
Public Comment Summary Report

Initial Report from the EPDP on Specific Curative Rights Protections for IGOs

Open for Submissions Date:

Tuesday, 14 September 2021

Closed for Submissions Date:

Sunday, 24 October 2021

Summary Report Due Date:

Monday, 20 December 2021 (extension from Monday, 8 November 2021)

Category: Policy

Requester: Generic Names Supporting Organization (GNSO)

ICANN org Contact(s): policy-staff@icann.org

Open Proceeding Link:

<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021>

Outcome:

ICANN org is grateful for the feedback from the community and appreciates the submissions about the Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for International Governmental Organizations (IGOs). There was a total of 33 submissions: 14 individuals, 13 organizations, and six ICANN community groups. The EPDP-IGOs Team is responsible for analyzing all submissions and, if appropriate, will update its preliminary recommendations accordingly.

Section 1: What We Received Input On

The Expedited Policy Development Process (EPDP) Team on Specific Curative Rights Protections for International Governmental Organizations (IGO) sought input on the preliminary recommendations contained in its Initial Report. The preliminary recommendations included several policy options under consideration by the EPDP Team which it had not yet reached agreement on.

The GNSO Council had tasked the EPDP Team to consider "whether an appropriate policy solution can be developed that is generally consistent with the first four recommendations from the GNSO IGO-INGO Access to Curative Rights PDP [which had concluded its work in July 2018] and:

- accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;
- does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;
- preserves registrants' rights to judicial review of an initial Uniform Domain Name Dispute Resolution Policy or Uniform Rapid Suspension decision; and
- 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."

Section 2: Submissions

Organizations and Groups:		
Name	Submitted by	Initials
WIPO - World Intellectual Property Organization	Brian Beckham	WIPO
Council of Europe	Jorg Polakiewicz	CoE
ICAO (International Civil Aviation Organization)	Pier-Olivier Turcot	ICAO
Governmental Advisory Committee	GAC	GAC
Internet Commerce Association	Zak Muscovitch	ICA
Registries Stakeholder Group	RySG	RySG
Digimedia.com, LP	Jay Chapman	JC
Leap of Faith Financial Services Inc.	George Kirikos	LoF
Telepathy, Inc.	Nat Cohen	NC
Organisation for Economic Co-operation and Development	Matthew Coleman	OECD
Business Constituency	BC	BC
Registrar Stakeholder Group (RrSG)	Zoe Bonython	RrSG
World Bank	David Satola	WB
At-Large Advisory Committee (ALAC)	Policy Staff	ALAC
Namecheap, Inc.	Owen Smigelski	OS

TurnCommerce Inc.	Jeffrey Reberry	TC
Domain Registrant Rights	Max Menius	DRR
Intellectual Property Constituency	Paul McGrady	IPC
UNESCO	Asoid García	UNESCO

Individuals:

Name	Affiliation (if provided)	Initials
Ted Chang		TC
Mike Rodenbaugh		MR
Dan Rundio		DR
Michael Zachery		MZ
Philip Busca		PB
Aarti Narayan-Denning		AND
Alex Lerman		AL
Lucas Gimeno		LG
Kevin Garvin		KG
Joseph Slabaugh		JS
Pierce Dawson		PD
Mikael Kervevan		MK
Castle Holdings		CH
Paul Cotton		PC

Section 2a: Late Submissions

Two submissions were received after the 24 Oct 2021 closing date. These comments were considered by the Working Group and to ensure comprehensiveness these are posted at the end of this report.

- Intellectual Property Constituency (IPC)
- UNESCO

Section 3: Summary of Submissions

There was a total of 33 submissions:

- 14 Individuals
- 13 Organizations (this refers to submissions made on behalf of entities that are not one of ICANN's recognized community structures)
- 6 Community Groups

Summary of Individual Submissions (14):

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- All Individual commentators were opposed to developing policy recommendations that would apply specifically to IGOs and domain name disputes where it is the IGO that files a complaint against a domain name registrant. Many comments focused on the risk that registrant rights could be adversely affected or reduced if the EPDP Team's recommendations were implemented in a way as to restrict a registrant's ability to file judicial proceedings against an IGO or to effectively compel a registrant to agree to arbitration. Several commentators supported the more detailed comments submitted by the Internet Commerce Association and Leap of Faith Financial Services. A few thought that the duration of this proceeding was not sufficient to allow for input from more affected parties and one commentator recommended translating the report to increase accessibility and opportunity to comment.

