

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

### Status of this Document

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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

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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, which remains outstanding. 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

Resolution Policy (UDRP) or Uniform Rapid Suspension (URS) proceeding, following which the losing registrant files suit in a court and the IGO asserts immunity from the jurisdiction of that court. Recommendation #5 provided that, in such a situation, the original UDRP or URS panel decision is to be set aside. The effect of implementing Recommendation #5 would be to put the parties to the dispute in their original situations, as if the UDRP or URS proceeding in which the IGO had prevailed had never been commenced.

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

## 1.2 Final Recommendations

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

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

### 1.2.1 Recommendation regarding UDRP and URS Eligibility Requirements for IGOs

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

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

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

## 1.3 Summary of Deliberations to Date

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

## 1.4 Next Steps

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

## 2 Final Recommendations

The EPDP team has kept the GNSO Council's instructions regarding consideration of an appropriate policy solution for Recommendation #5 from the IGO-INGO Access to Curative Rights PDP at the forefront in its work. However, most of the EPDP team concluded early on that a feasible and appropriate policy solution cannot be crafted simply by looking at that recommendation in isolation. Although Recommendation #5 is concerned with the outcome of a dispute resolution process where the affected IGO asserts immunity from jurisdiction, most of the EPDP team agreed that, in order to address this specific issue, it needed to first determine how and which IGOs are able to file a complaint under the relevant dispute resolution mechanism. In this regard, EPDP team members noted that, due to national State obligations under the Paris Convention for the Protection of Industrial Property, IGOs may not own or hold registered trademarks<sup>1</sup> in their names, acronyms, or other identifiers.

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

To address the specific issue under Recommendation #5 from the IGO-INGO Access to Curative Rights PDP, the EPDP team proposes a further set of recommendations (Recommendations #2, #3, #4, and #5) that, in combination with Recommendation #1, are intended to be "interdependent" (as contemplated by Section 13 of the GNSO's PDP Manual<sup>2</sup>). Most of the EPDP team believes that this set of recommendations is responsive to the GNSO Council's directions that the proposed policy solution be *"generally consistent"* with the four other recommendations from the IGO-INGO Access to Curative Rights PDP.

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

<sup>2</sup> 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".)

## 2.1 Final Recommendations

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

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

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

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

The EPDP team understands that under the GNSO's PDP Manual, in the absence of exceptional circumstances, the GNSO Council must direct the creation of an Implementation Review Team (IRT) to assist ICANN org staff in developing implementation details. Due to the complexity of the legal issues involved, the EPDP team advises the GNSO Council to ensure that the IRT includes members familiar with the substantive and procedural rules governing arbitration proceedings, in line with Principle IC of the IRT Principles & Guidelines.

## 2.1.1 Recommendation regarding UDRP and URS Eligibility Requirements

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

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

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

“‘IGO Complainant’ refers to:

- (i) an international organization established by a treaty, and which possesses international legal personality; or
- (ii) an ‘Intergovernmental organization’ having received a standing invitation, which remains in effect, to participate as an observer in the sessions and the work of the United Nations General Assembly; or
- (iii) a Specialized Agency or distinct entity, organ or program of the United Nations<sup>3</sup>.”

- ii. Add the following explanatory text to UDRP Rules Section 3(b)(viii), URS Section 1.2.6 and URS Rules Section 3(b)(v):

“Where the Complainant is an IGO Complainant, it may show rights in a mark by demonstrating that the identifier which forms the basis for the complaint is used by the IGO Complainant to conduct public activities in accordance with its stated mission (as may be reflected in its treaty, charter, or governing document). Such use shall not be a token use.”

Consensus level designation for Recommendation #1: Full Consensus

#### Explanatory Text:

The EPDP team acknowledged that there is no single authoritative source for determining whether an organization is an IGO. To ensure that its recommendations are limited to a policy solution for the specific issue it was tasked to address, the EPDP team thought it necessary to ensure that its recommendations apply only to those organizations for which there is demonstrable factual proof of their status as IGOs. In arriving at its final definition for an “IGO Complainant”, the EPDP team analyzed the United Nations system and documentation, relevant provisions in international treaties

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<sup>3</sup> 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](https://www.un.org/en/pdfs/un_system_chart.pdf).

