over the Final Report from the IGO-INGO
51 Access to Curative Rights PDP, concerns were expressed as to whether
52 Recommendation #5 will require a substantive modification to the UDRP and URS as
53 well as result in a potential reduction of the existing level of curative protections
54 currently available to IGOs – such as they are; i.e., at present IGOs must agree to *submit*
55 *to the jurisdiction of a court at “either (a) the principal office of the registrar (provided*
56 *that the domain name registrant has submitted in the Registration Agreement to that*
57 *jurisdiction for court adjudication of disputes concerning or arising from the use of the*
58 *domain name) or (b) the domain name registrant’s address as shown for the registration*
59 *of the domain name in the concerned registrar’s WHOIS database at the time the*
60 *Complaint is submitted to a dispute resolution service provider (“Mutual Jurisdiction”).*
61 IGOs are concerned that the agreement to this “Mutual Jurisdiction” clause could be
62 considered an express or implied waiver of the IGOs’ immunities under existing national
63 laws. The Curative Rights PDP had been chartered to determine *“whether to amend the*
64 *UDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs ...or*
65 *whether a separate, narrowly-tailored dispute resolution procedure at the second level*
66 *modeled on the UDRP and URS that takes into account the particular needs and specific*
67 *circumstances of IGOs and INGOs should be developed”,* and Recommendation 5 was
68 viewed by many as reducing access to curative rights mechanisms by IGOs. As a result,
69 the GNSO Council decided that additional policy work was needed on the specific issue
70 that Recommendation #5 had been intended to resolve.

71 1.2 Final Recommendations

72
73 The EPDP team has arrived at five final recommendations to address the issues within
74 the scope of its work, in accordance with the GNSO Council’s instructions as
75 documented in its Charter.
76

77 The EPDP team reached final agreement on the following points: (1) adding a definition
78 of “IGO Complainant” to the current Rules applicable to the UDRP and URS, to facilitate
79 an IGO’s demonstration of rights to proceed against a registrant (in the absence of a
80 registered trademark); and (2) including an option for voluntary arbitration following
81 the initial UDRP or URS panel decision in favor of an IGO Complainant, to resolve the
82 issue of how to recognize an IGO’s jurisdictional immunity while preserving a
83 registrant’s right to choose to go to court.
84

85 1.2.1 Recommendation regarding UDRP and URS Eligibility 86 Requirements for IGOs

87
88 The first recommendation from the EPDP team (Recommendation #1) addresses an
89 initial challenge that IGOs face under the current UDRP and URS requirement for a
90 complainant to have trademark rights in order to proceed against a domain name
91 registrant. In this regard, the EPDP team is proposing specific modifications to the Rules
92 applicable to the UDRP and URS that will add a definition clarifying the criteria for “IGO
93 Complainants”. The EPDP team believes that adding this definition will provide clearer
94 eligibility requirements for IGOs in relation to the need to show that they have
95 adequately demonstrated rights to proceed with a UDRP or URS complaint.
96

97 1.2.2 Recommendations to Address IGO Immunities While 98 Preserving a Registrant’s Right to Seek Review of a UDRP or 99 URS Decision Issued Against It

100
101 Together with Recommendation #1, Recommendations #2, #3, #4, and #5 from the
102 EPDP team comprise a set of related, interdependent recommendations. This set of
103 recommendations is intended to achieve an appropriate policy balance between respect
104 for an IGO’s privileges and immunities (specifically, immunity from judicial process) and
105 maintaining a registrant’s right to file a court case seeking judicial consideration of the
106 merits of the case where a UDRP or URS decision has been issued against the registrant.
107

108 1.3 Summary of Deliberations to Date

109
110 Section 3 of this report outlines the EPDP team’s deliberations regarding how it
111 considered and developed the final recommendations.
112

113 1.4 Next Steps

114
115 This Final Report will be delivered to the GNSO Council for its consideration of the
116 recommendations developed through this EPDP.

117

118 **2 Final Recommendations**

119

120 The EPDP team has kept the GNSO Council’s instructions regarding consideration of an
 121 appropriate policy solution for Recommendation #5 from the IGO-INGO Access to
 122 Curative Rights PDP at the forefront in its work. However, the EPDP team concluded
 123 early on that a feasible and appropriate policy solution cannot be crafted simply by
 124 looking at that recommendation in isolation. Although Recommendation #5 is
 125 concerned with the outcome of a dispute resolution process where the affected IGO
 126 asserts immunity from jurisdiction, the EPDP team agreed that, in order to address this
 127 specific issue, it needed to first determine how and which IGOs are able to file a
 128 complaint under the relevant dispute resolution mechanism. In this regard, EPDP team
 129 members noted that, due to national State obligations under the Paris Convention for
 130 the Protection of Industrial Property, IGOs may not own hold registered trademarks¹ in
 131 their names, acronyms, or other identifiers.

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133 This presents a challenge for such IGOs, as there is a specific requirement under the
 134 UDRP and URS that a complainant “*must demonstrate that the domain name at issue is*
 135 *identical or confusingly similar to a trademark in which the complainant has rights*”. As a
 136 result of its discussions, the EPDP team proposes Recommendation #1, which it believes
 137 will clarify eligibility requirements for IGOs to demonstrate (unregistered) rights under
 138 the UDRP and URS.

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139

140 To address the specific issue under Recommendation #5 from the IGO-INGO Access to
 141 Curative Rights PDP, the EPDP team proposes a further set of recommendations
 142 (Recommendations #2, #3, #4, and #5) that, in combination with Recommendation #1,
 143 are intended to be “interdependent” (as contemplated by Section 13 of the GNSO’s PDP
 144 Manual²). The EPDP team believes that this set of recommendations is responsive to the
 145 GNSO Council’s directions that the proposed policy solution be “*generally consistent*”
 146 with the four other recommendations from the IGO-INGO Access to Curative Rights
 147 PDP.

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¹ IGOs do not engage in trade or commerce in the strict sense for which trademarks are generally registered and used.

² See <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-2-pdp-manual-24oct19-en.pdf> (“Although the GNSO Council may adopt all or any portion of the recommendations contained in the Final Report, it is recommended that the GNSO Council take into account whether the PDP Team has indicated that any recommendations contained in the Final Report are interdependent. The GNSO Council is strongly discouraged from itemizing recommendations that the PDP Team has identified as interdependent.”.)

154 **2.1 Final Recommendations**

155
 156 The GNSO Council had decided not to approve the original Recommendation #5 from
 157 the IGO-INGO Access to Curative Rights Protection Mechanisms PDP. The EPDP Team’s
 158 collective understanding is that the GNSO Council thereby rejected the original
 159 Recommendation #5 and, instead, tasked the RPM PDP Working Group to develop a
 160 policy solution for the problem that the original Recommendation #5 was intended to
 161 solve and that would be generally consistent with Recommendations #1 - #4 from that
 162 PDP. The EPDP Team believes that its final recommendations (below) address the issues
 163 raised by IGOs’ jurisdictional immunity in relation to court proceedings following a UDRP
 164 or URS decision, and that these recommendations are responsive to the GNSO Council’s
 165 directions that the proposed policy solution be “generally consistent” with
 166 Recommendations #1 - #4 from the IGO-INGO Access to Curative Rights PDP. As such,
 167 the EPDP Team recommends that the GNSO Council approve the following final
 168 Recommendations #1 - #5 from this EPDP.

169
 170 To address the specific issue under Recommendation #5 from the IGO-INGO Access to
 171 Curative Rights PDP, the EPDP team is proposing the following single package of
 172 recommendations.

