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**Leap of Faith
Financial Services Inc.**

January 30, 2023

ICANN Board

Subject: Call for Public Comments on Final Report from the EPDP on Specific Curative Rights Protections for IGOs

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Dear ICANN Board,

This submission is in response to the call for public comments on "Final Report from the EPDP on Specific Curative Rights Protections for IGOs" as per the notice at:

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

I also attach 2 prior comment submissions, which are incorporated into this submission **by reference**. They should be fully considered by the Board, along with this new document. They are:

a) our October 23, 2021 submission to the GNSO as a separate PDF, which responded to the Initial Report of the EPDP Working Group. It was originally submitted at:

<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021/submissions/kirikos-george-24-10-2021>

Given that the final recommendations have not been changed in substance from the initial report, and that the working group did not

seriously analyze or consider the input of the public comment period process, **all** of the arguments in that comment submission are still applicable.

At 54 pages in length (longer and more detailed than both the initial and final reports of the working group), this was arguably **one of the best comments submitted in ICANN's history of public comments**. It not only provided a history of the "mutual jurisdiction" clause, and the root cause of the "problem" (i.e. the "role reversal"), it provided an elegant solution (one which was not seriously evaluated by the working group) using a 'Notice of Objection' system (which already exists in the real world) that would preserve registrants' rights while also improving things for IGOs. This submission also detailed the numerous process issues of the working group, including the unbalanced participation.

b) our August 20, 2019 submission to the Board as a separate PDF, for completeness (a few sections reference it when discussing procedural history of the prior working group), which addressed the prior working group's final report. It was originally submitted at:

<https://mm.icann.org/pipermail/comments-igo-ingo-crp-recommendations-11jul19/2019q3/000025.html>

Briefly, this ICANN Working Group's **final report should be rejected in its entirety** by the ICANN Board. It is an **unforgivable betrayal of registrants' rights that will not be forgotten**, demonstrating ICANN at its worst.

Furthermore, its recommendations **openly violated** the limited remit of the working group. The working group was required to "**preserve registrants' rights to judicial review.**" Instead, they ignored this requirement, and produced recommendations which **harm** registrants' rights to judicial review. This is a fatal flaw of the final report. The final report can and should be rejected on this basis alone (see section 10).

We will provide more details below, but ask that you first read the 2 documents above before proceeding.

Sincerely,

George Kirikos

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1. INTRODUCTION

Leap of Faith Financial Services Inc. is a privately held company based in Toronto, Canada. It is the owner of approximately 500 domain names, including school.com, math.com, leap.com, seeds.com, and options.com. This portfolio is worth many millions of dollars. As such, we have a direct interest in any changes to the UDRP/URS policies, to the extent that those changes deprive us of our legal right to challenge adverse UDRP/URS rulings in our national courts (in Ontario, Canada).

We have long been defenders of domain name registrants' fundamental rights in ICANN policymaking, and make our comments in that same spirit in this response to the final report of the latest working group looking at IGO curative rights mechanisms.

Our track record of analysis of ICANN policy proposals is without equal in the past two decades. A **sample** of our work:

- We opposed the monopolistic "Wait Listing Service" proposed by Verisign. While this was ultimately foolishly approved by the ICANN Board, we feel vindicated that Verisign has **never launched** this service, as presumably it would not have survived antitrust challenges.
- We [led the opposition](#) to Verisign's "Sitefinder" system, [creating](#) a petition that generated over 20,000 signatures. In fact, we were opposed to it [before it even launched](#). Had ICANN heeded [our advice](#), that debacle would not have taken place.
- We [sounded the alarm](#) about the proposed registry contracts which would have permitted tiered pricing in .biz, .info, and .org contracts (and which could have then propagated to other gTLDs). This led to a public outcry with [thousands of comment submissions](#) opposing the one-sided contracts, as registry operators' blatant greed and ICANN management's ineptitude in initially agreeing to such terms was made obvious to everyone. We were vindicated as price caps remained in place, with uniform pricing for all domain renewals.
- We have repeatedly defended balanced due process protections for registrants in relation to the UDRP/URS.
- We [sounded the alarm](#) about the deeply flawed "Expedited Transfer Reversal Policy" proposal which would have decimated the secondary market for domain names by enabling "sellers' remorse" to reverse legitimate domain name transfers. We worked tirelessly to educate affected stakeholders, and the IRTP-B working group was forced to back down from that flawed proposal.
- We repeatedly opposed the entire new gTLD program (with detailed

submissions to the relevant public comment periods). Unlike others who lost substantially via bad investments in new gTLDs, our company was vindicated by its decision to focus on .com domain names. ICANN's predictions, and those of its consultants and "experts" were widely off the mark, worse than even their own "worst case scenarios".

- We [opposed](#) the controversial .org contract renewal of 2019 which removed price caps (and the similar proposals for .info, .biz and .asia, as noted on [our blog](#)). We were the **only organization** to have **warned ICANN that private equity could take over the .org contract** (point #6 of our submission), and it was only the intervention of the California Attorney General (Xavier Becerra) that forced ICANN to back down from approving the sale of the registry. Furthermore, NameCheap's recent successful challenge of ICANN's foolish approval of that contract, via the IRP, once again vindicates our analysis and position. It is clear that this "contract" is now void, and must revert to prior terms. If ICANN's Board does not take steps to do this, they will likely face further litigation in real courts (rather than another IRP), litigation that might be an existential threat to ICANN itself, or those responsible for the debacle. **I think a class action lawsuit that seeks reimbursement from ICANN of any price increases beyond the prior contracts (if they refuse to revert the contracts) would be successful, and would seek to eventually target ICANN's entire Reserve Fund.**

- We made [substantial comments](#) concerning the latest Transfer Policy Review, after sounding the alarm on [our blog](#). While that working group has yet to issue a final report, our intervention appears to have resulted in the preservation of the important "Losing FOA" safeguard and registrars have also backed down on their power grab that would have allowed them sweeping powers to prevent outgoing transfers.