(such as Article 6ter of the Paris Convention for the Protection of Industrial Property), and GAC advice.

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

### 2.1.2 Recommendations to Address IGO Immunities While Preserving a Registrant's Right to Seek Review of a UDRP or URS Decision Issued Against It

#### **Recommendation #2: Exemption from Submission to "Mutual Jurisdiction"**

- (a) The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1) be exempt from the requirement under Section 3(b)(xii) of the UDRP Rules and Section 3(b)(ix) of the URS Rules.
- (b) The EPDP team recommends that, when forwarding a complaint filed by an IGO Complainant to the respondent (pursuant to Paragraph 2(a) of the UDRP or Paragraph 4.2 of the URS, as applicable), the relevant UDRP or URS provider must also include a notice informing the respondent;
  - (i) of its right to challenge a UDRP decision canceling or transferring the domain name, or a URS Determination rendered in favor of an IGO Complainant, by filing a claim in court;
  - (ii) that, in the event the respondent chooses to initiate court proceedings, the IGO Complainant may assert its privileges and immunities with the result that the court may decline to hear the merits of the case on the basis of IGO privileges and immunities; and
  - (iii) that the respondent has the option to agree to binding arbitration to settle the dispute at any time, including in lieu of initiating court proceedings or, if it files a claim in court, where the court has declined to hear the merits of the case.

Consensus level designation for Recommendation #2: Full Consensus

Explanatory Text:

This recommendation addresses the GNSO Council’s instructions that the EPDP team’s recommended policy solution must *“[account] for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances; ... not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction whether following a UDRP/URS case or otherwise; and ... [recognize] 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”*.

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

### **Recommendation #3: Arbitral Review following a UDRP Proceeding**

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

- i. When submitting its complaint, an IGO Complainant shall indicate that it agrees, if the registrant also agrees, to have the final determination of the outcome of the UDRP proceeding settled through binding arbitration.
- ii. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall provide both parties with information regarding the applicable arbitral rules.
- iii. In accordance with Paragraph 4(k) of the UDRP, the relevant registrar shall wait ten (10) business days (as observed in the location of its principal office) before implementing a UDRP panel decision rendered in the IGO Complainant’s favor. The registrar shall stay implementation if, within that period, it receives official documentation that the registrant has either initiated court proceedings in its location or in the location of the registrar’s principal office or has submitted a request for or notice of arbitration.
- iv. Where the relevant registrar has received a request for or notice of arbitration, it shall stay or continue to stay, as applicable, implementation of the UDRP panel decision until it receives official documentation concerning the outcome of an

arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute.

- v. Where the registrant initiates court proceedings and the court declines to hear the merits of the case on the basis of IGO privileges and immunities, the registrant may submit the dispute to binding arbitration within ten (10) business days from the court order declining to hear the merits of the case, by submitting a request for or notice of arbitration to the competent arbitral institution with a copy to the relevant registrar and UDRP provider. Where the registrant does not submit a request for or notice of arbitration to the competent arbitral institution (with a copy to the registrar, UDRP provider and the IGO Complainant) within ten (10) business days from the court order declining to hear the merits of the case on the basis of IGO privileges and immunities, the original UDRP decision will be implemented by the registrar.
- vi. Where a registrant decides to submit the dispute to binding arbitration, it shall notify the relevant registrar prior to initiating the arbitration proceeding with the arbitral tribunal.
- vii. The arbitral institution to whom the registrant submits a request for or notice of arbitration shall notify the IGO Complainant of the registrant's decision to initiate arbitration.

#### Consensus level designation for Recommendation #3: Full Consensus

##### 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. These policy principles are intended to be an overarching guidance framework for the Implementation Review Team that will be formed to advise ICANN org on the implementation of approved policies from this EPDP.