173
 174 The EPDP team wishes to emphasize that its final recommendations are to be read in
 175 the following context:

- 176 • The inclusion of an arbitration option in the UDRP and URS does not replace,
 177 limit, or otherwise affect the availability of court proceedings to either party, or,
 178 in respect of the URS, the ability to file an appeal within the URS framework.
 179 Either party continues to have the right to file proceedings in a court, up to the
 180 point in time when an arbitration proceeding is commenced (if any).
- 181 • The inclusion of an arbitration option in the UDRP and URS does not affect the
 182 timelines for filing or for implementing the relevant remedy, unless otherwise
 183 expressly stated in the recommendations below.

184
 185 **2.1.1 Recommendation regarding UDRP and URS Eligibility**
 186 **Requirements**

187
 188 **Recommendation #1: Definition of “IGO Complainant”**

189 The EPDP team recommends that the UDRP Rules and URS Rules be modified in the
 190 following two ways:

- 191
 192 i. Add a description of “IGO Complainant” to section 1 (i.e., the definitions section
 193 of both sets of Rules):

194
 195 “‘IGO Complainant’ refers to:

Commented [MW1]: NOTE FOR EPDP TEAM: Following the Consensus Call, this section will be updated to reflect the final designated level(s) of consensus reached on each recommendation.

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Deleted: (set forth below) that are intended to be “interdependent” (as contemplated by Section 13 of the GNSO’s PDP Manual³)

- 202 (i) an international organization established by a treaty, and which possesses
 203 international legal personality; or
 204 (ii) an ‘Intergovernmental organization’ having received a standing invitation,
 205 which remains in effect, to participate as an observer in the sessions and the
 206 work of the United Nations General Assembly; or
 207 (iii) a Specialized Agency or distinct entity, organ or program of the United
 208 Nations⁴.”
 209
 210 ii. Add the following explanatory text to UDRP Rules Section 3(b)(viii), URS Section
 211 1.2.6 and URS Rules Section 3(b)(v):
 212
 213 “Where the Complainant is an IGO Complainant, it may show rights in a mark by
 214 demonstrating that the identifier which forms the basis for the complaint is used
 215 by the IGO Complainant to conduct public activities in accordance with its stated
 216 mission (as may be reflected in its treaty, charter, or governing document). Such
 217 use shall not be a token use.”

218
 219 Explanatory Text:

220 The EPDP team acknowledged that there is no single authoritative source for
 221 determining whether an organization is an IGO. To ensure that its recommendations are
 222 limited to a policy solution for the specific issue it was tasked to address, the EPDP team
 223 thought it necessary to ensure that its recommendations apply only to those
 224 organizations for which there is demonstrable factual proof of their status as IGOs. In
 225 arriving at its final definition for an “IGO Complainant”, the EPDP team analyzed the
 226 United Nations system and documentation, relevant provisions in international treaties
 227 (such as Article 6ter of the Paris Convention for the Protection of Industrial Property),
 228 and GAC advice.

229
 230 The EPDP team also believes it is critical to maintain the UDRP and URS standing
 231 requirement that a complainant must have rights in a trademark or service mark with
 232 which the registrant’s domain is identical or confusingly similar. In the case of IGO
 233 Complainants (as defined) who may not possess a registered trademark in the relevant
 234 IGO identifier, the EPDP team’s recommendation makes it clear how such complainants
 235 may fulfill that standing requirement by proving unregistered rights that are functionally
 236 equivalent to a trademark.

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Deleted: [For clarity, the EPDP Team emphasizes that this recommendation obviates Recommendation #2 in the IGO-INGO Access to Curative Rights Protection Mechanisms PDP that the GNSO Council approved on 18 April 2019. Thus, the ICANN Board no longer needs to consider it.] ¶

⁴ A visual depiction of the United Nations system is available here, including its Specialized Agencies and various programs: https://www.un.org/en/pdfs/un_system_chart.pdf.

243 **2.1.2 Recommendations to Address IGO Immunities While**
 244 **Preserving a Registrant’s Right to Seek Review of a UDRP or**
 245 **URS Decision Issued Against It**

246 **Recommendation #2: Exemption from Submission to “Mutual Jurisdiction”**

247 (a) The EPDP team recommends that an IGO Complainant (as defined under
 248 Recommendation #1) be exempt from the requirement under Section 3(b)(xii) of
 249 the UDRP Rules and Section 3(b)(ix) of the URS Rules.

250 (b) The EPDP team recommends that, when forwarding a complaint filed by an IGO
 251 Complainant to the respondent (pursuant to Paragraph 2(a) of the UDRP or
 252 Paragraph 4.2 of the URS, as applicable), the relevant UDRP or URS provider
 253 must also include a notice informing the respondent:

254 (i) of its right to challenge a UDRP decision canceling or transferring the domain
 255 name, or a URS Determination rendered in favor of an IGO Complainant, by filing
 256 a claim in court;

257 (ii) that, in the event the respondent chooses to initiate court proceedings, the
 258 IGO Complainant may assert its privileges and immunities with the result that
 259 the court may decline to hear the merits of the case; and

260 (iii) that the respondent has the option to agree to binding arbitration to settle
 261 the dispute at any time, including in lieu of initiating court proceedings or, if it
 262 files a claim in court, where the court has declined to hear the merits of the case.

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263 **Explanatory Text:**

264 This recommendation addresses the GNSO Council’s instructions that the EPDP team’s
 265 recommended policy solution must “[account] for the possibility that an IGO may enjoy
 266 jurisdictional immunity in certain circumstances; ... not affect the right and ability of
 267 registrants to file judicial proceedings in a court of competent jurisdiction whether
 268 following a UDRP/URS case or otherwise; and ... [recognize] that the existence and scope
 269 of IGO jurisdictional immunity in any particular situation is a legal issue to be determined
 270 by a court of competent jurisdiction”.

271 Early in its deliberations, the EPDP team agreed on the need to balance the rights and
 272 interests of registrants and IGOs. In finalizing its recommendation to exempt IGO
 273 Complainants from the requirement to agree, with respect to any challenge to a UDRP
 274 decision or URS Determination, to submit to the jurisdiction of the courts in at least one
 275 specified Mutual Jurisdiction (as the term is defined in the UDRP Rules and URS Rules),
 276 the EPDP team thought it important to ensure that registrants who wish to challenge a
 277 UDRP or URS outcome in court be made aware that an IGO Complainant’s exercise of its

287 privileges and immunities may mean that the court declines to hear the registrant’s
 288 case.