In summary, **we know what we're talking about**, and our warnings should not be lightly dismissed. History has vindicated **each and every** past position and our thorough analysis.

While we have severe disagreements with the recommendations in this final report, we also make our comments in good faith, and propose a "win-win" alternative (a "Notice of Objection" system, discussed later in this submission). By addressing the **root cause** of the "quirk of process" that we found during the prior working group's research, we can modify the UDRP/URS in a way that would be beneficial for both IGOs and domain name registrants, simultaneously improving the procedure for both complainants and respondents. We are confident that if this proposal was seriously considered, it would be welcomed as a great improvement in policy that solves multiple existing problems while balancing the rights of both sides of a dispute.

It's important to note that we are not cybersquatters. We **despise** cybersquatting, and applaud efforts to hold those bad actors fully accountable, especially in the courts (as Verizon did with iREIT¹, for example). We have advocated for **balanced policies** which target actual cybersquatters while ensuring that those falsely accused of cybersquatting are fully protected.

This is not some theoretical debate. We personally faced a UDRP over a valuable short dictionary word dot-com (Pupa.com), despite registering it in good faith. Instead of waiting for the outcome of the UDRP (which eventually decided to defer to the courts), we exercised our right to go to court in Ontario, Canada, and our position was fully vindicated, with costs awarded against the defendant (an Italian cosmetics company).²

We are sympathetic to trademark holders or other rightsholders, including IGOs who are targeting actual cybersquatters. However, we must ensure that the rights of innocent domain name registrants who are falsely accused of cybersquatting are fully protected, including their due process rights. Those due process rights include the right to have the merits of their dispute fully argued and decided in their national courts.

Article 8 of the ***Universal Declaration of Human Rights***³ states that:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Section 2 of Article 17 of the ***Universal Declaration of Human Rights*** states that:

No one shall be arbitrarily deprived of his property.

It is these fundamental rights that we are defending, to ensure that any mandatory policy imposed upon domain name registrants by ICANN fully reflects the existing legal rights of domain name registrants.

Furthermore, we fully acknowledge that IGOs have certain legal rights as well (discussed in more depth later on in this document). It is important,

- 1 [Verizon hits tiny iREIT with cybersquatting suit](https://www.bizjournals.com/houston/stories/2007/04/23/story4.html), April 22, 2007, <https://www.bizjournals.com/houston/stories/2007/04/23/story4.html>
- 2 [Ontario Court Rules In Favor Of George Kirikos On Pupa.com & Awards \\$4,500 In Fees](https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-awards-4500-in-fees/), April 8, 2013, <https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-awards-4500-in-fees/> ; [Canadian court orders company pay costs over wrongful domain claim](https://domainnamewire.com/2013/04/08/canadian-court-orders-company-pay-costs-over-wrongful-domain-claim/), April 8, 2013, <https://domainnamewire.com/2013/04/08/canadian-court-orders-company-pay-costs-over-wrongful-domain-claim/>
- 3 <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

though, that they are not given any **new rights** at the **expense** of domain name registrants' rights. Instead of a "win-lose" approach, we must instead adopt "win-win" solutions.

We believe that a sound policy should not prejudice either party's legal rights. The goal of the UDRP/URS should be to get the **exact same results** as would have been obtained had the parties gone to court instead, but in a **more streamlined, faster and cheaper manner where possible**.

2. RELATIVELY BRIEF REVIEW OF OUR PAST INPUT

As noted on the first two pages of this document, this is the **third document** that comprises our entire comment. If you are a diligent person, you've already read the first two documents. But, probably 95% (or more!) of readers will have simply skipped over the first two documents without reading them. However, **they form an integral part of our entire submission**. Let's quickly review them, for those who simply skipped over them:

a) August 20, 2019 comment submission:

This was a 32 page comment submission, involving the first working group that looked at the IGO issue. I (George Kirikos) was a member of that working group, but that work was directly undermined by its co-chairs, Phil Corwin and Petter Rindforth, who disagreed with one of the consensus recommendations of the working group.

We documented the sham nature of the comment periods themselves, pointing out the NameCheap challenge re: .org.

We documented the process manipulation by the co-chairs, and the "backchannel sabotage" of the report by its opponents. While opponents falsely claimed "capture" of the working group, we carefully showed that this was not the case, and that all of the recommendations should have been adopted.

We documented how the IGOs have relitigated the issues for more than 15 years, repeatedly seeking special rights that are not supported by law.

We documented how the final report of that first working group was rushed to completion, in order to undermine the reasoning behind the recommendations.

We documented how ICANN staff themselves sabotaged the report, by excluding important analysis and evidence.

We documented how immunity is a defense to a dispute, but is not in play when IGOs are the initiators of the dispute.

We carefully explained the "role reversal" issue, which is a fundamental but subtle design flaw in the UDRP itself. We also explained how this is related to the "lack of cause of action" problem for cases where one might want to appeal to the UK courts.

We then reviewed the history of the UDRP's "grand bargain" when it was developed, referencing the original documents and white paper, showing how the goal was to have the **same rights**, and **with resort to a court system**.

We then briefly reviewed a "Notice of Objection" system as an alternative (although it was discovered too late to be seriously considered by that working group). [a much more thorough review was in our 2nd PDF]

We documented how IGOs routinely made false and misleading statements to support their faulty positions.

We concluded that all 5 recommendations should be adopted.