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

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

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

- ii. In communicating a URS Determination to the parties where the complainant is an IGO Complainant, the URS provider shall provide both parties with information regarding the applicable arbitral rules.
- iii. Where the registrant initiates court proceedings and the court declines to hear the merits of the case on the basis of IGO privileges and immunities, the registrant may submit the dispute to binding arbitration within ten (10) business days from the date of the court order declining to hear the merits of the case, by submitting a request for or notice of arbitration to the competent arbitral institution, with a copy to the URS provider. The relevant domain name(s) will remain suspended throughout the pendency of any such arbitration proceeding.
- iv. Where the registrant files an appeal under URS Section 12 and does not prevail in the appeal, it may submit the dispute to binding arbitration within ten (10) business days from the date of the appeal panel's decision, by submitting a request for or notice of arbitration to the arbitral institution, with a copy to the URS provider and the IGO Complainant. The relevant domain name(s) will remain suspended throughout the pendency of any such arbitration proceeding.
- v. Where a registrant decides to submit the dispute to binding arbitration, it shall notify the relevant URS provider prior to initiating the arbitration proceeding with the competent arbitral tribunal.
- vi. The arbitral provider to whom the registrant submits a request for or notice of arbitration shall notify the IGO Complainant of the registrant's decision to initiate arbitration.

Consensus level designation for Recommendation #4: Full Consensus

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 the parties cannot reach mutual agreement in a case where the domain name was registered through a privacy or proxy service<sup>4</sup> and the underlying registrant's identity is disclosed as part of the UDRP or URS proceeding, the IGO Complainant shall elect either the law of the relevant registrar's principal office or the law in the location of the underlying registrant. In all cases, 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.

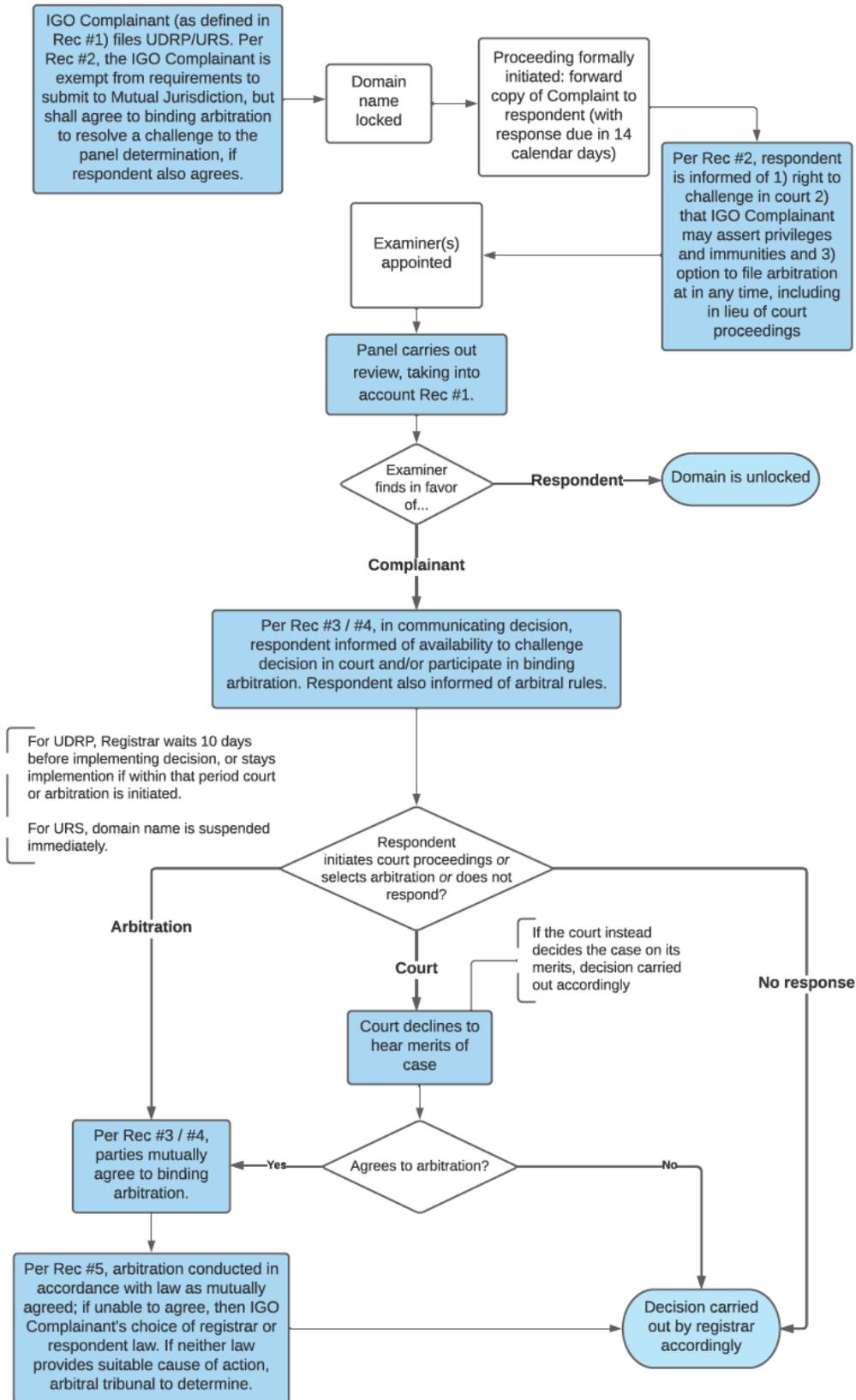
Consensus level designation for Recommendation #5: Full Consensus