289
 290 **Recommendation #3: Arbitral Review following a UDRP Proceeding**
 291

292 The EPDP team recommends that the following provisions be added to the UDRP to
 293 accommodate the possibility of binding arbitration to review an initial panel decision
 294 issued under the UDRP:

- 295
 296 i. When submitting its complaint, an IGO Complainant shall indicate that it agrees,
 297 if the registrant also agrees, to have the final determination of the outcome of
 298 the UDRP proceeding settled through binding arbitration.
 299
 300 ii. In communicating a UDRP panel decision to the parties where the complainant is
 301 an IGO Complainant, the UDRP provider shall provide both parties with
 302 information regarding the applicable arbitral rules.
 303
 304 iii. In accordance with Paragraph 4(k) of the UDRP, the relevant registrar shall wait
 305 ten (10) business days (as observed in the location of its principal office) before
 306 implementing a UDRP panel decision rendered in the IGO Complainant’s favor.
 307 ~~The registrar shall~~ stay implementation if, within that period, it receives official
 308 documentation that the registrant has ~~either~~ initiated court proceedings in its
 309 location or ~~in~~ the location of the ~~registrar’s~~ principal office or ~~has~~ submitted a
 310 request for or notice of arbitration.
 311
 312 iv. Where the relevant registrar has received a request for or notice of arbitration, it
 313 shall stay or continue to stay, as applicable, implementation of the UDRP panel
 314 decision until it receives official documentation concerning the outcome of an
 315 arbitration or other satisfactory evidence of a settlement or other final
 316 resolution of the dispute.
 317
 318 v. Where the registrant initiates court proceedings and the court declines to hear
 319 the merits of the case, the registrant may submit the dispute to binding
 320 arbitration within ten (10) business days from the court order declining to hear
 321 the merits of the case, by submitting a request for or notice of arbitration to the
 322 competent arbitral institution with a copy to the relevant registrar, ~~and~~ UDRP
 323 provider ~~and~~ the IGO Complainant. Where the registrant does not submit a
 324 request for or notice of arbitration to the competent arbitral institution (with a
 325 copy to the registrar, UDRP provider and the IGO Complainant) within ten (10)
 326 business days from the court order declining to hear the merits of the case, the
 327 original UDRP decision will be implemented by the registrar.
 328
 329 vi. Where a registrant decides to submit the dispute to binding arbitration, it shall
 330 notify the relevant registrar prior to initiating the arbitration proceeding with the

Deleted: The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA).

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Commented [MW3]: NOTE FOR THE EPDP TEAM: In rereading these provisions, it may be impractical to require the registrant to notify the IGO Complainant. In any event, Recommendation 3(vi) as agreed by the EPDP team already requires the registrar to notify the IGO Complainant. As such, this phrase can be deleted from (v).

344 competent arbitral tribunal. The registrar shall notify the IGO Complainant of the
 345 registrant’s decision to initiate arbitration.

346
 347 Implementation Guidance:

348 The EPDP team believes that the selection of the appropriate arbitral rules and
 349 provider(s) is a matter more appropriately addressed during implementation. To that
 350 end, the EPDP team has developed a set of policy principles which are set out in Annex
 351 A of this Final Report. These policy principles are intended to be an overarching
 352 guidance framework for the Implementation Review Team that will be formed to advise
 353 ICANN org on the implementation of approved policies from this EPDP.

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 355 **Recommendation #4: Arbitral Review following a URS Proceeding**

356 The EPDP team recommends that the following provisions be added to the URS to
 357 accommodate the possibility of binding arbitration to review a Determination made
 358 under the URS:

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359
 360 i. When submitting its complaint, an IGO Complainant shall indicate that it agrees,
 361 if the registrant also agrees, to have the final determination of the outcome of
 362 the URS proceeding settled through binding arbitration.

363
 364 ii. In communicating a URS Determination to the parties where the complainant is
 365 an IGO Complainant, the URS provider shall provide both parties with
 366 information regarding the applicable arbitral rules.

Deleted: The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA). ...

367
 368 iii. Where the registrant initiates court proceedings and the court declines to hear
 369 the merits of the case, the registrant may submit the dispute to binding
 370 arbitration within ten (10) business days from the date of the court order
 371 declining to hear the merits of the case, by submitting a request for or notice of
 372 arbitration to the competent arbitral institution, with a copy to the URS provider
 373 and IGO Complainant. The relevant domain name(s) will remain suspended
 374 throughout the pendency of any such arbitration proceeding.

Commented [MW4]: See above comment for Recommendation 3(v). For the URS, Recommendation 4(v) as agreed by the EPDP team already requires the URS provider to notify the IGO Complainant; thus, this phrase can be deleted from (iii).

375
 376 iv. Where the registrant files an appeal under URS Section 12 and does not prevail
 377 in the appeal, it may submit the dispute to binding arbitration within ten (10)
 378 business days from the date of the appeal panel’s decision, by submitting a
 379 request for or notice of arbitration to the competent arbitral institution, with a
 380 copy to the URS provider and the IGO Complainant. The relevant domain
 381 name(s) will remain suspended throughout the pendency of any such arbitration
 382 proceeding.

383
 384 v. Where a registrant decides to submit the dispute to binding arbitration, it shall
 385 notify the relevant URS provider prior to initiating the arbitration proceeding
 386 with the competent arbitral tribunal. The URS provider shall notify the IGO
 387 Complainant of the registrant’s decision to initiate arbitration.

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Implementation Guidance:
The EPDP team believes that the selection of the appropriate arbitral rules and provider(s) is a matter more appropriately addressed during implementation. To that end, the EPDP team has developed a set of policy principles which are set out in Annex A of this Final Report that is intended to serve as a guidance framework for the Implementation Review Team that will be formed to advise ICANN org on the implementation of policies from this EPDP that are approved by the GNSO Council and adopted by the ICANN Board.

Recommendation #5: Applicable Law for Arbitration Proceedings

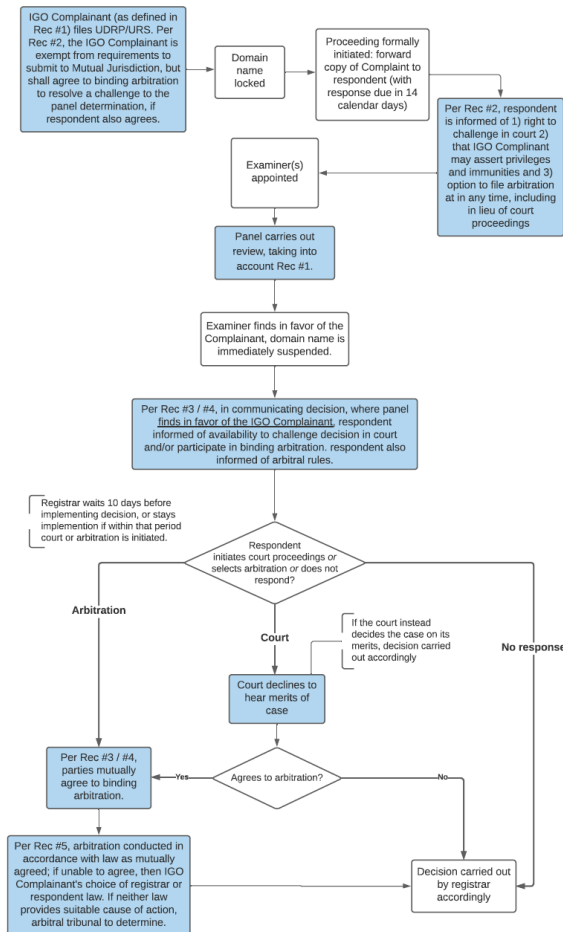
Arbitration will be conducted in accordance with the law as mutually agreed by the parties. Where the parties cannot reach mutual agreement, the IGO Complainant shall elect either the law of the relevant registrar’s principal office or the domain name holder’s address as shown for the registration of the disputed domain name in the relevant registrar’s Whois database at the time the complaint was submitted to the UDRP or URS provider. Where neither law provides for a suitable cause of action, the arbitral tribunal shall make a determination as to the law to be applied in accordance with the applicable arbitral rules.

NOTE ON RECOMMENDATIONS #1 - #5:

The flow chart below depicts the sequence of events that occur during a UDRP or URS proceeding, with the additions and changes proposed by the EPDP team highlighted in blue. The flow chart was prepared by the EPDP team for illustrative purposes only, to assist with understanding of the implications of the EPDP team’s final recommendations. It should not be interpreted as the authoritative source of the EPDP team’s final recommendations. In the event of any inconsistencies or gaps between the flow chart and the text of the EPDP team’s final recommendations (as set forth above), the text version of the recommendation shall prevail.