Of course, as we know, the Board did not do this, which led directly to the creation of a new working group, and thus our subsequent comment submission (next section).

b) October 23, 2021 comment submission:

This was an epic 54 page submission, responding to the initial report of the new working group. It is simply **one of the finest comment submissions in the history of ICANN, one that we stand behind 100%, staking our reputation on it**. It had diagrams, tables, and charts, and had thorough references and citations throughout. **It was superior to the initial report in every way**. Given the final report did not change materially from the initial report, the Board should carefully read the document, if they intend to do a good faith review. But, here's a summary of what it contained.

We carefully reviewed the origins of the UDRP, including the origins of the mutual jurisdiction clause (this is something the new working group never did, even after pretending to review our comments!). We even had a supporting flowcharts to explain things clearly. By carefully going through the historical documents, we explained that the mutual jurisdiction clause was a purported solution to an imbalance in a prior proposal, designed to ensure access to the courts.

We then carefully explained the unintended consequences of the mutual jurisdiction clause, at a deep level, carefully looking at the legal rights of both parties under various scenarios. Through this deep dive, we showed explicitly how the "role reversal" happened, how it directly leads to the "lack of cause of action" issue in the UK/Australian courts, and how it leads to the "quirk of process" for IGO immunity (where a court might recognize IGO

immunity despite submitting to mutual jurisdiction, thus depriving a registrant of an opportunity to have their dispute heard on the merits in court).

We then looked at the recommendation #5 of the first working group, and showed how we can do even better.

In particular, we carefully reviewed a "notice of objection system" (taken directly from the "Civil Resolution Tribunal" in British Columbia, Canada) which **would completely address the root cause of the issues** (role reversal), and improve things for both registrants and IGOs, replicating exactly the expected rights of both sides, to ensure they are not prejudiced by a UDRP/URS filing. This was a monumental accomplishment (pages 15 through 20 of the comment submission), **yet was utterly ignored by the new working group in their comment review (because IGOs were fixated on getting special rights through ICANN that are superior to those that exist under national laws)**.

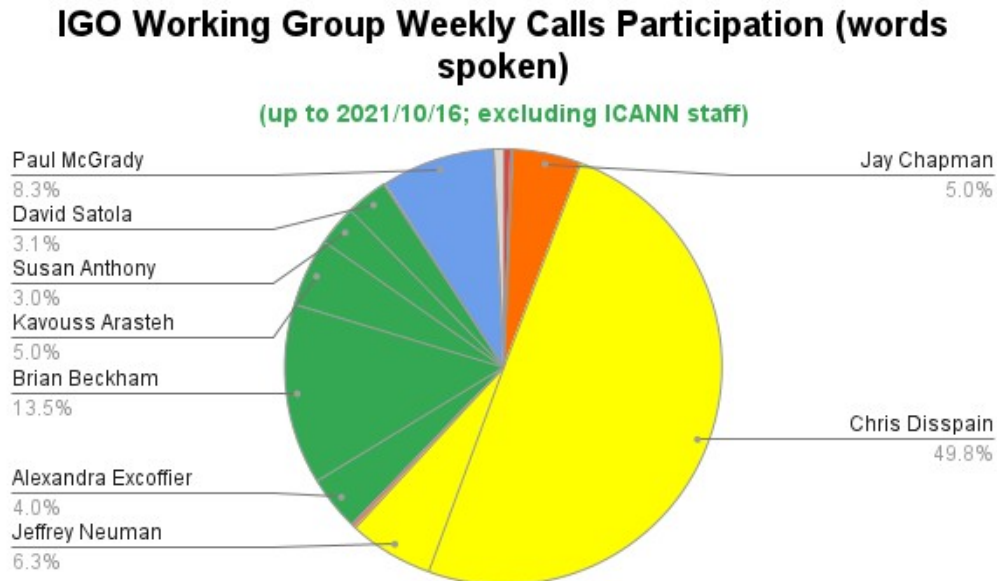
We discussed how immunity is a defense to a dispute, and is not in play when IGOs **initiate** a dispute. This is a **critical point**, because IGOs repeatedly overstate their alleged "immunity". The new working group again failed to consider these basic arguments (the first working group did consider them, thus coming to vastly different recommendations!). We gave the specific example of a bakery putting up a sign saying "UNESCO Cookies", and pointed out there is absolutely no mechanism for the UN agency to compel binding arbitration. Yet, this example is ignored by IGOs. They have no answer to it, and the captured new working group continues to grant IGOs "new rights" that simply do not exist under national law.

We also point out how any proposed arbitration cannot simply be limited to domain name disputes, as a court case involving domain names as **one aspect of a larger dispute** that is pushed to an ICANN-developed arbitration system **must also address that larger dispute**. An IGO **cannot selectively carve out aspects of their immunity when initiating a dispute**, and thus **cannot be allowed to gain a litigation advantage** by filing a UDRP/URS over a **subset of potential claims and counter-claims**.

Showing our commitment to innovation, we documented the **actual level of participation** in the working group (words spoken on the weekly calls; mailing list), with beautiful graphs after commissioning Mr. Kevin Ohashi of ReviewSignal.com to assist us. It demonstrated in **shocking detail** the **unbalanced participation** in the working group, and thus its capture. IGOs had far greater participation than Jay Chapman (purportedly the lone voice

of domain name owners, albeit one constrained by the Business Constituency). See pages 27-30 of our prior submission for graphs that had **never been seen before at ICANN.**

It is clear that the output of the working group reflects capture.



We then carefully documented how the working group went beyond the scope set by the GNSO. They decided early on to ignore their own charter! [we have the quotes, in their own words!] This shocking disregard for the charter shows how deeply flawed ICANN policymaking has become.

We then carefully went through each of the recommendations. We explained why the definition of IGO complainant was open to gaming (and also violates the prior working group's recommendations).

