

ICANN | GNSO

Generic Names Supporting Organization

Initial Report & Preliminary Recommendations from the Expedited Policy Development Process on Specific Curative Rights Protections for International Governmental Organizations (IGOs)

Status of this Document

This is the Initial Report containing preliminary recommendations from the GNSO's Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for International Governmental Organizations (IGOs). This report is being posted for Public Comment in accordance with the ICANN Bylaws and the GNSO's Policy Development Process Manual.

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

Preamble

This Initial 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 recommendations concerning a “curative” approach toward enforcement of IGO rights. This report describes the EPDP team’s deliberations and preliminary 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. Based on its review of all Public Comments received on this report, the EPDP team will finalize its policy recommendations and submit its Final Report to the GNSO Council, in accordance with a Motion proposed and carried during the Council teleconference meeting on 23 January 2020.

Table of Contents

Table of Contents

1 EXECUTIVE SUMMARY	4
2 PRELIMINARY RECOMMENDATIONS	8
3 SUMMARY OF DELIBERATIONS	19
4 CONCLUSIONS AND NEXT STEPS	23
5 RELEVANT PROCESS & ISSUE BACKGROUND	24
6 APPROACH TAKEN BY THE WORK TRACK	28
7 ANNEX A – SCOPE OF WORK (AS APPROVED BY THE GNSO COUNCIL)	31

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 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 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 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 has yet to be initiated, pending a review of the PDP Charter by the Council. The Council confirmed that the scope of work for the EPDP team was not affected, 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 provides that, in such event, the original UDRP or URS panel decision is to be set aside such that the effect will 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 as an express or implied waiver of the IGOs' immunities under existing national laws. Although 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”,* Recommendation 5 was viewed by many as reducing access to curative rights mechanisms by IGOs. As a result, the Council decided that additional policy work needed to be done on the specific issue that Recommendation #5 had been intended to resolve.

1.2 Preliminary Recommendations

The EPDP team has arrived at several conclusions and preliminary 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 initial 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, 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.

However, the EPDP team has not come to an agreed conclusion on the specific questions of: (1) whether the option to arbitrate will remain available to a registrant following the outcome of a court proceeding initiated by the registrant where the court

declines to hear the merits of the case; and (2) what should be the applicable choice of law for any arbitration that the parties may agree to.

Please refer to Section 2 for the full text, rationale, and additional details for the specific recommendation on an amended definition of an “IGO Complainant” and the options under consideration by the EPDP team for a means to address reviews of a UDRP or URS decision on which the EPDP team has not yet reached agreement.

Where the text for a potential recommendation has yet to be finalized or does not represent an agreed position within the EPDP team, square brackets have been used to indicate this to be the case.

The EPDP team welcomes Public Comments on its preliminary recommendations; in particular, on those elements where the group has not yet reached agreement and where the various options under consideration have been specifically included for community feedback.

1.2.1 Proposed 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. To facilitate Public Comments on this recommendation, relevant links to additional resources about the United Nations system have been included in Section 3.

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

Recommendations #2, #3, #4, #5 and #6 from the EPDP team comprise a set of related, interdependent recommendations that include a number of bracketed options currently under consideration. 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.

Preliminary Recommendations #4(v) (regarding the UDRP) and #5(iii) (concerning the URS) include square bracketed text indicating that the EPDP team has not yet reached agreement on two specific issues:

- (i) whether a losing registrant should be able to maintain the option to proceed to arbitration after the court in which they filed a proceeding declines to hear the merits of the case; and
- (ii) what substantive law should apply in a case where the parties have agreed to binding arbitration.

The current alternative formulations for each are noted in brackets in Section 2.1.2.

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 proposed preliminary recommendations and options under consideration.

1.4 Next Steps

This Initial Report will be posted for Public Comment for a minimum of forty (40) days. Following its review of all comments received to this report, the EPDP team will prepare its draft final recommendations and conduct a formal consensus call in accordance with the GNSO's Working Group Guidelines. Based on the outcomes of the formal consensus call, the EPDP team will document its final recommendations in a Final Report for submission to the GNSO Council.

2 Preliminary 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, 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, the EPDP team agreed that it should 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 hold registered trademarks¹ 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 discussion of this initial problem, 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 single package of recommendations (Recommendations #2, #3, #4, #5 and #6) that are intended to be “interdependent” (as contemplated by Section 13 of the GNSO’s PDP Manual²); this package of recommendations includes a number of different options that are highlighted in square brackets below. 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 GNSO Council’s previous approval of the first four recommendations from the IGO-INGO Access to Curative Rights PDP.