**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, nor is it an indication of the entire UDRP/URS procedures. 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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<sup>4</sup> The EPDP team has considered the differences between privacy and proxy services (e.g., as expressed in the respective definitions in Sections 1.2 and 1.3 of the Privacy & Proxy Specification in the Registrar Accreditation Agreement: <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#privacy-proxy>) as well as UDRP Rule 4(b) (concerning timely updates to a respondent's data, including as a result of a request by a privacy or proxy service to disclose underlying customer data). As Recommendation #5 is intended to ensure that the choice of law for an arbitration proceeding is linked to the actual or underlying registrant and where they are located, the EPDP team has included language in the recommendation to address a situation where a domain name was registered via a privacy or proxy service.



[Link to full chart](#)

## 2.2 Policy Change Impact Analysis

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.

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

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

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

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

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

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

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)<sup>5</sup>. 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

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<sup>5</sup> 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>.

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

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

### 3.2 Deliberations Regarding IGO Eligibility under the UDRP and URS

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

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

The EPDP team’s review of the Public Comments received on its proposed initial definition showed that those commentators who addressed the topic generally supported the EPDP team’s proposal, though a few expressed concerns relating to the

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

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

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

### 3.3 Deliberations Regarding IGO Immunity and Registrant Rights

The EPDP team noted that an external legal expert, Professor Edward Swaine, had been engaged previously to provide subject matter advice to the IGO-INGO Access to Curative Rights Protections PDP. The EPDP team discussed Professor Swaine’s conclusion that requiring a complainant to submit to Mutual Jurisdiction<sup>6</sup>, as is the case under the UDRP and URS, can amount to a waiver of jurisdictional immunity by an IGO. Conversely, the EPDP team acknowledged that removing this requirement for IGO Complainants could prejudice a registrant’s right and ability to have an initial UDRP or URS determination reviewed judicially, in that a successful assertion of immunity by an IGO means that the court in question will decline to proceed with the case. The EPDP team took note of the fact that Professor Swaine had suggested a few alternatives that could be pursued as a policy solution.

The EPDP team discussed several proposals that could allow for the recognition of IGO privileges and immunities without adversely affecting a registrant’s right to file proceedings in a court: in particular, the benefits and risks of developing an appeal process internal to the UDRP (i.e., where appeals from an initial UDRP panel decision would be reviewed by a panel comprising experienced UDRP panelists) compared with

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<sup>6</sup> 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.