We explained in detail why the IGOs should not be exempt from the "mutual jurisdiction" clause. We directly quoted Jay Chapman who called the working group's own recommendations "**intellectually dishonest.**"

We explained in careful detail why we were opposed to all recommendations involving arbitration, even quoting Professor Wendy Seltzer's article from 2003 (which shows how long IGOs have been relitigating this issue at ICANN). We listed **20 separate reasons why arbitration was unacceptable (pages 43-47)**. You will not find those discussed in any detail in the new working group's final report, further evidence of the sham public comment review.

We demonstrated (while pointing to their own words in the transcripts of their calls) how tunnel vision excluded serious consideration of other options besides arbitration. The **new working group was a classic "echo chamber."** This is in sharp contrast to the first working group, where many options were considered (and **where arbitration was explicitly rejected,** with **consensus against**) by a diverse group of participants.

We also brought up the important issue of lack of any meaningful metrics to measure the success or failure of their recommendations. This alone provides ample reason to reject the entire report (and as we'll see later on, was unaddressed in the final report).

We concluded with a plea that the entire initial report be rejected, but proposed a way forward, namely consideration of the "Notice of Objection" system as well as an expansion of the working group membership.

As we now see in the final report, which has no substantive changes relative to the initial report from the point of view of domain name registrants, our comments and those of others in the community were essentially ignored via a sham public comment review. Since those final report recommendations are essentially the same as before, in terms of their impact on registrants, **all of our past comments are still applicable.**

Thus, if you've not yet read the first 2 documents in full, please do so before proceeding any further.

The next sections of this document will focus on what happened since the October 23, 2021 comments. We followed the progress of the working group carefully, and blogged repeatedly (via our FreeSpeech.com site) about the sham nature of the new working group.

3. COMPARISON OF INITIAL REPORT VS FINAL REPORT RECOMMENDATIONS

Before proceeding, it's worth noting how little has actually changed between the initial report and the final report, in terms of the impact on domain name registrants, demonstrating the sham nature of the public comment review via a captured working group.



Here's a side-by-side comparison of the recommendations, to make it easier to see the changes (or lack thereof): **[NB: the yellow text in the initial report was very hard to copy/paste, and so there might be some mangling of the text below, as we had to type some manually; ultimately, we did a side-by-side comparison of the two original documents themselves, instead of relying on the table below!!]**

<u>Initial Report</u>	<u>Final Report</u>
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<p>Recommendation #1: Definition of “IGO Complainant”</p> <p>The EPDP team recommends that the UDRP Rules and URS Rules be modified in the following two ways:</p> <p>i. Add a description of “IGO Complainant” to section 1 (i.e., the definitions section of both sets of Rules):</p> <p>“‘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 Nations.”</p> <p>AND</p> <p>Add the following explanatory text to UDRP Rules Section 3(b)(viii), URS Section 1.2.6 and URS Rules Section 3(b)(v):</p> <p>“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).”</p>	<p>Recommendation #1: Definition of “IGO Complainant”</p> <p>The EPDP team recommends that the UDRP Rules and URS Rules be modified in the following two ways:</p> <p>i. Add a description of “IGO Complainant” to section 1 (i.e., the definitions section of both sets of Rules):</p> <p>“‘IGO Complainant’ refers to: (i) an international organization established by a treaty, and which possesses international legal personality; or (ii) an ‘Intergovernmental organization’ having received a standing invitation, which remains in effect, to participate as an observer in the sessions and the work of the United Nations General Assembly; or (iii) a Specialized Agency or distinct entity, organ or program of the United Nations.”</p> <p>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):</p> <p>“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.”</p>
<p>Recommendation #3: Exemption from</p>	<p>Recommendation #2: Exemption from</p>

<p>Agreement to Submit to Mutual Jurisdiction for IGO Complainants</p> <p>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.</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 courts in at least one specified Mutual Jurisdiction”⁵.</p>	<p>Submission to “Mutual Jurisdiction”</p> <ol style="list-style-type: none"> 1. (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. 2. (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; <ul style="list-style-type: none"> (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
<p>Recommendation #4: Arbitral Review following a UDRP Proceeding</p> <p>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> <ol style="list-style-type: none"> i. When submitting its complaint, an IGO 	<p>Recommendation #3: Arbitral Review following a UDRP Proceeding</p> <p>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> <ol style="list-style-type: none"> i. When submitting its complaint, an IGO

<p>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)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.</p> <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 below¹⁰.</p> <p>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</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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,</p>
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<p>other final resolution of the dispute.</p> <p>** 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:</p> <p>[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.]</p> <p>[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 fo the case, the original UDRP decision will be implemented by the registrar.]</p> <p>]</p>	<p>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.</p> <p>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.</p> <p>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.</p>
<p>Recommendation #5: Arbitral Review</p>	<p>Recommendation #4: Arbitral Review</p>

<p>following a URS Proceeding</p> <p>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:</p> <ul style="list-style-type: none"> 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: 	<p>following a URS Proceeding</p> <p>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:</p> <ul style="list-style-type: none"> 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. <p>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.</p> <ul style="list-style-type: none"> ii. 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. iii. 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.
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<p>[OPTION 1: Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case,]</p> <p>[OPTION 2: Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, 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.]</p> <p>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.</p>	<p>iv. 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.</p> <p>v. 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.</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]</p>	<p>Recommendation #5: Applicable Law for Arbitration Proceedings</p> <p>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</p>

<p>[OPTION 2:Where the parties cannot reach mutual agreement, the arbitral tribunal shall determine the applicable law.]</p> <p>ii. [POSSIBLE ADDITIONAL STEP UNDER CONSIDERATION:</p> <p>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>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 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;</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>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.</p>
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So, what's the difference? As the "meme" at the beginning of this section indicated, they're substantively the same recommendations as in the initial

report, in terms of their impact on domain name registrants!