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”).

2.1 Preliminary Recommendations

The EPDP team wishes to emphasize that preliminary recommendations #1 - #6, as well as the various options outlined below, should be read in the following context:

- Inclusion/addition 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).
- Inclusion/addition of an arbitration option in the UDRP and URS does not affect the timelines for filing or for implementing the relevant remedy, unless otherwise specifically called out in the preliminary recommendations and options laid out below.

2.1.1 Proposed 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:

- (a) an international organization established by a treaty and which possesses international legal personality; or
- (b) an ‘Intergovernmental organization’ having received a standing invitation to participate as an observer in the sessions and the work of the United Nations General Assembly; or
- (c) a Specialized Agency or distinct entity, organ or program of the United Nations³.”

AND

- 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

³ 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.

the IGO Complainant to conduct public activities in accordance with its stated mission (as may be reflected in its treaty, charter, or governing document).”

2.1.2 Proposed 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: Cumulative Effect of Recommendations #3, #4, #5 & #6

If the GNSO Council approves the recommendations set out below in Recommendations #3, #4, #5 and #6, then the EPDP team recommends that the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protections PDP be rejected.

**** A Note from the EPDP team on Recommendations #3, #4, #5 & #6:**

The EPDP team continues to deliberate on the text and final concept for these Recommendations. While the EPDP team is in general agreement that arbitration is an appropriate solution, it has not yet reached agreement on two specific aspects relevant to such an option (viz., (i) whether the option to arbitrate will remain available to a registrant following the outcome of a court proceeding initiated by the registrant where the court declined to exercise jurisdiction in the matter, and (ii) what should be the applicable choice of law for any arbitration that the parties may agree to). As such, the text that follows reflects proposals submitted by EPDP team members on these specific issues, as indicated by the square brackets around the relevant proposals and their text:

- *For two options in relation to arbitration following a UDRP proceeding, see Recommendation #4(v);*
- *For two options in relation to arbitration following a URS proceeding, see Recommendation #5(iii);*
- *For two options and a possible additional step in relation to the applicable law in an arbitration proceeding, see Recommendation #6(i) and #6(ii); and*
- *For possible additional text under consideration relating to the parties’ ability to present a complete case in an arbitration proceeding, see Recommendation #6(iii).*

Recommendation #3: Exemption from Agreement to Submit to Mutual Jurisdiction for IGO Complainants

- i. **In relation to the UDRP:** The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1, above) be exempt from the requirement to state that it will “submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction”⁴.

⁴ See Section 3(b)(xii) of the UDRP Rules. <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

- ii. **In relation to the URS:** The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1, above) be exempt from the requirement to state that it will “submit, with respect to any challenges to a determination in the URS proceeding, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction”⁵.

Recommendation #4: 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 also indicate whether it agrees that final determination of the outcome of the UDRP proceeding shall be through binding arbitration, in the event that the registrant also agrees to binding arbitration.
- ii. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall also request that the registrant indicate whether it agrees that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. 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)⁶, the World Intellectual Property Organization (WIPO)⁷, the United Nations Commission for International Trade Law (UNCITRAL)⁸ and the Permanent Court of Arbitration (PCA)⁹.
- iii. As provided in 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, and will stay implementation if, within that period, it receives official documentation that the registrant has submitted a request for or notice of arbitration, as described further below¹⁰.

⁵ See Section 3(b)(ix) of the URS Rules. <https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf>

⁶ See https://www.icdr.org/rules_forms_fees.

⁷ See <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

⁸ See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

⁹ See <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>.

¹⁰ The EPDP team is using the terms “notice of arbitration” and “request for arbitration” as the former is the term used by UNCITRAL while the latter is used for proceedings at the ICC and WIPO.