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

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

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

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

The Public Comments demonstrated strong concerns, particularly amongst individual commentators, regarding the EPDP team’s proposal to exempt IGO Complainants from the requirement to agree to submit to a Mutual Jurisdiction, to the extent that it would result in limitations on the registrant’s ability to file court proceedings against an IGO or in compelling a registrant to go to arbitration. These commentators emphasized that the outcomes of the EPDP should not reduce or otherwise adversely affect the rights of registrants.

Some commentators, including the ALAC and the GAC, welcomed the introduction of an arbitration option into the UDRP and URS processes, noting that arbitration is a well-recognized dispute resolution process, including for commercial disputes. However, although there was some support for an arbitration option, there was no universal

agreement amongst the commentators as to whether arbitration should be the sole avenue for final resolution of a dispute or whether a registrant should continue to be able to seek arbitration following an unsuccessful attempt to have the merits of its case considered by a court. Several commentators expressed the clear view that adding arbitration to the UDRP and URS should not remove or reduce a registrant's right to initiate court proceedings, and a few commentators suggested that the EPDP team should clarify its recommendations in this regard.

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

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

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

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

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## 4 Conclusions and Next Steps

### 4.1 Final Conclusions

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

### 4.2 Next Steps

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

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## 5 Relevant Process & Issue Background

### 5.1 Process Background

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

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

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

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

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

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

## 5.2 Issue Background

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

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

*Recommendation #1:*

*1(a): For INGOs (including the Red Cross movement and the International Olympic Committee), no substantive changes to the UDRP and URS are to be made, and no specific new dispute resolution procedures are to be created.*

*1(b): For IGOs, no specific new dispute resolution procedures are to be created.*

*Recommendation #2:*

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

*In this regard, the Working Group recommends that specific Policy Guidance on this topic be issued by ICANN to clarify the following points:*

*(a) this alternative mechanism for standing is not needed in a situation where an IGO already holds trademark or service mark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner;*

*(b) whether or not compliance with Article 6ter will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and*

*(c) the possibility that an IGO may seek to rely on its compliance with Article 6ter to demonstrate standing should not modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g., based on statutes and treaties).*

*Recommendation #3:*

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

*Recommendation #4:*

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

*Recommendation #5:*

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

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

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

## 6 Approach Taken by the EPDP Team

### 6.1 Working Methodology

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

As instructed by the GNSO Council, the EPDP team prepared a [work plan](#) which it reviewed on a regular basis. The EPDP Chair and the GNSO Council liaison to the EPDP team also provided regular reports to the GNSO Council regarding the status and progress of the group's work. Details of the project schedule, attendance and action items can be found in the monthly project packages.

The EPDP Team email archives can be found at <https://mm.icann.org/pipermail/gns-igo-wt/>.