Recommendation #1 is little changed, simply noting that the use shall not be token use.

Recommendation #2 in the initial report was unnecessary (and thus removed in the final report), simply saying that if the recommendations #3, #4, #5 and #6 were approved, they'd override the prior working group's recommendation. Thus, it was procedural in nature, and not substantive.

Thus, the subsequent recommendations were **renumbered** in the final report, compared to the initial report.

If we look at recommendation #2 in the final report, corresponding to recommendation #3 in the initial report, while the wording has changed (e.g. by referencing section numbers), and the addition of an "informational notice" has no substantive policy impact. In other words, the exemption from mutual jurisdiction is identical. All that flows from that critical change is thus identical from the point of view of a registrant, or an IGO, relative to the current policies.

If we look at recommendation #3 in the final report, corresponding to recommendation #4 in the initial report, the arbitration is described for the UDRP, with the onerous option #1 in the initial report eliminated in favour of option #2. Option #1 in the initial report was obviously a "throwaway" option, to pretend that the public input was being considered. It had no reasonable prospects of ever being adopted, but was placed there to pretend that the working group was listening by its elimination. All of our substantial arguments against arbitration were ignored.

For recommendation #4 in the final report, corresponding to recommendation #5 in the initial report, it's the same arbitration story as in the preceding paragraph, albeit for the URS rather than the UDRP.

For recommendation #5 in the final report, corresponding to recommendation #6 in the initial report, once again this refers to applicable law in arbitration, which ties in to the 2 prior recommendations. Again, these are implementation details for the arbitration advocates that are irrelevant if arbitration was rejected entirely.

Thus, it's clear that the concerns of the public were essentially ignored, and all our past arguments remain the same. Thus, our **54 page comment submission of October 23, 2021 remains entirely applicable.**

4. SHOW YOUR WORK (IF YOU ACTUALLY DID ANY)

This was supposedly a "final report" that reviewed the public comments to the initial report. Our own comments on the initial report amounted to 54 pages, and there were comments submitted by 32 others. Yet, the concerns of the public are noted in the report only from pages 18 to 22.

Page 18 of the final report links to the Public Comment Review Tool (PCRT) on the Wiki, to pretend that they reviewed the comments.

For example, recommendation #1 was at:

https://community.icann.org/display/GNSOIWT/Public+Comment+Review+Tool?preview=/178586684/180027715/EPDP_SCRP_IGO_pcrt-Initial-Report-Recommendations_Rec1_20211104.docx

and page 3 has the "response" to our own comments. The working group argued that their definition of IGO complainant is the same as the criteria for the GAC list, but it's NOT identical! Furthermore, it changes the prior working group's definition, thus relitigating the issue and exceeding the scope of the working group. **Furthermore, they literally said "Not Completed" in their status for the "Action Taken", which appears to mean that they never even finished the appropriate analysis.** We submitted a detailed comment, yet they simply made a general comment that didn't address or refute or engage with our examples.

For recommendation #3, at:

https://community.icann.org/display/GNSOIWT/Public+Comment+Review+Tool?preview=/178586684/181306623/EPDP_SCRP_IGO_pcrt-Initial-Report-Recommendations_Rec3_20211129.docx

discussing the exemption from mutual jurisdiction, their review of our own comments starts on page 5. From pages 5 through 8, we made a substantial point, yet their "analysis" consisted of "**The EPDP Team has considered this comment.**" That's not good enough! Show us why we're wrong, or withdraw your recommendation. The working group is making a mockery of the public comment period, when they are unable to refute the clear arguments and examples we provided.

From pages 10 through 15, more important comments from us, with the lip service again of "**The EPDP Team has considered this comment and**

understands it as as the background and context for the commentator's specific suggestion (below)." The working group doesn't suggest that there is anything incorrect in our analysis.

From pages 16 to 21, we outlined the "Notice of Objection" system in detail. The EPDP response was: "**EPDP Response: The EPDP Team has discussed this suggestion, which essentially provides an alternative to arbitration as a final solution. The EPDP Team has agreed to remain open to this option following its review of all other comments.**" and the "Action Taken" was "**The EPDP Team to return to this option, if necessary, following its review of the other comments relating to an arbitration option.**"

THAT IS AN UTTER SHAM!!

They never came back to it. They never explained what was wrong with the proposal. They never gave it a fair chance. It's right there in their own documents.

For a public comment review to be serious, it requires that the working group treat the public comments with respect. This didn't happen. This was a fake public comment review, they simply went through the motions, and that's why they cannot explain why the valid concerns of the public were rejected.

Remember, they had enormous resources of ICANN staff at their disposal. Their "explanation" doesn't appear in the final report. And it definitely doesn't appear in their own Public Comment Review Tool.

These are just my own company's comments, which are probably amongst the most serious of any submitted. If they were mistreated in this manner, how do you think the other comments were handled? We suggest that others who submitted comments check what this EPDP team did with them.

But, wait, there's more! Let's continue from pages 22 through 23, where we carefully addressed the nature of immunity, that it's not in play when IGOs are the initiators of the dispute. We brought up that "UNESCO Cookies" example. This underlies all the arguments that IGOs make, where they mislead the public as to the nature of their immunity. The EPDP's Response? They said "**The EPDP Team has considered this comment.**" and the Action Taken was "**None, as the concerns expressed relate to #6 above.**"

That is completely unacceptable, and a complete mischaracterization of our

submission. It didn't only apply to "#6 above", but applied to **all aspects of immunity claims by IGOs!** Furthermore, they **had no answer to it!** It attacks the very notion that arbitration is a suitable solution. It goes into the important question of ICANN creating new rights for IGOs that aren't present under national laws. Yet, the working group simply ignored the submission. Again, **unacceptable!**

To look at an example of others, TurnCommerce's submission on page 31 of the same document was met with "**The EPDP Team has considered this comment.**" With Action Taken of "**None.**" Again, utter sham.