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[Link to full chart](#)

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2.2 Policy Change Impact Analysis

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The EPDP team believes that its recommendations, if approved and adopted, will facilitate access to and use of the UDRP and URS by IGOs while preserving existing registrant rights. In addition, the EPDP team has developed specific rationale for its recommendations that it believes demonstrates how its proposed solution is appropriate and proportionate to the problem it was tasked to solve, without modifying the essential structure or scope of the UDRP or URS, both of which have been or will be reviewed by the GNSO's RPM PDP in its Phase 2 work.

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446 The EPDP team understands that, if these recommendations become consensus policy,
447 the policy will undergo review. Although the GNSO Council is responsible for
448 determining when consensus policy reviews take place, the EPDP team suggests that
449 initiation of a review should be triggered by a certain threshold number of IGO
450 Complaints rather than conducted at fixed intervals or by calendar date.

451

452 The EPDP team believes that a review should include determination of the effectiveness
453 of the policy. The EPDP team therefore proposes that a review include consideration of
454 the following questions:

- 455 • Did the introduction of a definition of “IGO Complainant” assist IGOs with accessing and
456 using the UDRP and URS?
- 457 • Were there instances where IGOs were not able to proceed with a UDRP or URS
458 complaint for failure to meet the definition of “IGO Complainant”?
- 459 • Are UDRP and URS providers aware of any instances where a respondent was confused
460 by the information included with the notice of complaint or opted for arbitration
461 instead of initiating court proceedings?
- 462 • Did the changes outlined in recommendations 3 and 4 preserve the registrant’s rights
463 for judicial review in a court but also provided the option for arbitration instead of court
464 or subsequent arbitration where an IGO successfully asserted its immunity?

465

466 The EPDP team also proposes the following metrics to assist with defining context to
467 assess the effectiveness of the policy:

- 468 • Number of UDRP and URS complaints filed by IGOs
- 469 • Number of UDRP and URS panel decisions in favor of IGO Complainants:
 - 470 ◦ (i) implemented by a registrar after ten (10) business days, without a court or
471 arbitral proceeding; and
 - 472 ◦ (ii) stayed (i.e., not implemented) by a registrar as a result of the
473 commencement of arbitration proceedings
- 474 • Number of UDRP and URS panel decisions involving IGO Complainants where there was
475 no response from the registrant, and their outcomes
- 476 • Number of court proceedings filed by the registrant and whether the court assumed or
477 declined jurisdiction
- 478 • Number of arbitration proceedings between an IGO Complainant and losing registrant

479

480 The EPDP team recognizes that while some of these suggested metrics may be obtained
481 from the relevant UDRP and URS service providers and ICANN-accredited registrars, it
482 will likely be very difficult to obtain accurate counts and reports regarding post-
483 UDRP/URS court proceedings. Similarly, obtaining accurate numbers and outcomes of
484 arbitration proceedings will be extremely difficult, especially where these are not public.
485 In these cases, it may be necessary to attempt to obtain illustrative data via registrant
486 and IGO surveys, although the EPDP team acknowledges that the data obtained via such
487 means are likely to be incomplete.

3 Summary of Deliberations

This Section provides an overview of the deliberations of the EPDP team. The points outlined below are meant as brief, relevant background information on the group's discussions that provide the context for its proposed outcomes. They should not be read as representing the entirety of the deliberations of the EPDP team.

Deleted: either final recommendations or as

The EPDP team published its Initial Report for Public Comments in September 2021. It received a total of thirty-three (33) comments, fourteen (14) of which were submitted by individual commentators, thirteen (13) by organizations (largely from either IGOs or members of the domain investor community), with the remaining six (6) filed by one of ICANN's recognized community structures (viz., the Business and Intellectual Property Constituencies, the At Large Advisory Committee (ALAC), the Governmental Advisory Committee (GAC), the Registrars Stakeholder Group and the Registries Stakeholder Group)⁵. The EPDP team used the GNSO's Public Comment Review Tool to organize the various submissions according to each preliminary recommendation contained in the Initial Report. This facilitated the EPDP team's analysis of each comment and identification of any new issues, facts or concerns raised by the commentators.

The Public Comment Review Tool and the EPDP team's discussions of the comments it received can be reviewed on the EPDP team's wiki space here.

Between October 2021 (when the Public Comment Proceeding on the Initial Report was closed) to February 2022, the EPDP team reviewed the input it received and began developing draft final recommendations based on the feedback and its subsequent deliberations. The following sub-sections summarize the major themes and considerations discussed by the EPDP team in reaching its final conclusions.

3.1 Initial Fact-Finding and Research

Under the Addendum establishing the IGO Work Track and reflected in the EPDP team Charter, the EPDP team "is expected to take into account the review of the relevant historical documentation and prior community work conducted by the IGO-INGO Access to Curative Rights Protection Mechanisms PDP Working Group (see Sections 3.1 and 3.2 of the PDP Final Report), relevant GAC Advice, the 31-October-2016 letter from IGO Legal Counsels to Council Leadership, the external legal expert opinion commissioned by the PDP Working Group (Annex F), and the IGO Small Group Proposal (Annex D)." EPDP team members were provided with these documents and a [Briefing Paper](#) to clarify the

⁵ The Public Comment proceeding, submissions and the staff report can be viewed here: <https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021>.

525 expected scope of work and to highlight the previous deliberations that took place in
526 the IGO-INGO Access to Curative Rights PDP.

527
528 Notably, the Addendum provides that “[i]n order to avoid, to the extent possible, re-
529 opening or re-visiting the policy recommendations, the GNSO Council instructs the IGO
530 Work Track to base its recommendations on its analysis of the materials cited in this
531 paragraph, and its deliberations as to whether there is a need to develop appropriate
532 policy recommendations to address identified IGO needs in respect of the specific issue
533 that was referred to the RPM PDP by the GNSO Council.” In this context, the EPDP team
534 also reviewed a limited number of [prior materials](#) that the IGO-INGO Access to Curative
535 Rights Protections PDP had considered relating to its discussions of an appeal process
536 and possible elements of an arbitration process.

537 3.2 Deliberations Regarding IGO Eligibility under the UDRP and 538 URS

539
540 As noted in Section 2 above, the EPDP team agreed that, to develop an appropriate
541 policy solution for the problem it was [tasked](#) to solve, it was necessary to first consider
542 the challenges which IGOs face with the current UDRP and URS requirement that a
543 complainant have trademark rights. The GNSO Council had previously approved
544 Recommendation #2 from the IGO-INGO Access to Curative Rights Protections PDP,
545 which would allow IGOs to attempt to satisfy this requirement through reliance on the
546 protections afforded by Article 6ter of the Paris Convention for the Protection of
547 Industrial Property. In this regard, the EPDP team noted that, while Article 6ter requires
548 member states at minimum to protect IGO identifiers against potentially confusing
549 third-party trademark registrations or use as a mark, it does not in and of itself confer a
550 recordation of substantive trademark rights to IGOs. The EPDP team also observed that
551 the original Recommendation #2, as approved, leaves the decision as to whether Article
552 6ter protections would suffice for eligibility to file a UDRP and URS complaint to the
553 relevant panelist(s) in each case, thereby potentially creating uncertainty for the parties
554 involved.

