

GNSO Council Recommendations Report to the ICANN Board – Adoption of Final Recommendations from the Expedited Policy Development Process on Specific Curative Rights Protections for IGOs

11 July 2022

Status of This Document

This is the GNSO Council Recommendations Report to the ICANN Board following the approval by the GNSO Council of all five Full Consensus final recommendations from the Expedited Policy Development Process on Specific Curative Rights Protections for International Governmental Organizations (IGOs).

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1. Executive Summary

On 25 June 2022, the GNSO Council [voted](#) unanimously to approve all five Final Consensus recommendations contained in the [Final Report](#) from the Working Group that had been chartered to conduct an Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for International Governmental Organizations (IGOs). This Recommendations Report is being sent to the ICANN Board for its review of the recommendations approved by the GNSO Council, which the GNSO Council recommends be adopted by the ICANN Board. Please see Annex A for a summary of all the approved recommendations.

The EPDP on Specific Curative Rights Protections for IGOs was [chartered](#) to consider:

“... whether an appropriate policy solution can be developed, to the extent possible, that is generally consistent with Recommendations 1, 2, 3 & 4 of the IGO-INGO Access to Curative Rights PDP Final Report and:

1. accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;
2. does 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
3. 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”.

The EPDP team’s scope of work reflects the initial [direction](#) from the GNSO Council to refer the matter to the Review of All Rights Protection Mechanisms (RPMs) Policy Development Process (PDP) Working Group in January 2020, to consider the above-noted question as part of its Phase 2 policy work via an Addendum to the original PDP charter establishing a standalone IGO Work Track. The IGO Work Track began its work in February 2021. However, due to the indeterminate timeline for commencement of the RPMs Phase 2 PDP, and to maintain the momentum and progress of the IGO Work Track, the GNSO Council took the procedural step to launch this EPDP on Specific Curative Rights Protections for IGOs in August 2021.

The EPDP team published its [Initial Report](#) for public comment on 14 September 2021. Following its review of all the public comments received as well as extensive discussions over a number of options that it had included in the Initial Report for community input, the EPDP finalized its recommendations and submitted its [Final Report](#) to the GNSO Council on 4 April 2022. The EPDP team’s final recommendations included amendments to some of its preliminary recommendations as a result of its review of the community input submitted on its Initial Report.

The five policy recommendations attained Full Consensus within the EPDP team and are intended to be interdependent (as described in Section 13 of the GNSO’s [PDP Manual](#)). Under the ICANN Bylaws, a Supermajority vote by the GNSO Council for the policy recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN. In this case, the GNSO Council approved all five recommendations unanimously, thus exceeding the Supermajority threshold.

2. GNSO Vote

If a successful GNSO Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the Constituency(ies) or Stakeholder Group(s) that held that position.

The GNSO Council's vote to approve the EPDP recommendations was unanimous.

3. Analysis of affected parties

An analysis of how the issue(s) would affect each Constituency or Stakeholder Group, including any financial impact on the Constituency or Stakeholder Group.

By introducing a specific definition for the term "IGO Complainant", the EPDP recommendations will provide clarity to all stakeholders as to what type of international entity will be eligible to rely on the two current second-level domain name dispute resolution policies and procedures without prejudicing any immunity from a court's jurisdiction that the IGO may have and without affecting the right of domain name registrants to take the dispute to a court.

Save for exempting IGO Complainants (as defined) from the requirement to agree to submit to a Mutual Jurisdiction, the EPDP recommendations do not change the applicability, scope, or substantive criteria of ICANN's current domain name dispute resolution policies and procedures, which are the Uniform Domain Name Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension procedure (URS). The EPDP recommendations, if adopted and implemented, will entail several procedural changes to the UDRP and URS Rules that are likely to have the most impact on the various dispute resolution providers and, to the extent they may need to update or change their processes for handling these disputes, ICANN-accredited registrars.

Exempting IGO Complainants from the Mutual Jurisdiction requirement will facilitate the use of the UDRP and URS by IGOs in circumstances where requiring the IGO to submit to this requirement could be viewed by a court as the IGOs waiving any jurisdictional immunity it may otherwise enjoy before that court. At the same time, the EPDP recommendations preserve the right of registrants to submit the dispute to a court at any time and clarifies that the question whether an IGO may (or may not) be immune from that court's jurisdiction is a matter of law to be determined by the court and not ICANN policy.

Finally, by explicitly allowing for a voluntary arbitration option within the existing framework of the UDRP and URS, the EPDP recommendations make it clear that a registrant continues to maintain both the right to go to court as well as the option to select arbitration as a final means of resolving a dispute with an IGO. The arbitration option remains available even if a registrant elects to first file a court proceeding, where the result is that the court declines to hear the case due to a finding that the IGO in question is immune from that court's jurisdiction.