#### 6.1.1 EPDP Membership and Attendance

##### Plenary Meetings:

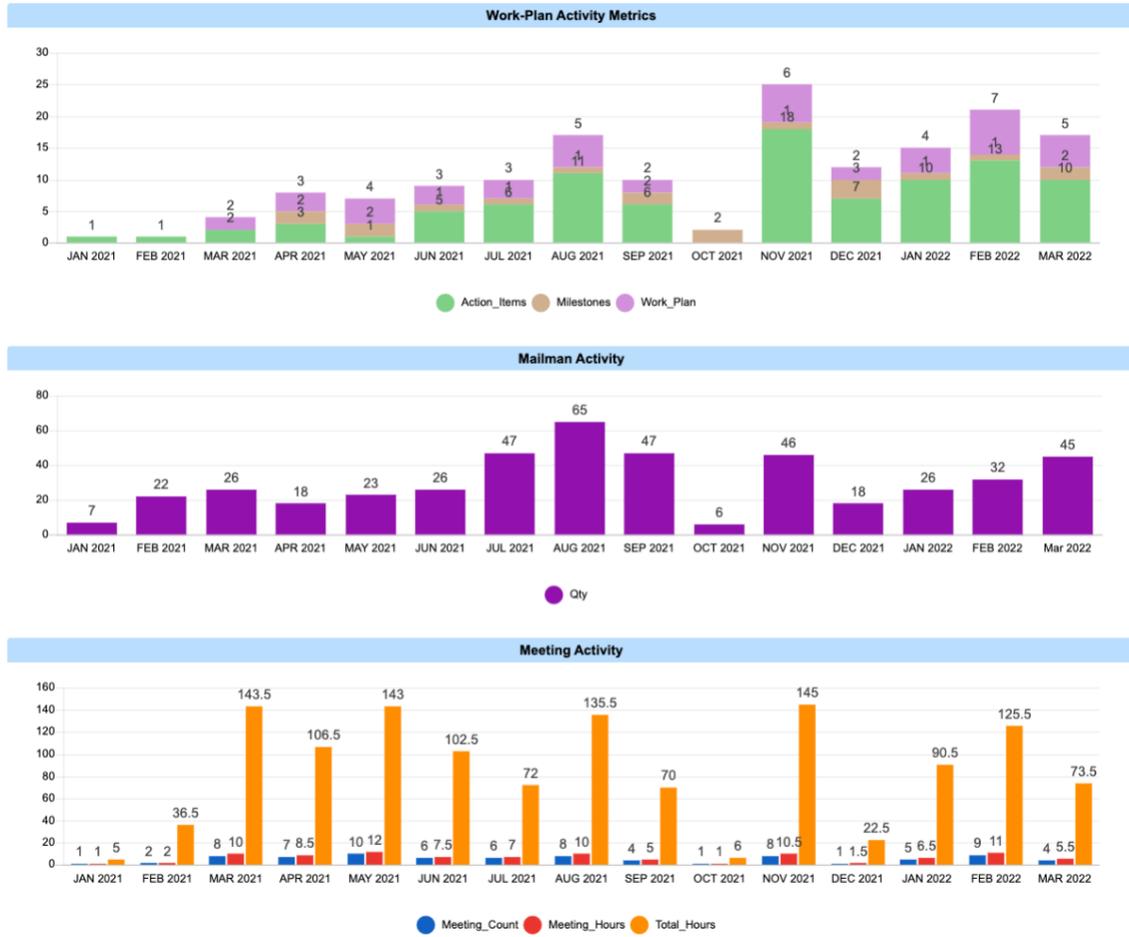
- 39 Plenary calls (w/ 6 cancelled) for 58.5 call hours for a total of 1015.5 person hours
- 80.3% total participation rate

##### Small Team Meetings:

- 8 Small team calls for 8.0 call hours for a total of 62.0 person hours
- 100.0% total participation rate

##### Leadership Meetings:

- 33 Leadership calls for 33.0 call hours for a total of 200.0 person hours



The Members of the EPDP team are:

Represented Group / Member	SOI	Start Date	Depart Date	Attended %	Role
<b>At-Large Advisory Committee (ALAC)</b>				<b>93.2%</b>	
Justine Chew	<a href="#">SOI</a>	17-Dec-2020		91.4%	
Yrjö Länsipuro	<a href="#">SOI</a>	17-Dec-2020		94.9%	
<b>Commercial Business Users Constituency (BC)</b>				<b>100.0%</b>	
Jay Chapman	<a href="#">SOI</a>	17-Dec-2020		100.0%	
<b>GNSO Council</b>				<b>93.2%</b>	
Chris Disspain	<a href="#">SOI</a>	17-Dec-2020		100.0%	Chair
Jeffrey Neuman	<a href="#">SOI</a>	8-Jan-2021		87.2%	Liaison
John McElwaine	<a href="#">SOI</a>	8-Jan-2021		92.3%	Liaison
<b>Governmental Advisory Committee (GAC)</b>				<b>74.4%</b>	
Alexandra Excoffier	<a href="#">SOI</a>	17-Dec-2020		69.2%	
Brian Beckham	<a href="#">SOI</a>	17-Dec-2020		92.3%	
Kavouss Arasteh	<a href="#">SOI</a>	17-Dec-2020		38.5%	
Susan Anthony	<a href="#">SOI</a>	17-Dec-2020		97.4%	