555
556 [The EPDP team sought to reach a solution that would provide more uniform and clearer](#)
557 [guidance to IGOs, registrants and panelists without creating inconsistency with](#)
558 [Recommendation #2. Following its analysis of Article 6ter, relevant GAC advice and the](#)
559 [United Nations system, the EPDP team](#) developed a proposed definition (including a
560 demonstration of their public activities) for an “IGO Complainant” that would allow an
561 IGO to demonstrate the rights that would be functionally equivalent to unregistered
562 trademark rights.

563
564 [The EPDP team’s review of the Public Comments received on its proposed initial](#)
565 [definition showed that those commentators who addressed the topic generally](#)
566 [supported the EPDP team’s proposal, though a few expressed concerns relating to the](#)

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To supplement the applicability of and to remain consistent with Recommendation #2, the EPDP team discussed and

572 need to ensure consistency with the prior Curative Rights PDP recommendations and
 573 one commentator opposed the EPDP team’s proposal. As a result of its consideration of
 574 the comments submitted, the EPDP team formed a small team to review its initial
 575 proposed definition. The small team proposed a refinement to the definition that the
 576 EPDP team discussed and approved. The EPDP team’s final recommendations, including,
 577 its amended proposed definition for an “IGO Complainant”, can be found in Section
 578 2.1.1, above.

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580 The EPDP team referred to the following resources about the United Nations system in
 581 arriving at its proposed definition:

- 582 • A list of the current (as of August 2020) states and organizations that have
 583 received standing invitations to be observers at the United Nations General
 584 Assembly: <https://undocs.org/A/INF/75/3>.
- 585 • A list of the United Nations’ various entities and programs, including its
 586 Specialized Agencies: <https://www.un.org/en/about-us/un-system>.
- 587 • A list of the United Nations’ subsidiary bodies, including its standing and ad hoc
 588 committees: <https://www.un.org/en/ga/about/subsidiary/index.shtml>.

590 3.3 Deliberations Regarding IGO Immunity and Registrant Rights

591 The EPDP team noted that an external legal expert, Professor Edward Swaine, had been
 592 engaged previously to provide subject matter advice to the IGO-INGO Access to Curative
 593 Rights Protections PDP. The EPDP team discussed Professor Swaine’s conclusion that
 594 requiring a complainant to submit to Mutual Jurisdiction⁶, as is the case under the UDRP
 595 and URS, can amount to a waiver of jurisdictional immunity by an IGO. Conversely, the
 596 EPDP team acknowledged that removing this requirement for IGO Complainants could
 597 prejudice a registrant’s right and ability to have an initial UDRP or URS determination
 598 reviewed judicially, in that a successful assertion of immunity by an IGO means that the
 599 court in question will decline to proceed with the case. The EPDP team took note of the
 600 fact that Professor Swaine had suggested a few alternatives that could be pursued as a
 601 policy solution.

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 Deleted: . In addition, the EPDP team recognized that
 Deleted: , with the result that the outcome of the initial UDRP or URS determination will therefore stand
 Commented [MW5]: Added as the PCRT notes that the EPDP team had agreed to mention how it considered Prof Swaine’s memo in its Final Report.
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603 The EPDP team discussed several proposals that could allow for the recognition of IGO
 604 privileges and immunities without adversely affecting a registrant’s right to file
 605 proceedings in a court: in particular, the benefits and risks of developing an appeal
 606 process internal to the UDRP (i.e., where appeals from an initial UDRP panel decision
 607 would be reviewed by a panel comprising experienced UDRP panelists) compared with

⁶ This term in the UDRP and URS refers to the jurisdiction either of a court where the relevant registrar’s principal office is located, or of the registrant’s location.

621 allowing for a voluntary arbitration process. The EPDP team reviewed proposals
 622 concerning the required elements for either an appeal process or an arbitration option,
 623 covering matters ranging from the selection of an appeals panel or arbitral tribunal and
 624 how to ensure their neutrality, to the procedural rules that should apply to either
 625 process option⁷. Initially, some EPDP team members believed that an internal appeals
 626 process was the most efficient path forward (e.g., pointing to the process that Nominet
 627 has been using in the “.uk” ccTLD), but other members of the Work Track thought that
 628 making the option of voluntary arbitration explicit in the UDRP and URS was the more
 629 appropriate solution.

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630 The EPDP team ultimately agreed to work on an arbitration process rather than an
 631 internal appeal mechanism, and reached agreement on several elements that needed to
 632 be incorporated into the UDRP and URS as requirements, e.g., the arbitration must be
 633 conducted as a substantive review of the case, and in UDRP cases the registrar’s lock on
 634 the disputed domain must be maintained for the duration of the relevant proceedings⁸.
 635 The EPDP team decided to seek public input on other key aspects regarding an
 636 arbitration option. In its Initial Report, which it published for Public Comments in
 637 September 2021, the EPDP team requested community feedback on the following two
 638 questions:

Deleted: Having

Deleted: accepted that it would be appropriate to continue

Deleted: , the EPDP team discussed what aspects of an arbitration proceeding would need to be incorporated into the UDRP and URS as requirements. The EPDP team

Deleted: At this stage, however, the EPDP team was not able to reach preliminary agreement on two specific questions

- 639 • Whether a losing registrant should have the ability to preserve the option to go
 640 to arbitration if it decides to first file a case in court and the court declines to
 641 hear the merits of the case; and
- 642 • What substantive law should apply in the arbitration proceeding.

643
 644 The EPDP team had decided to seek Public Comments on these questions as some EPDP
 645 team members believed that preserving the option for a registrant to go to arbitration
 646 following an unsuccessful attempt to invoke judicial consideration of its case would lead
 647 to a much more costly and inefficient process, while other members thought it was
 648 important to ensure that a registrant continues to be able to seek consideration of the
 649 merits of its case.

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Deleted: retaining the registrant’s ability to proceed to arbitration following its choice to go to court as an initial option was important to ensure that the registrant can seek consideration of the merits of its case

650
 651 The Public Comments demonstrated strong concerns, particularly amongst individual
 652 commentators, regarding the EPDP team’s proposal to exempt IGO Complainants from
 653 the requirement to agree to submit to a Mutual Jurisdiction, to the extent that it would
 654 result in limitations on the registrant’s ability to file court proceedings against an IGO or
 655 in compelling a registrant to go to arbitration. These commentators emphasized that the

Deleted: The EPDP team’s final conclusions can be found in Section 2.1.2. The text includes the options for these two questions that are currently under consideration. The EPDP team emphasizes that it intends for these recommendations to be interdependent, i.e., considered and adopted as a single package. ...

⁷ See [INSERT RELEVANT EARLY GOOGLE DOC] for details of the proposed appeal process that the IGO Work Track considered.

⁹ These were the rules in use at the International Center for Dispute Resolution, the Permanent Court of Arbitration, the United Nations Commission for International Trade Law, and the World Intellectual Property Organization.

Deleted: ⁸ See Section 2.1.2 for the full set of elements recommended by the Work Track for the arbitral option. ¶

680 outcomes of the EPDP should not reduce or otherwise adversely affect the rights of
681 registrants.

682
683 Some commentators, including the ALAC and the GAC, welcomed the introduction of an
684 arbitration option into the UDRP and URS processes, noting that arbitration is a well-
685 recognized dispute resolution process, including for commercial disputes. However,
686 although there was some support for an arbitration option, there was no universal
687 agreement amongst the commentators as to whether arbitration should be the sole
688 avenue for final resolution of a dispute or whether a registrant should continue to be
689 able to seek arbitration following an unsuccessful attempt to have the merits of its
690 case considered by a court. Several commentators expressed the clear view that adding
691 arbitration to the UDRP and URS should not remove or reduce a registrant's right to
692 initiate court proceedings, and a few commentators suggested that the EPDP team
693 should clarify its recommendations in this regard.