- iv. If it receives a request for or notice of arbitration, the registrar shall continue to stay 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. **** Note:** *The square bracketed text below describes two alternatives under consideration by the EPDP team, as to whether the option to arbitrate will remain available to the registrant after it initiates court proceedings against an IGO that has prevailed in the UDRP proceeding and the court declines to hear the case on its merits:*

[OPTION 1:

Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, **the original UDRP decision will be implemented by the relevant registrar within ten (10) business days from the court order declining to hear the merits of the case.]**

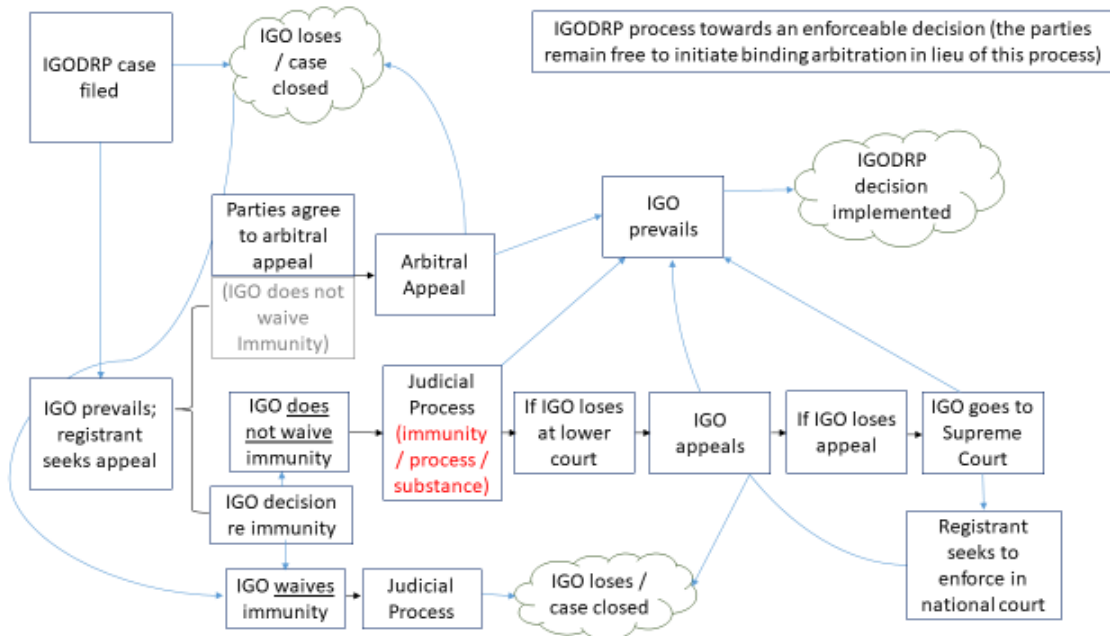
[OPTION 2¹¹:

Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, **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, UDRP provider and the IGO Complainant. If 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, the original UDRP decision will be implemented by the registrar.]**

**** Note:** *With respect to these two options under consideration, IGO members of the EPDP team have provided the following illustrative high-level potential court flow chart to explain the difference – in terms of added time and cost and legal uncertainty – when arbitration is not the direct path for review of a UDRP or URS decision¹²:*

¹¹ If approved and implemented, Option 2 will preserve the registrant's ability to agree to binding arbitration throughout the duration of any judicial proceedings that it may file prior to such agreement. Under Option 1, the registrant may only elect to pursue either judicial proceedings or binding arbitration within the ten (10) day period following the relevant registrar's notification of the outcome of the initial UDRP decision.

¹² This process flow chart has not been agreed on by the full EPDP team and is being included as a submission from the IGO members of the EPDP team, for purposes of Public Comment.



- vi. The Registrar shall continue to maintain the Lock on the disputed domain name during the pendency of any judicial proceedings and/or arbitration, as applicable.

Recommendation #5: 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 also indicate whether it agrees that final determination of the outcome of the URS proceeding shall be through binding arbitration, in the event that the registrant also agrees to binding arbitration.
- ii. In communicating a URS Determination to the parties where the complainant is an IGO Complainant, the URS provider shall also request that the registrant indicate whether it agrees that any review of the URS Determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. 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)¹³, the World Intellectual Property Organization (WIPO)¹⁴, the United Nations Commission for International Trade Law (UNCITRAL)¹⁵ and the Permanent Court of Arbitration (PCA)¹⁶.

- iii. *** Note: The square bracketed text below describes two alternatives under consideration by the EPDP team, as to whether the option to arbitrate will remain available to the registrant after it initiates court proceedings against an IGO that has prevailed in the URS proceeding and the court declines to hear the case on its merits:*

[OPTION 1:

Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, the relevant domain name(s) will remain suspended in accordance with the URS Determination. The registrant will not have the option to proceed to arbitration at this stage.]