<b>Intellectual Property Constituency (IPC)</b>				<b>89.7%</b>	
Paul McGrady	<a href="#">SOI</a>	11-Jan-2021		89.7%	
<b>Internet Service Providers and Connectivity Providers Constituency (ISPCP)</b>				<b>69.2%</b>	
Oswaldo Novoa	<a href="#">SOI</a>	17-Dec-2020		69.2%	
<b>Non-Commercial Stakeholder Group (NCSG)</b>				<b>56.3%</b>	
Ioana Florina Stupariu	<a href="#">SOI</a>	17-Dec-2020		59.0%	
Juan Manuel Rojas	<a href="#">SOI</a>	17-Dec-2020		51.3%	
Krishna Seeburn	<a href="#">SOI</a>	17-Dec-2020	3-Mar-2021	100.0%	

The Alternates of the EPDP Team are:

Represented Group / Alternate	SOI	Start Date	Depart Date	Attended %	Role
<b>At-Large Advisory Committee (ALAC)</b>				<b>55.1%</b>	
Carlos Raúl Gutiérrez	<a href="#">SOI</a>	17-Dec-2020		18.5%	
Vanda Scartezini	<a href="#">SOI</a>	17-Dec-2020		91.7%	
<b>Governmental Advisory Committee (GAC)</b>				<b>66.7%</b>	
David Satola	<a href="#">SOI</a>	17-Dec-2020		100.0%	
Jorge Cancio	<a href="#">SOI</a>	17-Dec-2020		0.0%	
Matthew Coleman	<a href="#">SOI</a>	17-Dec-2020		100.0%	

ICANN org Policy Staff Support for the EPDP Team:

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			

## 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 Report<sup>7</sup>.

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. As a general matter, the EPDP team acknowledges that these principles are subject to the applicable law governing a particular arbitration proceeding.

### **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. The arbitration process must include customary and reasonable protections against abuse of process.
4. To ensure predictability, the process for initiating, conducting, and concluding the arbitration should be clear and should allow for electronic communications by default.
5. The arbitration process should be cost-efficient. A fixed range of arbitral fees should be encouraged to ensure predictability and affordability.
6. Arbitration is not an appeal limited to specific circumstances; it is a *de novo* review of the elements of the UDRP or URS action.
7. Unless the parties agree to a more streamlined process, there should be a full exchange of documents and information relevant to the proceeding.

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<sup>7</sup> 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.

8. The parties should be encouraged to consider voluntary mediation prior to or during the arbitration.
9. Unless agreed otherwise by the parties, the arbitration should be conducted through hearings where both parties may present oral and written evidence as well as call, question and cross-examine witnesses. By default, hearings should be conducted online, though the parties should have the ability to opt for in-person or “hybrid” (i.e., combination of in-person and online) hearings.
10. 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.
11. 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.
12. 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), including a declaration of abuse of process or reverse domain name hijacking in cases where the arbitrator(s) has/have found such behavior. The arbitrator(s) should have the discretion to award injunctive relief where this is considered necessary for equitable reasons.

**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 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.
4. The parties should be encouraged to agree on the appointment of a single arbitrator. In the event the parties cannot agree on the appointment of a single arbitrator, the arbitral tribunal shall appoint the sole arbitrator from a pre-defined list of arbitrators.
5. Either party may elect that a three-person panel be constituted, in which case each party is to elect an arbitrator from a pre-defined list of arbitrators, and the third (presiding) arbitrator shall be chosen through mutual agreement. In the event the parties cannot agree on the appointment of the third (presiding) arbitrator, the parties’ designated arbitrators shall choose the third (presiding) arbitrator from the available list.
6. Consideration should be given to publishing a list of potential arbitrators who are recognized as experts in domains name issues.

7. Arbitrators should observe specific rules of evidence, similar to those applicable to court proceedings.
8. Parties should be able to discuss and disclose details regarding possible settlements at any time.
9. Consideration should be given to the possibility of sanctions against parties that do not comply with applicable rules, who have been found to have engaged in an abuse of process, or who seek to cause unnecessary delay or expense.
10. All final arbitral decisions should be published or otherwise made available to the public. This does not include case filings or other documentation relating to the conduct of the proceedings.

## 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-crp-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-crp-igo-epdp>