694
695 The EPDP team agreed that its final recommendations must represent a balance
696 between the rights of IGOs and those of registrants. In reviewing all the Public
697 Comments received on this topic, the EPDP team also considered specific alternative
698 suggestions and text raised by a few commentators. A small team was tasked to develop
699 specific policy principles on key elements that the EPDP team believes are important for
700 arbitration proceedings between an IGO Complainant and a registrant. These policy
701 principles are intended to guide the future Implementation Review Team in selecting an
702 arbitration provider (or providers) and the applicable arbitral rules.

703
704 Based on its analysis of the Public Comments, the EPDP team modified its preliminary
705 recommendations to:

- 706 (i) Clarify that its proposal to exempt an IGO Complainant (as defined) from the
707 requirement to agree to submit to a Mutual Jurisdiction does not alter or
708 limit a registrant's ability and right to initiate court proceedings;
- 709 (ii) Include an obligation for a UDRP or URS provider to inform a registrant, when
710 notifying it of a complaint filed by an IGO Complainant, that it has the right to
711 file court proceedings as well as to seek arbitration, and the potential
712 implications where an IGO raises its immunities and privileges in a court
713 proceeding;
- 714 (iii) Provide that a registrant continues to have the option to seek arbitration
715 even after it has filed suit in court and the court has declined to hear the
716 merits of the case; and
- 717 (iv) Require that the relevant registrar (in a UDRP proceeding) or URS provider (in
718 a URS proceeding) inform the IGO Complainant should a registrant decide to
719 pursue arbitration.

720
721 The EPDP team's final recommendations can be found in Section 2.1.2 (above).
722
723

724 4 Conclusions and Next Steps

725 4.1 Final Conclusions

726
727 As described more fully in Section 2, above, the EPDP team has reached agreement on
728 the addition of a definition of “IGO Complainant” to the current Rules applicable to the
729 UDRP and URS, which is intended to clarify how an IGO may demonstrate rights to
730 proceed against a registrant in the absence of a (registered) trademark. The EPDP team
731 has also agreed that providing for voluntary arbitration within the overall framework of
732 the UDRP and URS is an appropriate approach toward resolving the issue of how to
733 recognize an IGO’s jurisdictional immunity, provided that a registrant’s right to choose
734 to go to court is also preserved.

735
736

737 4.2 Next Steps

738
739 This Final Report will be delivered to the GNSO Council for its consideration of the
740 recommendations from the EPDP team.

741
742

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743 5 Relevant Process & Issue Background

744 5.1 Process Background

745
746 In June 2014, the GNSO Council [chartered](#) the IGO-INGO Access to Curative Rights PDP
747 to develop policy recommendations as to whether “to amend the UDRP and URS to
748 allow access to and use of these mechanisms by IGOs and [International Non-
749 Governmental Organizations (INGOs)] and, if so in what respects or whether a separate,
750 narrowly-tailored dispute resolution procedure at the second level modeled on the UDRP
751 and URS that takes into account the particular needs and specific circumstances of IGOs
752 and INGOs should be developed.” The PDP Working Group submitted its [Final Report](#)
753 containing five recommendations to the GNSO Council in July 2018. Following several
754 months of deliberations over the PDP recommendations, during which several
755 Councilors voiced concerns over the implications of Recommendation #5, in April 2019
756 the GNSO Council [voted](#) to approve the first four recommendations, and to refer
757 Recommendation #5 to the RPM PDP to consider during Phase 2 of its work.
758

759 As indicated in its April 2019 resolution, the GNSO Council [approved](#) an Addendum to
760 the RPM PDP Charter in January 2020 to initiate the necessary policy work on
761 Recommendation #5. The Addendum reflects the outcomes of various discussions
762 between the GNSO Council and the [GAC](#) as well as interested IGOs, during which the
763 GAC and IGO representatives had indicated that they would be willing to participate in a
764 targeted policy effort that focuses on the issue of curative rights for IGOs and drawing
765 on the community's recent experiences with the Expedited PDP on the Temporary
766 Specification for gTLD Registration Data and Work Track 5 of the GNSO New gTLD
767 Subsequent Procedures PDP.
768

769 In October 2020, the GNSO Council issued a call for [Expressions of Interest](#) to serve as
770 the IGO Work Track Chair. Following the GNSO Council leadership team's review of the
771 applications it received, the GNSO Council [appointed](#) former ICANN Board Director Chris
772 Disspain to the position in December 2020.
773

774 The [Addendum](#) to the RPM PDP Charter laid out certain criteria for membership
775 appointments to the IGO Work Track and specified its overall composition and
776 representativeness across the ICANN community. The GNSO's Business Constituency,
777 Intellectual Property Constituency, Internet Service Providers and Connectivity Providers
778 Constituency and the Non-Commercial Stakeholder Group, as well as the [ALAC](#), the GAC
779 and interested IGOs all appointed [members](#) in accordance with the requirements in the
780 Addendum.
781

782 Following the completion of Phase 1 of the RPM PDP and pending the launch of Phase 2,
783 the GNSO Council [resolved](#) to continue the IGO Work Track's work through an EPDP in
784 August 2021. The Council emphasized that this decision was wholly procedural in

Deleted: Governmental Advisory Committee (“GAC”)

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787 nature, and was intended to provide a process framework to maintain the momentum
788 the IGO Work Track had displayed and to continue the same scope of work (via the new
789 EPDP Charter) as reflected in the original Addendum that the GNSO Council had
790 previously approved.

791 5.2 Issue Background

792
793 The IGO-INGO Access to Curative Rights PDP (active from June 2014 to July 2018) had
794 been preceded by an IGO-INGO Protections in All gTLDs PDP, which had taken place
795 between October 2012 and November 2013. One of the recommendations from that
796 prior PDP, which the GNSO Council approved, was for the GNSO Council to request an
797 Issue Report to determine whether a separate PDP should be initiated to explore
798 possible amendments to the UDRP and the URS that would enable access to and use of
799 such curative rights protection mechanisms by IGOs and INGOs. The [Final Issue Report](#)
800 that the GNSO Council requested includes background on prior work within and outside
801 the ICANN community on the issue of curative rights protections for IGOs and INGOs,
802 and documented the challenges that these organizations face in using the existing UDRP
803 and URS. Consequently, the GNSO Council initiated the IGO-INGO Access to Curative
804 Rights PDP in June 2014, "to evaluate: (i) whether the UDRP and/or URS should be
805 amended (to enable their access and use by IGOs and INGOs whose identifiers had been
806 recommended for protection by the IGO-INGO PDP WG) and if so, in what way; or (ii)
807 whether a separate narrowly-tailored procedure modeled on these curative rights
808 protection measures to apply only to protected IGO and INGO identifiers should be
809 developed."