Summary of Organizational Submissions (13):

- In general, two main types of organizations submitted comments: International Governmental Organizations (IGOs) and members and representatives of the domain investor community. In addition, a domain name registrar filed its own comment, separately from the RrSG.
- IGO Community:
 - WIPO welcomed the EPDP Team's work to clarify an IGO's ability to file a dispute and on the issue of IGO jurisdictional immunity. However, it was concerned that arbitration did not seem to be recognized as a globally accepted means of resolving disputes despite this avenue being known to the ICANN community and referenced in ICANN's contracts with registries and registrars.
 - Several IGOs endorsed WIPO's comments, including the CoE, ICAO, OECD, World Bank and UNESCO. IGOs supported the elimination of the need for IGOs to agree to submit to Mutual Jurisdiction when filing a complaint and arbitration as a default option following a UDRP or URS proceeding.
- Domain Investor Community:
 - ICA largely opposed the preliminary recommendations, including eliminating the requirement that IGO complainants submit to Mutual Jurisdiction as it believes this will increase the likelihood that a national court will refuse to assume jurisdiction in a post-UDRP action. ICA also highlighted the need to protect registrant rights and noted that the design of an arbitration procedure should be done during the policy development phase and not left to an implementation review team. It also suggested that proposed changes be first considered by the forthcoming Phase 2 Rights Protection Mechanisms policy review that will focus on the UDRP, prior to adoption of any recommendations from this EPDP.
 - Other commentators in this group also referenced or agreed with ICA's concerns; in particular, highlighting the need to preserve a registrant's right to file a court proceeding, opposing removal of the requirement to submit to Mutual Jurisdiction and noting that IGOs currently have access to the UDRP, with some IGOs having already used it. These commentators include Digimedia, Telepathy, TurnCommerce and DRR. Commentators also pointed out that judicial review remains a critical avenue to address problems such as reverse domain name hijacking and flawed UDRP panel decisions as well as the importance of developing balanced solutions.
 - While some commentators in this group were not necessarily opposed to arbitration as an option following a judicial process, they did not support the premise that this option be predicated on removing the Mutual Jurisdiction requirement for IGO complainants.

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- Leap of Faith expressed the same concerns as the other commentators in this group in its opposition to the preliminary recommendations. LoF noted that IGOs should not be granted any new rights at the expense of registrants and pointed out the UDRP was intended to handle clear cut cases, not situations where two parties have legitimate competing interests. It proposed an alternative to arbitration that it believed will address a “quirk of the process” that it had also raised during the previous Curative Rights policy development process. LoF suggested incorporating a “Notice of Objection” process that is used in certain legal jurisdictions that may eliminate the need to agree to submit to Mutual Jurisdiction. LoF noted that immunity is a defense to a dispute and is thus not applicable when the dispute is initiated by the party seeking to claim immunity.
 - LoF’s comments were supported by other commentators in this group, including Telepathy which specifically supported the proposed alternative of a “Notice of Objection” process.
 - Registrar:
 - Namecheap submitted a comment expressing its concerns that the EPDP is not properly representative of all stakeholders in the multistakeholder model and believed that consequently the preliminary recommendations favor trademark and arbitration provider interests over registrants. As well as supporting the RrSG’s comments, Namecheap also noted that the recommendations may create new trademark rights for IGOs and have the effect of compelling registrants to pursue costly arbitration under foreign laws. It proposed that the ICANN community consider requiring IGOs to waive immunities when asserting rights against registrants.

Summary of Community Groups (6):

- GAC referred to its previous instances of Consensus Advice regarding IGO privileges and immunities under international law. It supported arbitration as the exclusive, or at least the default (with an opt-out option for the registrant), final mechanism to resolve disputes concerning IGOs, noting that the alternative solutions will involve an overly complex, inefficient, and costly process. GAC noted that if registrants file court proceedings they should not be able to subsequently commence arbitration if the court decides not to hear the case on the basis of an IGO’s immunity from its jurisdiction.
- RySG and BC suggested that there be outreach to the Rights Protection Mechanisms policy review group and review of the EPDP recommendations by the Phase 2 policy review group respectively. While generally supportive of some of the recommendations (e.g., clarifying who qualifies as an “IGO Complainant” and allowing a registrant to opt for arbitration following an unsuccessful attempt to have the case heard by a court), they had concerns about proceeding with some of the recommendations as-is. For example, BC suggested what it considered to be compromise language for the text of the Mutual Jurisdiction clause.
- ALAC generally supported the EPDP Team’s preliminary recommendations, given the possibility of fraud and end-user confusion were third parties to use domain names identical to IGO identifiers. It noted that allowing for a quick arbitration process would be in the interest of end-users.
- IPC generally supported the direction that the EPDP Team is taking, particularly in relation to clarifying the scope of eligibility for IGO Complainants and the possibility of arbitration. However, IPC noted the need to clarify other aspects of the preliminary

recommendations and highlighted a few questions and suggestions for the EPDP Team to consider.