[OPTION 2:

Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, 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 arbitration¹⁷ to the competent arbitral institution, with a copy to the URS provider and IGO Complainant.]

- iv. Where a registrant that has lost in a URS proceeding 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 competent 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.

*** Note: Draft URS Process Flow Chart for Recommendation #5¹⁸:*

¹³ See https://www.icdr.org/rules_forms_fees.

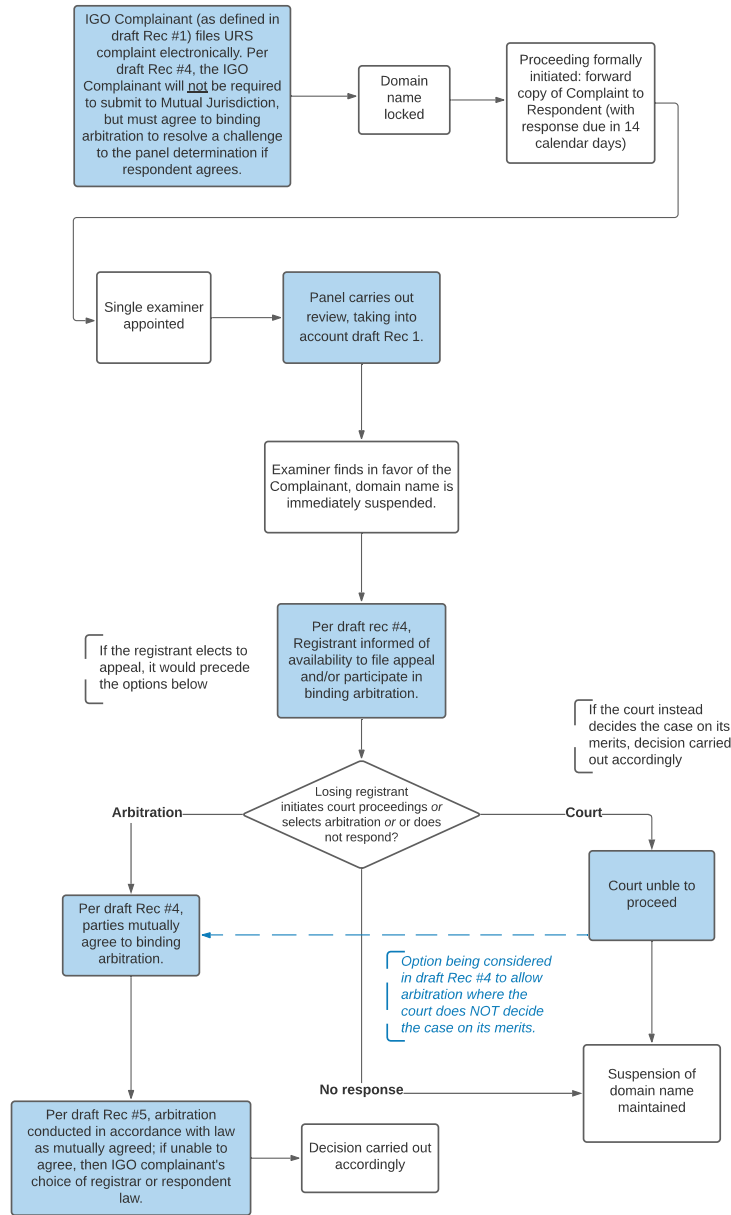
¹⁴ See <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

¹⁵ See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

¹⁶ See <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>.

¹⁷ The EPDP team is using the terms “notice of arbitration” and “request for arbitration” as the former is the term used by UNCITRAL while the latter is used for proceedings at the ICC and WIPO.]

¹⁸ The following flow chart was prepared by ICANN org Policy staff supporting the EPDP team and has not been finalized by the EPDP team. It is being included as a visual guide for purposes of Public Comment.



Recommendation #6: Applicable Law in an Arbitration Proceeding

- i. Any arbitration will be conducted in accordance with the law as mutually agreed to by the parties.

**** Note:** The square bracketed text below describes two alternatives under consideration by the EPDP team, to apply in situations where the parties cannot agree on the applicable law:

[OPTION 1:

Where the parties cannot reach mutual agreement, the arbitration will be conducted in accordance with the law of the relevant registrar's principal office or where the respondent is resident at the election of the IGO Complainant.]