810
811 Following four years of deliberations, the IGO-INGO Access to Curative Rights PDP
812 proposed five recommendations to the GNSO Council, as follows:

813
814 ***Recommendation #1:***
815 *1(a): For INGOs (including the Red Cross movement and the International*
816 *Olympic Committee), no substantive changes to the UDRP and URS are to be*
817 *made, and no specific new dispute resolution procedures are to be created.*
818 *1(b): For IGOs, no specific new dispute resolution procedures are to be created.*

819
820 ***Recommendation #2:***
821 *The Working Group notes that an IGO may seek to demonstrate that it has the*
822 *requisite standing to file a complaint under the UDRP or URS by showing that it*
823 *has complied with the requisite communication and notification procedure in*
824 *accordance with Article 6ter of the Paris Convention for the Protection of*
825 *Industrial Property. An IGO may consider this to be an option where it does not*
826 *have a registered trademark or service mark in its name and/or acronym but*
827 *believes it has certain unregistered trademark or service mark rights for which it*
828 *must adduce factual evidence to show that it nevertheless has substantive legal*
829 *rights in the name and/or acronym in question.*

830
831 *In this regard, the Working Group recommends that specific Policy Guidance on*
832 *this topic be issued by ICANN to clarify the following points:*
833 *(a) this alternative mechanism for standing is not needed in a situation where an*
834 *IGO already holds trademark or service mark rights in its name and/or acronym,*
835 *as the IGO would in such a case proceed in the same way as a non-IGO*
836 *trademark owner;*
837 *(b) whether or not compliance with Article 6ter will be considered determinative*
838 *of standing is a decision to be made by the UDRP or URS panelist(s) based on the*
839 *facts of each case; and*
840 *(c) the possibility that an IGO may seek to rely on its compliance with Article 6ter*
841 *to demonstrate standing should not modify or affect any of the existing grounds*
842 *which UDRP and/or URS panelists have previously found sufficient for IGO*
843 *standing (e.g., based on statutes and treaties).*

844
845 *Recommendation #3:*

846 *ICANN shall create and issue Policy Guidance: (a) outlining the various procedural*
847 *filing options available to IGOs, e.g. they have the ability to elect to have a*
848 *complaint filed under the UDRP and/or URS on their behalf by an assignee, agent*
849 *or licensee; and (b) advising IGOs and INGOs to, in the first instance and prior to*
850 *filing a UDRP or URS complaint, contact the registrar of record to address the*
851 *harms for which they are seeking redress. In addition, ICANN shall ensure that*
852 *this Policy Guidance document is brought to the notice of the Governmental*
853 *Advisory Committee (GAC) for its and its members' and observers' information*
854 *and published along with the procedures and rules applicable to the UDRP and*
855 *URS on the ICANN website.*

856
857 *Recommendation #4:*

858 *Notwithstanding GAC advice concerning access to curative rights processes for*
859 *IGOs as well as the Charter language requiring the Working Group to consider*
860 *"the need to address the issue of cost to IGOs and INGOs to use curative*
861 *processes", there was no support within the Working Group for a*
862 *recommendation to provide subsidies to any party to use the UDRP or URS.*
863 *Nevertheless, the Working Group recognizes that it has no authority to obligate*
864 *the expenditure of ICANN funds, and it understands, further, that the feasibility*
865 *of providing IGOs with access to the UDRP and URS at no or nominal cost to the*
866 *IGOs is a question that must be addressed directly through discussions between*
867 *the ICANN Board with the GAC and IGOs. The Working Group also notes that*
868 *many Working Group members believe that a respondent should also be eligible*
869 *to receive financial support for its defense in a case where ICANN has subsidized*
870 *the complainant.*

871
872 *Recommendation #5:*

873 *Where a losing registrant challenges the initial UDRP/URS decision by filing suit*
874 *in a national court of mutual jurisdiction and the IGO that succeeded in its initial*
875 *UDRP/URS complaint also succeeds in asserting jurisdictional immunity in that*
876 *court, the decision rendered against the registrant in the predecessor UDRP or*
877 *URS shall be set aside (i.e. invalidated).*
878

879 As noted in Section 1, above, the GNSO Council’s review of the PDP Final Report
880 revealed several concerns over the implications of Recommendation #5. The GNSO
881 Council therefore decided not to approve this recommendation, electing instead to
882 refer it to the RPM PDP and to create a separate IGO Work Track within that PDP
883 framework that was to try to develop a policy solution that would nevertheless be
884 “generally consistent” with the other four PDP recommendations that the GNSO Council
885 approved.
886

887 The GNSO Council’s intentions and instructions as to the scope of work for the new IGO
888 Work Track are documented in its resolution creating the Work Track and the
889 Addendum laying out the problem statement, membership requirements and process
890 methodology for the Work Track. As noted above, these instructions and scope of work
891 were not affected or modified through the GNSO Council’s procedural decision to
892 continue the Work Track’s work via an EPDP.
893

894
895
896
897

898 6 Approach Taken by the Work Track

899 6.1 Working Methodology

900 The EPDP team held its first meeting in February 2021. Recordings and transcripts of the
901 group's discussions can be found on its [wiki space](#). It has conducted its work primarily
902 through weekly conference calls, in addition to email exchanges on its mailing list.
903

904 As instructed by the GNSO Council, the EPDP team prepared a [work plan](#) which it
905 reviewed on a regular basis. The EPDP Chair and the GNSO Council liaison to the EPDP
906 team also provided regular reports to the GNSO Council regarding the status and
907 progress of the group's work.
908
909

910 6.1.1 Work Track Membership and Attendance

911 **Plenary Meetings:**

- 912 • 23 Plenary calls (+3 cancelled) for 34.5 call hours for a total of 637.5 person
913 hours
- 914 • 84.8% total participation rate
915

916 **Small Team Meetings:**

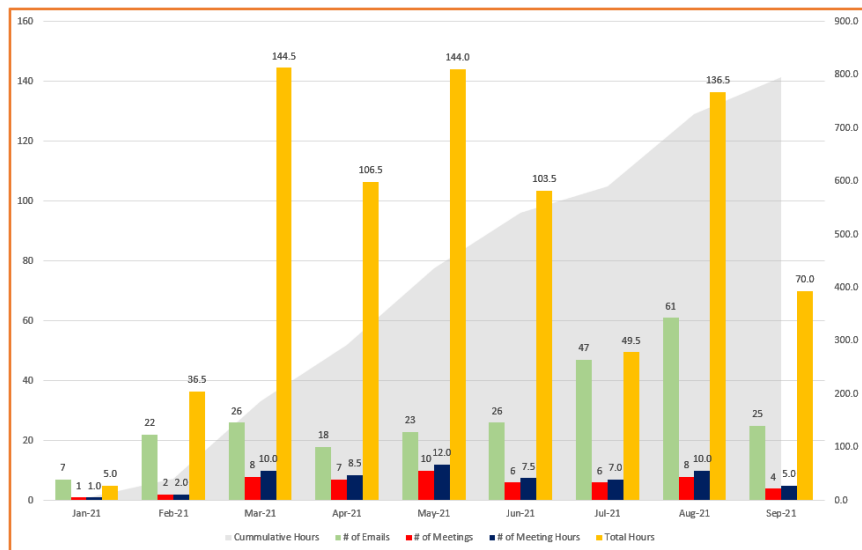
- 917 • 2 Small team calls for 2.0 call hours for a total of 12.0 person hours
- 918 • 100.0% total participation rate
919

920 **Leadership Meetings:**

- 921 • 27 Leadership calls for 27.0 call hours for a total of 161.0 person hours
922

923 The EPDP Team email archives can be found at [https://mm.icann.org/pipermail/gns-](https://mm.icann.org/pipermail/gns-igo-wt/)
924 [igo-wt/](https://mm.icann.org/pipermail/gns-igo-wt/).
925
926

Commented [BC7]: Updated after last EPDP call in March 2022. In the meantime, latest metrics can be found in the Project Package: <https://community.icann.org/pages/viewpage.action?pageId=164626455>



927
928
929
930

The members* of the EPDP team are:

Represented Group / Member	SOI	Start Date	Depart Date	Attended %	Role
At-Large Advisory Committee (ALAC)				56.5%	
Carlos Raúl Gutiérrez	SOI	17-Dec-2020		21.7%	
Yrjö Lämsipuro	SOI	17-Dec-2020		91.3%	
Commercial Business Users Constituency (BC)				100.0%	
Jay Chapman	SOI	17-Dec-2020		100.0%	
GNSO Council				95.7%	
Chris Disspain	SOI	17-Dec-2020		100.0%	Chair
Jeffrey Neuman	SOI	8-Jan-2021		95.7%	Liaison
John McElwaine	SOI	8-Jan-2021		91.3%	Liaison
Governmental Advisory Committee (GAC)				85.9%	
Alexandra Excoffier	SOI	17-Dec-2020		87.0%	
Brian Beckham	SOI	17-Dec-2020		95.7%	
Kavouss Arasteh	SOI	17-Dec-2020		60.9%	
Susan Anthony	SOI	17-Dec-2020		100.0%	
Intellectual Property Constituency (IPC)				91.3%	
Paul McGrady	SOI	17-Dec-2020		91.3%	
Internet Service Providers and Connectivity Providers Constituency (ISPCP)				78.3%	
Oswaldo Novoa	SOI	17-Dec-2020		78.3%	
Non-Commercial Stakeholder Group (NCSG)				75.0%	

Ioana Florina Stupariu	SOI	17-Dec-2020		73.9%	
Juan Manuel Rojas	SOI	17-Dec-2020		73.9%	
Krishna Seeburn	SOI	17-Dec-2020	3-Mar-2021	100.0%	

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932 The Alternates* of the EPDP Team are:
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Represented Group / Alternate	SOI	Start Date	Depart Date	Attended %	Role
At-Large Advisory Committee (ALAC)				90.3%	
Justine Chew	SOI	17-Dec-2020		89.5%	
Vanda Scartezini	SOI	17-Dec-2020		91.7%	
Governmental Advisory Committee (GAC)				94.9%	
David Satola	SOI	17-Dec-2020		100.0%	
Jorge Cancio	SOI	17-Dec-2020		0.0%	
Matthew Coleman	SOI	17-Dec-2020		100.0%	

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935 ICANN org Policy Staff Support for the EPDP Team:
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Represented Group / Staff Assigned	SOI	Start Date	Depart Date	Attended %	Role
Andrea Glandon		17-Dec-2020			
Berry Cobb		17-Dec-2020			
Julie Bisland		17-Dec-2020			
Mary Wong		17-Dec-2020			
Steve Chan		17-Dec-2020			
Terri Agnew		17-Dec-2020			

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939 * This membership list was accurate as of the date of publication of this report.
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7 Annex A – Principles regarding Arbitral Rules

In agreeing to include a voluntary arbitration option in the UDRP and URS, the EPDP team understood and agreed that it will also be necessary to provide guidance for the policy implementation phase regarding the key elements to include in an arbitration proceeding. The EPDP team acknowledged that there are several major sets of international arbitral rules that could potentially be applied, which it noted in its Initial Report⁹.

Following further deliberations and consideration of the Public Comments that were submitted, the EPDP Team agreed that the Implementation Review Team would benefit from the clarity that a set of governing policy principles can provide. A small team of EPDP members was formed to develop the proposed principles. Below is the final set of principles that the EPDP team approved.

General Principles:

1. As the type of arbitration proceeding contemplated by the EPDP recommendations is intended to be final and binding, the arbitration should be conducted in such a manner as to be the substantive equivalent of a judicial review of the merits of the case as much as is feasible.
2. At the same time, any arbitration proceeding should be conducted as expeditiously as possible. As such, the arbitral rules framework should be sufficiently flexible to allow for a more streamlined process if the parties agree.
3. To ensure predictability, the process for initiating, conducting, and concluding the arbitration should be clear and should allow for electronic communications by default.
4. The arbitration process should be cost-efficient. A fixed range of fees can be considered to ensure predictability and affordability.
5. Arbitration is not an appeal limited to specific circumstances; it is a *de novo* review of the merits of the case.
6. As such, full discovery (subject to the parties' ability to agree to a more streamlined process) should be the norm.
7. The parties should be encouraged to consider voluntary mediation in lieu of or prior to the arbitration.
8. The arbitration should be conducted through hearings where both parties may present oral and written evidence as well as call and question witnesses. By default, hearings should be conducted online, though the parties should have

⁹ These were the rules in use at the International Center for Dispute Resolution, the Permanent Court of Arbitration, the United Nations Commission for International Trade Law, and the World Intellectual Property Organization.

the ability to opt for in-person or “hybrid” (i.e., combination of in-person and online) hearings.

9. The arbitrator(s) should have discretion as to the **general conduct** of the proceedings. In particular, the arbitrator(s) should have discretion regarding the admissibility and weight of the evidence presented by both parties.
10. There should be a clear, transparent, and uniform process for the selection and appointment of arbitrators, as well as for challenging an appointment. All arbitrators should be required to attest to their impartiality and independence.
11. All arbitration proceedings must result in clear and enforceable outcomes. These may include confirmation of a transfer or cancellation of the disputed domain name(s), or an order that the registrant retains the disputed domain name(s). The arbitrator(s) should have the discretion to award **injunctive relief** where this is considered necessary for equitable reasons.

Commented [MW8]: Will this extend to handling non-cooperative witnesses?

Commented [MW9]: Should monetary damages (not punitive) be clearly included or excluded? What about costs?

Specific Principles:

1. To facilitate flexibility, the parties should be permitted to tailor any requirement or step in the arbitration process to their specific, mutually agreed needs.
2. Each party may elect to be represented by a person of their choice, who need not be an attorney.
3. Except when presenting their case during the hearing, parties should be prohibited from communicating with the arbitrator(s) prior to or during the arbitration process unless they have obtained the other party’s prior agreement.
4. Unless agreed otherwise, the parties should agree on either one or a maximum of three arbitrators and should be able to select the arbitrator(s) from a defined list.
5. Arbitrators may be required to observe specific rules of evidence, similar to those applicable to court proceedings.
6. Parties should be able to discuss and disclose details regarding possible settlements at any time.
7. There should be sanctions for parties that do not comply with applicable rules or who seek to cause unnecessary delay or expense.

OPEN QUESTIONS FOR EPDP TEAM DISCUSSION:

- How should confidentiality of case information be handled (e.g., redaction of business-confidential or personal information)?
- Should all arbitration decisions be published; if so, where and by who?
- In addition to the EPDP team’s recommendation on choice of law, is there a need to discuss matters such as the location or seat for the arbitration?
- Are there other concerns or issues regarding enforceability and/or **enforcement** of the arbitral award?

Commented [MW10]: e.g., if there is a need to go to court to enforce

- Should there be guidance as to how the arbitration provider appoints potential arbitrators for the parties to select, including how to ensure that the list of arbitrators is balanced and qualified?

8 Annex B – Scope of Work (as approved by the GNSO Council)

EPDP Team Charter, as approved by the GNSO Council:

<https://gns0.icann.org/sites/default/files/file/field-file-attach/specific-cr-igo-epdp-charter-16aug21-en.pdf>

GNSO Council resolution establishing the EPDP Team:

<https://gns0.icann.org/en/council/resolutions/2020-current#20210819-2>

GNSO Council project webpage for the EPDP: <https://gns0.icann.org/en/group-activities/active/specific-cr-igo-epdp>