Or, consider the Internet Commerce Association's (ICA) submission on pages 2 through 4. The ICA made strong arguments, like:

Make no mistake about it; removal of the Mutual Jurisdiction provision for IGOs is a radical change to the UDRP and substantially undermines the rights of registrants to be able to effectively seek recourse in the courts, as is their right. As law Professor Wendy Seltzer and former member of the ICANN Board pointed out in 2003, "the possibility [of] appeal to national courts is no minor detail, but part of the balance of keeping domain name disputes in check. If UDRP arbitrators, or the ICANN "consensus" veer too far from national laws, they can be corrected by courts".iv

By exempting IGOs from agreeing to the Mutual Jurisdiction requirement, registrants are left without any assurance whatsoever that a court will assume jurisdiction in a post-UDRP action to overturn a UDRP transfer order. Essentially, this proposal means that rather than ensuring that a registrant has the ability to overturn an errant UDRP decision in court, the registrant will be left empty handed when asking the court for relief since the IGO will not have submitted to any court jurisdiction, period. This is not a remote possibility, but rather a serious and predictable outcome which the EPDP implicitly acknowledges by its inclusion of Recommendations which expressly consider what would happen if the court did decline jurisdiction in the absence of an IGO's submission to a Mutual Jurisdiction.

The pithy response of the EPDP Team was "**The EPDP Team has considered this comment.**" with the Action Taken of "**The EPDP Team will make clear in its Final Report how it took into account the legal advice from Professor Edward Swaine.**" as if that's a full response to what they submitted? **An utter joke and sham. How can you respond to a detailed comment with 1 sentence? That's disrespectful.**

But wait, there's more! Let's continue on to Recommendation 4:

https://community.icann.org/display/GNSOIWT/Public+Comment+Review+Tool?preview=/178586684/197266144/EPDP_SCRP_IGO_pcr-Initial-Report-

Pages 16 through 19 had a substantial comment from us, yet the "EPDP Response" and "Action Taken" were **nonsensical**, and **didn't address what we even submitted** (nor did the "alternative PCRT tool"). **It appears they simply copied/pasted the same text over and over again in their "review" of the public comments.**

Same for pages 20 through 26, where we enumerated **20 specific arguments against arbitration (with footnotes!)**. Did they address them in any way? **No**. They simply copied/pasted the same **nonsensical text**. Here's the nonsense, in case they change it!

EPDP Response "**The EPDP reviewed the input received on preliminary recommendations 4/5 at its 10 Jan 2022 and 24 Jan 2022 meetings. The EPDP was reminded from its charter that any consensus recommendations do "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 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 also used this alternative PCRT tool to review the public comments and deliberate updated text of the recommendation.**"

Action Taken: "**Based on the input that pure arbitration (option #1) was not supported and continued EPDP deliberations regarding recommendation 3 with an exception for IGOs to submit to mutual jurisdiction, the EPDP opted to pursue Option #2 of Recommendation #4/#5 that preserves the RNH ability to file judicial proceedings and in the event the IGO successfully asserted its immunity, that the RNH then has the option to consider arbitration.**"

These did not address in any way what we actually submitted!

Same story on pages 27 to 28. Others should look at how their own comments were handled (it's pretty bad!).

But wait, there's more! Under "Other Comments":

https://community.icann.org/display/GNSOIWT/Public+Comment+Review+Tool?preview=/178586684/197266145/EPDP_SCRP_IGO_pcrt-Initial-Report-

Pages 19 through 22 showed the innovative comment detailing the unbalanced participation in the working group. We invested money to commission Mr. Kevin Ohashi to do much of the analytics, as noted in the comment. The working group's response was mere boilerplate and filler, namely "EPDP Response" of **"The EPDP reviewed all comments classified as "Other" otherwise not specifically attributed to any of the proposed recommendations offline in preparation for its meeting on 14 Feb 2022. Instructions for this review were for members to signal to the EPDP prior to or during this call if any of the comments should be considered in more detail."** and "Action Taken" of **"No specific action taken, but with the EPDP recognizing lack of support for an arbitration only option, the EPDP supported a revised Recommendation #4/#5 that that preserves the RNH ability to file judicial proceedings and in the event the IGO successfully asserted its immunity, that the RNH then has the option to consider arbitration."**

That has absolutely nothing to do with our submission. This is where our ICANN fees are going, for what is essentially garbage? This is an utter sham.

We submitted serious comments and concerns. It's very clear that the working group did not take them seriously.

The exact same thing happens on pages 23 through 28, where we noted that the working group didn't respect their own charter, but instead went far beyond its scope. We quoted their own words to them!

Same on page 28, where we made the point about metrics. They have no valid response to our serious concerns.