[OPTION 2:

Where the parties cannot reach mutual agreement, the arbitral tribunal shall determine the applicable law.]

- ii. **[POSSIBLE ADDITIONAL STEP UNDER CONSIDERATION:** If either party raises concerns to the arbitral tribunal about applying the law of the registrar's principal office or the respondent's place of residence, e.g., because it does not have a satisfactory cause of action related to the parties' dispute, the arbitral tribunal may request submissions from the parties as to the suggested applicable law or principles of law (which may include UDRP case precedent) to be applied.]

*** Note: With respect to the bracketed text immediately above, some members of the EPDP team have raised concerns that some jurisdictions may not have a substantive cause of action for the parties to invoke. However, other members of the EPDP team have noted that this concern may arise for all UDRP complainants; as such, it will be more appropriate to address this topic as part a general review of the UDRP.*

- iii. In addition, the following non-exhaustive general principles (to be further developed by the expected Implementation Review Team) shall govern all arbitral proceedings conducted through this process:
- a. The arbitration shall be conducted as a de novo review; i.e., the parties are permitted to restate their case completely anew, including making new factual and legal arguments and submit new evidence;
 - b. The parties may select more than one arbitrator;
 - c. The arbitrator(s) must be neutral and independent, and cannot be the panelist(s) who rendered the initial UDRP or URS decision; and
 - d. Both parties should be able to present their case in a complete manner.

*** Note: The EPDP team continues to discuss whether specific requirements should be included in this policy recommendation. Some EPDP team members believe it is important to include requirements to ensure that an arbitration proceeding will provide the same procedural protections as would have been provided through a court review of the merits of the case; other members believe that these details are more appropriate for the expected IRT to develop, as part of its consideration of the arbitral rules to be applied. The EPDP team is currently discussing whether the following additional text should be included:*

[For example, and within the framework of the applicable arbitral rules, the parties should be able to provide additional written submissions and call witnesses, and hearings (which may be conducted online) should be permitted.]

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 solutions are 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 proposes the following metrics as useful starting points for measuring the effectiveness of its recommendations over time:

- Number of UDRP [and URS] complaints filed by IGOs, showing whether IGOs that may previously have had difficulty using the UDRP or URS due to the requirement to have (registered) trademarks are able to fulfill the requirement to demonstrate requisite unregistered rights through the Work Track's proposed eligibility requirements
- 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
- If the final recommendation includes the possibility of a losing registrant filing a request for arbitration following an unsuccessful attempt to file a court proceeding against an IGO Complainant prior to entering arbitration: number of court proceedings filed and their outcomes (e.g., whether the court assumed or declined jurisdiction)
- Number of arbitration proceedings between an IGO Complainant and losing registrant, the applicable law in all cases, and their outcomes

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 IGO Work Track 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 to date. 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 either final recommendations or as representing the entirety of the deliberations of the EPDP team. The EPDP team will not finalize its recommendations to the GNSO Council until it has conducted a thorough review of the comments received during the Public Comment period on this Initial Report.

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 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, the EPDP team agreed that, to develop an appropriate policy solution for the problem it was created 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.

To supplement the applicability of and to remain consistent with Recommendation #2, the EPDP team discussed and 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 initial conclusions, including potential text for a definition, can be found in Section 2.1.1, above.

The EPDP team referred to the following additional 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 the report that an external legal expert, Professor Edward Swaine, had provided to the IGO-INGO Access to Curative Rights Protections PDP, which included the conclusion that requiring a complainant to submit to Mutual Jurisdiction¹⁹, as is the case under the UDRP and URS, can amount to a waiver of jurisdictional immunity by an IGO. Relatedly, 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 addition, the EPDP team recognized that a successful assertion of immunity by an IGO means that the court

¹⁹ 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.

in question will decline to proceed with the case, with the result that the outcome of the initial UDRP or URS determination will therefore stand.

The EPDP team considered 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 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 option²⁰. While 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), ultimately, other members of the Work Track did not agree and preferred making the option of voluntary arbitration explicit in the UDRP and URS.

Having accepted that it would be appropriate to continue to work on an arbitration process rather than an internal appeal mechanism, 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 reached agreement on several elements, e.g., the arbitration must be conducted as a substantive 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 proceedings²¹. At this stage, however, the EPDP team was not able to reach preliminary agreement on two specific 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.