4. Period of time needed to implement recommendations

An analysis of the period of time that would likely be necessary to implement the policy.

As the EPDP recommendations are focused on making procedural updates to the UDRP and URS Rules and framework, implementing the policy recommendations will require consultation with and the involvement of the various UDRP and URS providers as well as ICANN-accredited registrars. In approving the EPDP recommendations, the GNSO Council had expressly requested that the ICANN organization convene a community-based Implementation Review Team (IRT) to assist with the development of the implementation details for the EPDP recommendations and ensure that the resultant implementation conforms to the intent of the approved recommendations.

As part of its responsibilities, the IRT will be expected to work with ICANN org to develop the elements and select the rules and provider(s) for any voluntary arbitration proceedings that may be initiated in accordance with the EPDP recommendations; in particular, the implementation guidance contained in Annex A of the EPDP Final Report. In this regard, the EPDP team had advised the GNSO Council, in its Final Report, to ensure that the IRT includes members familiar with the substantive and procedural rules governing arbitration proceedings.

While an Operational Design Phase and associated assessment is not envisioned to be needed for this implementation, requirements as to resourcing, timing, and duration of the implementation work will need to be considered as part of the prioritization work of the community and ICANN org.

5. External advice (if any)

The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest.

The EPDP team did not use external advisors to develop its recommendations. As part of its Charter, the EPDP team was required to review materials that were used to develop prior recommendations concerning IGO curative rights protections. In this regard, the EPDP team reviewed the report from an external legal expert who had been engaged by ICANN org to provide advice on the question of IGO jurisdictional immunity to a prior GNSO PDP Working Group.

6. Final Report Submission

The EPDP team's Final Report was submitted to the GNSO Council on 4 April 2022 and can be found here in full: [Final Report](#). The text of the five recommendations that the GNSO Council approved in June 2022 are included as an annex to this report.

7. Council Deliberations

A copy of the minutes of the Council deliberation on the policy issue, including all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

The minutes from the GNSO Council's May 2022 meeting where it discussed the EPDP recommendations can be found [here](#). The minutes from the Council's June 2022 meeting where it approved all the EPDP recommendations can be found [here](#).

In addition, the GNSO Council received a briefing on the EPDP recommendations from the EPDP Chair and the GNSO Council liaison to the EPDP in April 2022. The presentation for that briefing can be found [here](#).

8. Consultations undertaken

The EPDP team's consideration of all the input it received is documented on its wiki page, including its use of a Public Comment Review Tool:

<https://community.icann.org/display/GNSOIWT/Public+Comment+Review+Tool>.

9. Summary and analysis of Public Comment Forum

Summary and analysis of Public Comment Forum to provide input on the Initial Report.

The EPDP team's Initial Report was published for [Public Comment](#) on 14 September 2021 and closed on 24 October 2021. A [Report](#) on Public Comment was published on 20 December 2021. As documented in the Final Report, the EPDP team agreed to amend some of its preliminary recommendations as a result of its review of the input it received through the Public Comment Forum.

10. Impact/implementation considerations from ICANN staff

The internal ICANN org implementation team is expected to comprise staff members who worked on the implementation of the Consensus Policy on the Protection of IGOs and INGOs in All gTLDs (including subsequent policy recommendations concerning certain Red Cross names). Resourcing for the implementation work is expected to be covered by existing resources within ICANN org.

Although there are GNSO recommendations pertaining to other aspects of IGO protection currently pending before the ICANN Board as well as GAC advice on those matters, resolution of these pending topics is not expected to be a dependency for the implementation of the five EPDP recommendations. However, the timing, staffing and other details regarding this implementation will be subject to the community's and ICANN org's prioritization work, and any specific directions or instructions from the Board.

Annex A: Final Recommendations from the EPDP on Specific Curative Rights Protections for IGOs

The GNSO Council notes that the five Full Consensus recommendations that it approved and is sending to the Board are intended to be interdependent, as that term is defined in the GNSO's PDP Manual. While the text of the five recommendations is reproduced below, the Final Report contains additional explanatory notes and implementation guidance that provide important context for the recommendations.

In addition, the GNSO Council draws the Board's attention to the EPDP team's work on a Policy Change Impact Analysis, regarding suggested questions and metrics that can be used for future reviews of the EPDP policy recommendations.

Finally, the GNSO Council notes that Annex A of the EPDP team's Final Report contains specific guidance for the selection, during implementation, of the applicable rules and provider(s) for arbitration.

The EPDP team reached FULL CONSENSUS on all the following recommendations:

Recommendation #1: Definition of "IGO Complainant"

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

- (a) 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 Nations³."
- (b) 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."

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.

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.

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.

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 service⁴ 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.