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# Public Comment Summary Report

## Final Report from the EPDP on Specific Curative Rights Protections for IGOs

**Open for Submissions Date:**

Monday, 28 November 2022

**Closed for Submissions Date:**

Monday, 30 January 2023 (extended from Friday, 13 January 2023)

**Summary Report Due Date:**

Wednesday, 1 March 2023 (extended from Wednesday, 15 February 2023)

**Category:** Policy

**Requester:** ICANN Board

**ICANN org Contact(s):** [policy-staff@icann.org](mailto:policy-staff@icann.org)

**Open Proceeding Link:**

<https://www.icann.org/en/public-comment/proceeding/final-report-from-the-epdp-on-specific-curative-rights-protections-for-igos-28-11-2022>

**Outcome:**

All the Public Comments submitted for this proceeding will be transmitted to the ICANN Board for its consideration as it reviews the EPDP recommendations with a view toward acting on them. Under the ICANN Bylaws, prior to any action by the Board on proposed policies that substantially affect the operation of the Internet or third parties, ICANN is required to provide a reasonable opportunity for parties to comment on these policies. The Bylaws also obligate the Board to consider any timely advice that may be duly submitted by the Governmental Advisory Committee as part of the Board's decision-making.

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## Section 1: What We Received Input On

This Public Comment proceeding had sought public input on the five Full Consensus recommendations from the Generic Names Supporting Organization's (GNSO) Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for International Governmental Organizations (IGOs). The EPDP recommendations, if adopted by the ICANN Board, will result in several procedural changes to ICANN's existing second-level domain name dispute resolution processes, but without affecting their applicability, scope, or substantive criteria.

The five EPDP recommendations are to:

- add a definition of "IGO Complainant" to the Uniform Domain Name Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension dispute resolution procedure (URS), to clarify the applicability of these dispute resolution mechanisms to IGOs that can demonstrate the requisite legal rights;
- exempt IGO Complainants from the requirement to agree to a Mutual Jurisdiction (as defined in the UDRP and URS), such that the question of an IGO's immunity from the jurisdiction of a court is determined as a matter of law by the relevant court, while preserving the existing right of a domain name registrant to file a court proceeding at any time during a UDRP or URS proceeding;
- add a voluntary mutual arbitration option to the two dispute resolution processes, such option to remain available to a registrant even after the registrant has elected to file a court proceeding; and
- clarify the law to be applied in a voluntary arbitration proceeding.

Ten (10) Public Comments were submitted, including by one of ICANN's Advisory Committees and two of the GNSO's Stakeholder Groups.

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## Section 2: Submissions

<b>Organizations and Groups:</b>		
<b>Name</b>	<b>Submitted by</b>	<b>Initials</b>
ICANN Governmental Advisory Committee	Benedetta Rossi	GAC
GNSO Registrars Stakeholder Group	Zoe Bonython	RrSG
GNSO Business Constituency	Business Constituency	BC
Internet Commerce Association	Zak Muscovitch	ICA
GNSO Registries Stakeholder Group	Registries Stakeholder Group	RySG

  

<b>Individuals:</b>		
<b>Name</b>	<b>Affiliation (if provided)</b>	<b>Initials</b>
Nojus Saad	Youth for Women Foundation	NS
C. Hb.		CH
Roger Fearon	United States	RF
Md. Jahangir Hossain		JH
George Kirikos	Leap of Faith Financial Services, Inc.	GK

## Section 3: Summary of Submissions

### General:

RrSG noted its appreciation that the EPDP team had incorporated the RrSG's feedback to the Initial Report in making changes to the Final Report, to address a complicated and nuanced scenario.

GAC supports and welcomes the EPDP recommendations. It also noted that the recommendations were the result of compromises on policy outcomes that the GAC had previously preferred.

BC emphasized its support for the existing UDRP and URS framework for IGOs without the need to conceive, develop, and implement a separate rights protection mechanism for IGOs. , BC considers that any adjustments to the UDRP to address participation by IGOs as recommended by the EPDP should undergo further expert review within the GNSO's expected Phase 2 PDP on the Review of All Rights Protection Mechanisms (RPMs), to ensure overall internal consistency with the existing UDRP.

ICA commended the EPDP team for incorporating public feedback into its final recommendations. ICA also proposed that the EPDP recommendations, if adopted by the Board, should not be implemented until they are also approved through the RPMs Phase 2 PDP or a review by experts representing both complainants and respondents.

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ICA further noted that the GNSO Council's specific mandate to the EPDP team had been to develop policy recommendations that are generally consistent with the approved outcomes of the prior GNSO PDP on IGO curative rights, including preserving registrant rights to file judicial proceedings and have judicial review of UDRP and URS decisions. As such, ICA recommends that the ICANN Board carefully consider if the EPDP recommendations fulfill that Council mandate.

RySG recommends that the ICANN Board adopt and implement the EPDP recommendations as efficiently as possible. It noted the length and complexity of the work involved and expressed the hope that, following Board approval, IGOs will be able to take advantage of second level domain name registrations and registries will have the required information to operationalize requests for registration.

GK believes that the ICANN Board should reject the EPDP final report in its entirety. He considers the report the product of a demonstrably captured group that did not meaningfully review the Public Comments submitted to its initial report and did not follow the Board's guidance not to provide IGOs with greater rights than exist under international law. GK's submission included and expressly incorporated his feedback to the EPDP initial report and the prior GNSO PDP on IGO curative rights, which among other things traces the history of the UDRP and its Mutual Jurisdiction clause. GK contends that these comments remain valid in view of his belief that the EPDP ignored community input in finalizing its recommendations, to the detriment of registrants.

GK also noted the GNSO Council's directions to the EPDP team and stated that, by emphasizing a registrant's right to file and initiate a court proceeding, the EPDP recommendations do not succeed in preserving registrant rights to judicial review but actually result in harm to registrants.