Some EPDP team members believe 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 that 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. The EPDP team's initial 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

²⁰ See [INSERT RELEVANT EARLY GOOGLE DOC] for details of the proposed appeal process that the IGO Work Track considered.

²¹ See Section 2.1.2 for the full set of elements recommended by the Work Track for the arbitral option.

recommendations to be interdependent, i.e., considered and adopted as a single package.

4 Conclusions and Next Steps

4.1 Preliminary Conclusions

As described more fully in Section 2, above, the EPDP team has reached preliminary 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 preliminarily 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.

However, the EPDP team has not reached agreement on the following specific questions: (1) whether a registrant should continue to be able to agree to voluntary arbitration after a court has declined to hear the merits of the case; and (2) what the applicable substantive law should be where the parties have agreed to proceed to arbitration.

4.2 Next Steps

The EPDP team will review and analyze all Public Comments received on this Initial Report, following which it will prepare its draft final recommendations for a formal consensus call in accordance with the GNSO’s Working Group Guidelines. The group’s final recommendations will be submitted to the GNSO Council as a Final Report.

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 Governmental Advisory Committee (“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 At Large Advisory Committee, 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 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 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 Work Track

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.

6.1.1 Work Track Membership and Attendance

Plenary Meetings:

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

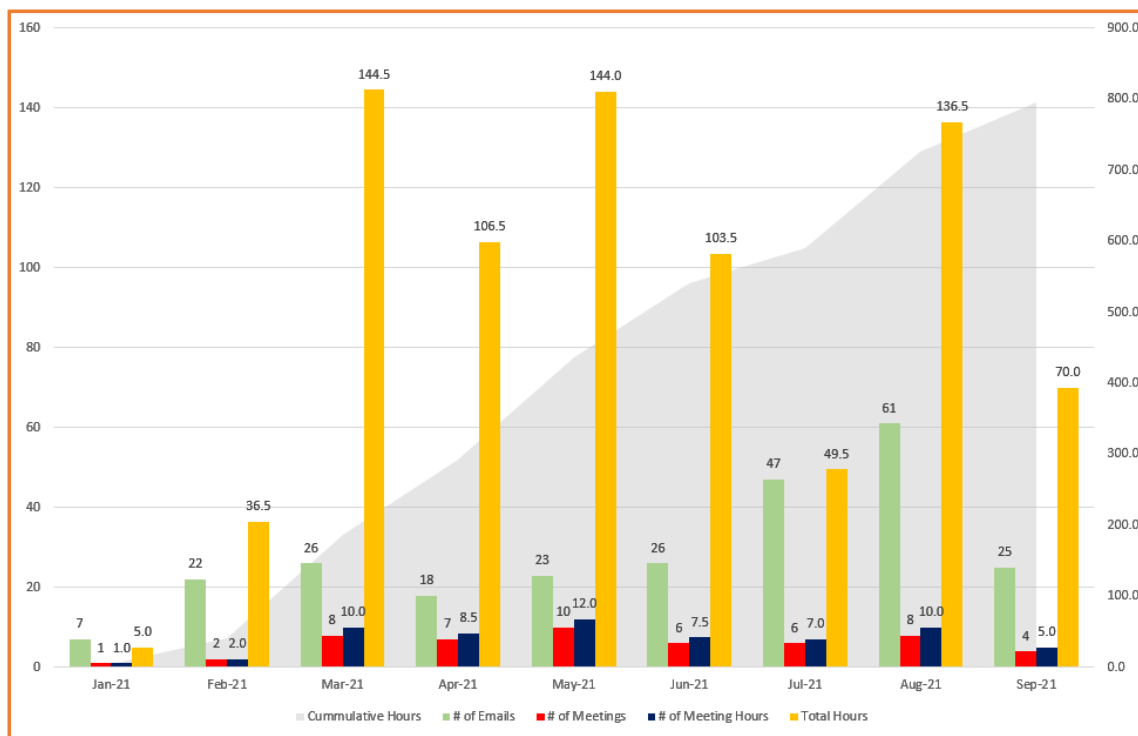
Small Team Meetings:

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

Leadership Meetings:

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

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



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 Länsipuro	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%	

The Alternates* of the EPDP Team are:

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%	

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			

* This membership list was accurate as of the date of publication of this report.

7 Annex A – 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>