- RrSG was concerned about the lack of balanced stakeholder participation in the EPDP and the impact of the recommendations on registrants' ability to seek judicial recourse following a UDRP or URS proceeding. RrSG thought that the EPDP Team's scope of work is broader than the ICANN Board's view that IGOs should not be given additional rights beyond what is conferred by international law. RrSG also raised questions about the need to change the existing dispute resolution procedures, the cost of arbitration and the need to ensure that registrants are protected if the Mutual Jurisdiction requirement is eliminated, and arbitration recommended as a final mechanism to resolve a dispute.

Section 4: Analysis of Submissions

The EPDP Team is responsible for analyzing all Public Comments submitted. To view the EPDP's Public Comment Review Tools and for information on how the group considered the comments, please view their [PCRT page on the wiki](#).

Section 5: Next Steps

The EPDP-IGO Team will analyze all the Public Comment submissions and, if appropriate, update its preliminary recommendations accordingly. It will submit a Final Report to the GNSO Council for consideration and vote following a consensus call within the team on any proposed final recommendations.

Intellectual Property Constituency

The Intellectual Property Constituency (IPC) welcomes this opportunity to comment on the proposed Recommendations of the IGO EPDP Initial Report. Taking each in turn:

Proposed Recommendation	IPC Reaction
<p>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 the IGO Complainant to conduct public activities in accordance with its stated mission (as may be reflected in its treaty, charter, or governing document).”</p>	<p>The IPC supports these proposed changes.</p> <p>Consider modifying “...having received a standing invitation to participate...” to “...having received, accepted, and is actively engaging in, a standing invitation to participate...”</p> <p>Consider adding “Such use shall not be a token use” at the end of the final sentence, such that the revised sentence reads ““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 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.”</p> <p>Consider specifying for the sake of clarity how this Recommendation #1 relates to the original Recommendation #2 from the IGO-INGO Access to Curative Rights Protections PDP (“Old 2”). From the Deliberations section it appears that the intent is to supplement Old 2 but from the Recommendation alone this may be misunderstood.</p> <p>Implementation Suggestion: in order to ensure that the IGO's identification is applied consistently throughout policy development across the organization, we recommend that those keeping the IGO Identifier List use the identical system we</p>

	set forth in this Recommendation going forward.
<p>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</p>	<p>The IPC believes this Recommendation is worded poorly as it implies that the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protections PDP (“Old 5”) was not already rejected. That Recommendation was not adopted by the GNSO Council. When a recommendation from a PDP is not adopted by Council, it is dead. Creating confusion that somehow the failure to adopt the recommendations of this EPDP would somehow resurrect (through non-rejection – whatever that may be) Old 5 simply doesn’t reflect how policy development works. This Recommendation needs to be reworked in order to tease out whatever concept the EPDP team was meaning to put forward.</p>
<p>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”</p> <p>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</p>	<p>The IPC supports this Recommendation so long as the other major concepts found in Recommendations 4 and 5 and IPC’s comments herein make their way into the final report. Additionally, the IPC believes that this Recommendation would have more support, both within the IPC and the community generally, if acronym domain names were carved out from the changes proposed, e.g. the World Health Organization should have no particular extra rights should it attempt to obtain transfer of a domain name from the famous band, The WHO. The IPC does not support this Recommendation in a vacuum.</p> <p>As an alternative, the IPC also supports proposed compromise language that an IGO “will submit, <u>without prejudice to an IGO Complainant’s privileges and sovereign immunity</u>, with respect to any</p>

<p>courts in at least one specified Mutual Jurisdiction”</p>	<p>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.” This proposed compromise language is intended to allow an IGO Complainant to abide by UDRP Rules Section 3(b)(xii), without expressly waiving its privileges and ability to assert sovereign immunity.</p>
<p>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:</p> <p>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.</p> <p>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), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA).</p>	<p>Since this Recommendation seems incomplete, the IPC will react to its constituent elements rather than to the Recommendation as a whole and, therefore, express no reaction to the Recommendation as a whole at this time.</p> <p>Subsection i.</p> <p>The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration? It seems to us that the combination of this option for IGOs found in this subsection combined with the “opt out” concept in Recommendation 3 above could work together to give a registrant little or no recourse following an incorrect decision by a panelist. The IPC recommends the EPDP team take another look at this subsection and rework. For example, make it clear that if an IGO chooses not to submit to binding arbitration, the UDRP would be handled like a regular UDRP and the IGO would have to submit to the jurisdiction of either the registrar or registrant’s home location for any post-decision action that a losing registrant may file. Conversely, the EPDP could implement the IPC’s above-proposed compromise language in UDRP Rules Section 3(b)(xii) to address this issue.</p> <p>.ii.</p>

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 below.