Specific Comments on EPDP Recommendation #1:

BC supports this recommendation as it believes this to be consistent with the BC's previously stated positions.

Subject to its objection to the other recommendations and proposed review by the RPMs Phase 2 PDP, ICA supports this recommendation if it is a minor change to the UDRP and URS that will permit an IGO to use a proxy or agent to file complaints without having to itself submit to Mutual Jurisdiction.

Specific Comments on EPDP Recommendation #2:

BC supports this recommendation and alerts Respondents to their right to either challenge a decision in court or to agree to binding arbitration.

ICA strongly opposes the recommendation to exempt IGOs from the current Mutual Jurisdiction requirement under the UDRP and URS, as it believes this would leave registrants without any assurance of judicial review of an adverse UDRP decision. ICA highlighted the original premise for the UDRP and commented that the UDRP and URS are convenient, expedited, and lower cost supplements to available judicial processes, not preemptive substitutes for them. ICA believes that there is no legal basis for the EPDP recommendations, noting that only one legal expert had been engaged to provide advice to the prior GNSO PDP. ICA recommended that the

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ICANN Board review that advice and seek further expert guidance prior to approving this recommendation.

GK notes that removing the need for IGOs to agree to submit to Mutual Jurisdiction will have deleterious impacts on registrants, as this would enhance IGOs' ability to claim jurisdictional immunity and result in courts declining to hear most cases filed by losing registrants, whereas in the current situation this is a rare occurrence.

Specific Comments on EPDP Recommendation #3:

BC partially supports this recommendation, subject to the caveat that the final structure of the arbitration system must first be determined in a manner satisfactory to all parties, to function as an adequate substitute for court proceedings. In this regard, BC considered the principles as set out by the EPDP team in Annex A of the EPDP Final Report to be generally agreeable and promising.

GAC continues to believe that arbitration as the default means of appeal for a UDRP decision will be more efficient; however, as a matter of compromise, GAC supports the recommendation that if a court declines jurisdiction over an appeal from a UDRP case, the IGO and registrant should have an arbitration option available to resolve their dispute.

ICA considers it premature to ask if stakeholders support post-UDRP arbitration, since the system has not been finalized. ICA noted the likely expense and time that setting up such a system would entail, as well as the importance of determining questions about the selection of a provider, and appointment and accreditation of arbitrators.

Specific Comments on EPDP Recommendation #4:

For the reasons stated in relation to Recommendation #3 regarding the UDRP, BC expressed qualified support for Recommendation #4.

Specific Comments on EPDP Recommendation #5:

BC supports a reasonable approach toward the choice of applicable law for arbitration. To avoid gaming of the system and subject to any subsequent recommendations from the RPMs Phase 2 PDP, BC specifically supports the recommendation that "[i]n 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 rules."

Other Comments

NS agreed with the concerns that the GNSO Council and IGOs had expressed regarding Recommendation #5 from the prior GNSO PDP on IGO curative rights, and proposed the development of a separate, narrowly tailored dispute resolution mechanism modeled on the UDRP and URS.

CH's and RF's submissions did not address the EPDP recommendations.

GAC noted previous GAC advice on the topic and stated that, as IGOs are unique treaty-based institutions created by governments under international law to undertake global public service missions, protecting their names and acronyms in the DNS serves the global public interest. GAC also noted that, owing to the public funding of IGOs' missions, curative rights protection mechanisms such as the UDRP should be at no or nominal cost to IGOs.

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ICA stated its belief that there is no evidence that cyber-squatting on IGO domains is a significant problem, and that the EPDP recommendations represent a solution in search of a problem, especially since the UDRP can be used for that purpose, potentially with some minor adaptations.

ICA also recommended that any approach that the ICANN Board may adopt in relation to RPMs be evaluated in the near and mid-term, and subject to a sunset clause that automatically repeals it unless a preemptive decision is made based upon evidence, consultation, and consensus, to maintain it.

JH supports preserving registrant rights to judicial review and the need for clear, transparent, and universally accepted guidelines to protect registrant rights.

GK provided a detailed analysis of the EPDP team's consideration of the Public Comments submitted to its initial report to support his contention that the EPDP team did not perform a meaningful review of the substantive input it received. He also noted his concern that IGOs may have undermined the legitimacy of ICANN's multi-stakeholder model by relitigating their issues excessively, including in the EPDP which he considered had only limited, unbalanced, and unengaged participation.

GK suggested a few ways for the ICANN Board to mitigate damage that may result from its adoption of the EPDP recommendations. These suggestions include "grandfathering" existing domain registrations, reconsidering the metrics proposed in the final report, creating a "supergroup" consisting of members from the prior GNSO PDP and the new EPDP teams, permitting legitimate registrants to opt out of the UDRP and URS by posting a security bond, providing financial aid to registrants who waive the right to go to court, and consideration of a "Notice of Objection" system as proposed in GK's feedback to the prior PDP and the ICANN Board. In addition, he suggested that the ICANN Board meet with members of the prior GNSO PDP team (including himself), to try to obtain the consensus of all affected stakeholders.

## Section 4: Analysis of Submissions

While some commentators expressed support for the EPDP recommendations, including commentators representing ICANN community structures such as the GAC and various GNSO stakeholder groups, a few commentators noted specific concerns, including with the potential consequences for registrant rights should IGOs be exempt from the current UDRP and URS requirement to agree to submit to a Mutual Jurisdiction. Several commentators commended the EPDP team for its work on a complex and longstanding topic and noted that the EPDP recommendations are the result of compromise.

## Section 5: Next Steps

This summary report as well as all the Public Comments received will be forwarded to the ICANN Board for its consideration.