Recall, we started this section by noting that the final report referenced their Public Comment Review Tool, so we actually checked that out. If you then continue to read pages 18 through 22 of the final report, to see if there were any substantive comments or analysis of what the public actually said, we find **nothing of any value whatsoever**. Once you remove all the "filler" text, you're left with just:

The EPDP team's review of the Public Comments received on its proposed initial definition showed that those commentators who addressed the topic generally supported the EPDP team's proposal, though a few expressed concerns relating to the need to ensure consistency with the prior Curative Rights PDP recommendations

and one commentator opposed the EPDP team's proposal. (pp. 19-20)

and

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

Some commentators, including the ALAC and the GAC, welcomed the introduction of an arbitration option into the UDRP and URS processes, noting that arbitration is a well-recognized dispute resolution process, including for commercial disputes. However, although there was some support for an arbitration option, there was no universal agreement amongst the commentators as to whether arbitration should be the sole avenue for final resolution of a dispute or whether a registrant should continue to be able to seek arbitration following an unsuccessful attempt to have the merits of its case considered by a court. Several commentators expressed the clear view that adding arbitration to the UDRP and URS should not remove or reduce a registrant's right to initiate court proceedings, and a few commentators suggested that the EPDP team should clarify its recommendations in this regard. (pp 21-22)

Those were the sole references to the actual public comments in that entire document! **That obviously is not good enough.** The EPDP working group and ICANN staff simply make a mockery of the public comment period. There was significant public input, which is summarized in a handful of sentences that doesn't capture it in any meaningful manner. Nor do they actually **respond** to the serious concerns in any meaningful manner, or refute the detailed arguments and submissions that were made. You need only look at our own submissions, and see how they weren't addressed at all.

The working group can't show their work, because they didn't do the work!

5. ICANN BOARD SAYS IT'S INAPPROPRIATE TO PROVIDE GREATER PROTECTION TO IGOs THAN WHAT EXISTS UNDER INTERNATIONAL LAW

We engaged in correspondence with the ICANN Board, as noted on our blog:

<https://freespeech.com/2021/12/09/icann-responds-to-my-open-letter-regarding-igo-protections/>

which is also visible via ICANN's website at:

<https://www.icann.org/resources/pages/correspondence-2021>

(jump to December 9, 2021 on ICANN's page)

Mr. Botterman's letter of December 9, 2021:

<https://www.icann.org/en/system/files/correspondence/botterman-to-kirikos-09dec21-en.pdf>

makes the point:

"In our 23 February 2021 letter to the GAC, the Board noted the scope and limitations of Article 6ter as well as our belief that **it will not be appropriate to provide greater protection to IGOs than what exists under international law.**"
(page 2, emphasis added)

We **completely agree**, it would be **inappropriate to provide greater protection than what exists under international law** (and not just in relation to Article 6ter, but **also in relation to how immunity is understood**).

But, the new working group did what they were warned not to do! Domain name registrants would be directly harmed if this final report was adopted, because IGOs would be granted rights that are greater than what exists under international law.

We made this point on pages 21-22 of our October 23, 2021 comment, via the "UNESCO Cookies" example. There'd be no way under international law for UNESCO to compel arbitration, if they're the **initiator** of the dispute. By exempting IGOs from the mutual jurisdiction clause, registrants are effectively losing the right to meaningful court access. They're left with the "choice" of having an adverse UDRP/URS stand (when denied judicial review due to immunity, which will happen more than at present due to the

proposed exemption for IGOs from submitting to mutual jurisdiction) or arbitration. Thus, it's essentially a forced arbitration or a forced acceptance of a UDRP/URS loss. The current legal rights of registrants are **NOT** preserved.

This was discussed on pages 40 through 42 of our October 23, 2021 comments. Some samples to remind you, for those who didn't read that October 23, 2021 comment, Jay Chapman in the August 2, 2021 called it "intellectually dishonest." (see transcript,

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-wt-02aug21-en.pdf>

page 22):

So really what the problem is as I see it, the current proposal as written today, it doesn't provide for due process. It's a forced process. And at best, it seems to me to be somewhat intellectually dishonest. And I think everyone kind of knows it on the call.

With the mutual jurisdiction requirement also currently sought to be disposed of, it seems to be kind of a wink-wink on the registrant being able to find relief or at least a decision on the merits I suppose by going to court. It's kind of like the group wants to say, well, good luck with that, Mrs./Mr. Business Registrant. There won't be any jurisdiction in the court and thus no remedy for you.

Indeed, if one reviews the transcripts carefully, as we did, the working group was aware that the community would not like what they're recommending. On page 10 of the August 2, 2021 transcript, Chris Disspain said:

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-wt-02aug21-en.pdf>

One of the things that I'm personally very concerned about is the response we're going to get from this when we go out for public comment.

And the more we do, that encroaches on the general rules and regulations for the current UDRP system and **carves out a different status for the IGOs that is not specifically required**. And you can argue that the point about mutual jurisdiction is specifically required. The more we do that, the more likely we are to end up with pushback of such a heavy nature that we will stand no chance of getting this across the line. And I really don't want to lose that opportunity. [emphasis added]

Or in the April 19, 2021 meeting, but via chat transcripts by Paul McGrady:

https://icann.zoom.us/rec/sdownload/Vyz6GUlqm_8Xvg3DxR9JefG-VqyGQPSYao4xOTISPGNDWio5TJ0i9SsGIJo3EIKS_Q8FuMf_FIKlWQIS.II7ZspCvOf2vsbI1

00:39:14 Paul McGrady: I worry about **not only the legal ramifications to registrants**, but also the optics of **ICANN appearing to want to strip registrants of rights they otherwise have at law**. [emphasis added]

Paul McGrady made the same point orally on that call, on page 32 of the oral transcript:

Thanks, Chris. It was just the nerdy thing that I put into the chat that a waiver of the right to go to court, **those rights that are being given up could really never fully be captured in an arbitration mechanism** because the rights in Poland are different than the rights in South Africa, which are different than the rights in the U.S. or whatever. So what we would be doing is creating some sort of amalgam of protections for registrants in the arbitration process that we, I guess, think best blend all the various rights around the world. **Then we would be offering that to registrants in lieu of their local protections. And as I said before, I think in the chat, the optics of that, they're hard to get your arms around that. We don't want ICANN be accused of overreach, for what it's worth.** Thanks. [emphasis added]

Make no mistake, the first working group considered these issues very carefully. But, we came to the different recommendations because we insisted that IGOs not get any new rights that weren't present under international law. Our recommendations ensured that the rights of both sides were not prejudiced by the UDRP or URS. Both sides would have the exact same rights as if the UDRP or URS didn't happen, if that "quirk of process" occurred.