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.

[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 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 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

The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration (as discussed in Subsection i. immediately above). Does the Provider still request that the registrant indicate its willingness to submit to arbitration? If the IGO hasn't done so, why would the registrant? The IPC recommends the EPDP team take another look at this subsection and rework, as it is likely it only applies where an IGO has already indicated its willingness to have a final determination through binding arbitration.

iii.

So long as the ten (10) business day delay and following stay of decision implementation is not exclusive to the filing of arbitration, i.e. the filing of a court action by the respondent also still triggers the stay of implementation, the IPC supports this subsection. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity.

iv.

The IPC express the same concerns regarding court actions also triggering the stay as it did for subsection iii. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity.

v.

The IPC can support OPTION 2 subject to a couple caveats. Option 2 seems to us to be a reasonable safeguard designed to prevent undue pressure for a

<p>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.]</p> <p>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.</p>	<p>losing respondent to seek relief from the courts (which is in many jurisdictions, a basic human right). That said, the IPC does not support any mandatory, automatic, <i>de novo</i> appeals mechanisms for UDRP cases filed by non-IGO Complainants. Moreover, any such appeal or arbitration mechanisms under the UDRP, such as under Option 2, must incorporate appropriate safeguards, like reasonable filing fees, to prevent gaming and abuse by respondents. The IPC recommends that the EPDP team take another look at this subsection to supplement it with such safeguards.</p> <p>vi.</p> <p>The IPC supports this subsection and believes that it makes much of subsection iii. and all of subsection iv. redundant and therefore confusing. The IPC recommends the EPDP team take another look at those subsections and enhance their clarity.</p>
<p>Recommendation #6: Applicable Law in an Arbitration Proceeding</p> <p>i. Any arbitration will be conducted in accordance with the law as mutually agreed to by the parties.</p> <p>[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.]</p> <p>[OPTION 2: Where the parties cannot reach mutual agreement, the arbitral</p>	<p>Since this Recommendation seems incomplete, the IPC will react to its constituent elements rather than to the Recommendation as a whole and, therefore, express no reaction to the Recommendation as a whole at this time.</p> <p>i.</p> <p>The IPC does not support either option. There is no reason to over-engineer the arbitration process to make it UDRP-like in nature. It appears that the selection of venue found in the UDRP is being forced to morph into a selection of choice of law. We do not need to create new things not</p>

<p>tribunal shall determine the applicable law.]</p> <p>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.]</p>	<p>in the UDRP and then try to push them into what is meant to be a <i>de novo</i> arbitration process. ICANN should not interfere in the arbitration process and leave it to the parties to decide what claims and defenses they wish to bring to the arbitrator under which set of laws they wish to bring them.</p> <p>ii.</p> <p>Please see our comments on subsection i. above. This additional step, or any variants of the same, would be necessary if the arbitration process is allowed to proceed without pre-manipulation by baking in a choice of law provision.</p>
<p>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:</p> <p>a. The arbitration shall be conducted as a <i>de novo</i> review; i.e., the parties are permitted to restate their case completely anew, including making new factual and legal arguments and submit new evidence;</p> <p>b. The parties may select more than one arbitrator;</p> <p>c. The arbitrator(s) must be neutral and independent, and cannot be the panelist(s) who rendered the initial UDRP or URS decision; and</p> <p>d. Both parties should be able to present their case in a complete manner.</p>	<p>iii.</p> <p>The IPC supports all of the concepts found within this subsection. In addition, the EPDP’s final report should be very clear that these concepts, and indeed the general principle of an added binding arbitration option for UDRP appeals, applies only to IGO Complainants and not to the UDRP in general.</p>

UNESCO

UNESCO wishes to express its support to the attached letter from WIPO to ICANN which was posted on the ICANN website section on Public Comment on 22 October 2021. We would be most grateful if you could add UNESCO to the list of IGOs expressing their support to WIPO's comments, together with the World Bank, the OCDE, ICAO, and others.