Instead, this new working group decided to go far beyond its limited scope (because it was dominated by IGO members, as demonstrated convincingly by our quantitative participation analysis by Kevin Ohashi), and grant IGOs their "wish list" that they had wanted for two decades. This was entirely like a hostage situation orchestrated by the IGOs, who decided to hold the new gTLD program hostage (along with various currently reserved names in new gTLDs) unless they got what they wanted, all at the expense of underrepresented registrants and at the expense of principled policymaking. That's not about the "public interest", but instead about special interest groups (IGOs) manipulating policymaking at ICANN through coordinated sabotage of proper policy work. The only proper policy work happened in the prior working group, which came to very different recommendations.

6. FINAL REPORT FALSELY CLAIMS ORIGINAL PDP RECOMMENDATION #5 WAS REJECTED

On page 8 of the Final Report, it states:

"The GNSO Council had decided not to approve the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP. The EPDP Team's collective understanding is that the GNSO Council thereby rejected the original Recommendation #5...."

This is false. It was simply not put to a vote, which is quite different than rejecting it. They can certainly revisit that recommendation, in light of the fact that the new working group didn't do what they were tasked to do, namely ensuring that any recommendations **preserved** registrants' rights.

Although, as we already pointed out, there is another solution on the table that would be a "win-win" for everyone, namely the "Notice of Objection" system previously proposed by us in detail.

Thus, the Board's rejection of this Final Report would not create a 'dead end', but would instead allow for the appropriate solutions to come to the forefront.

7. WORKING GROUP ONLY CONSIDERED "CONSTRUCTIVE CLARIFICATIONS", RATHER THAN REASONED OPPOSITION

We've already documented above the sham nature of the public comment review. It's worth documenting further, via the transcripts, the superficial review and outright dismissal of any comments that differed from or challenged the predetermined outcome.

From the December 13, 2021 call transcript, Berry Cobb of ICANN staff went through the public input, saying (starting on page 35):

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-epdp-igos-13dec21-en.pdf>

I think pretty much all of the individuals that had submitted comments had diverged against the current recommendation as proposed. And most of them either referred to the Leap of Faith or the ICA's comments that were submitted prior to that.

I believe as well as that we've just discussed from Jay from the BC but is also representing DigiMedia, noting that in isolation of the recommendation, option two would be supported. But again, that has a tight connection back to Recommendation 3.

Leap of Faith, I believe, it would be a fair characterization that there was zero support for any of Recommendation 4. **There is quite substantive rationale for why it shouldn't be supported.** It refers to previous cases that either occurred in courts or through other routes of litigation. It does take note about concerns with the claim about the lower cost of arbitration versus courts, and it goes on quite a bit. I think that there's also a connection back to Recommendation 3 and kind of in terms of concluding on the rationale for being against this is the reference back to the notice of objection idea that was provided for Recommendation 3 from the Leap of Faith comments. [emphasis added]

But, jumping to page 38, Chris Disspain (the chair, who dominated the working group discussions, as noted above via the quantitative analysis performed by Kevin Ohashi), made it clear that the comment review would be rigged. He said:

What I'd also like to suggest is that—Berry, I agree with you. I think we should **concentrate on**—we start out our discussion on **clarifications**. If people have made **constructive clarifications**, we think this need might need to be tweaked. We need to look at those. [emphasis added]

So, if you weren't making "constructive" input, but opposed the recommendations with "substantive rationale" you were considered a **second-class citizen**, and would be essentially ignored (which the Public Comment Review Tool shows is **exactly what happened**, given there's no actual refutation of any of the arguments of opponents to be found).

Similarly, continuing on page 38, Chris Disspain declared:

It's pretty clear to me, let me say, and without wishing to preempt anything, it's pretty clear to me that notwithstanding that there are a number of unhappy commenters generally speaking, there is a significant leaning towards if I had to choose, I choose option two, which I suspect it may well be hard to go past.

How is that anywhere close to a review of the substantive opposition to proposals, which had serious rationale accompanying them? All they did was go through the motions of a comment review, and discarded anything that deviated from the predetermined outcome.

And to demonstrate how lazy and unproductive this working group was, including staff, on page 39 Chris Disspain asked ICANN staff to send an email to the full list extracting "**a bunch of things that we've identified as being clarification questions or things that people suggest should be clarified for you to consider**". This was on December 13, 2021, and the next meeting was January 10, 2022.

But, if you check the actual mailing list archives of that working group for December and January:

<https://mm.icann.org/pipermail/gnso-igo-wt/2021-December/date.html>

<https://mm.icann.org/pipermail/gnso-igo-wt/2022-January/date.html>

no such email appears! They just weren't putting in the work. They simply pretended to do so.

This isn't an isolated example. Consider the January 10, 2022 transcript:

<https://gnso.icann.org/sites/default/files/policy/2022/transcript/transcript-gnso-epdp-igos-10jan22-en.pdf>

Berry Cobb is going through the comments and says (page 10):

I just really wanted to not to leave anybody out but to point here that there is a considerable amount of no support for the recommendation as a whole.

But, **they did not bother to actually go through the reasoning for the opposition!** (try to find it!) If you were in favour of their proposals, you were heard, but if you were not in favour of them, the working group did not rebut, analyze, dissect, or provide a rationale for why that opposition shouldn't be used to reject the proposal. This is why the Final Report didn't contain a rebuttal to the opposition --- it's because they failed to even attempt it in the working group at any deep level. This was a superficial analysis by a captured group. Because of the capture, there was no one within the working group (like us) to compel them to answer their opponents. Instead, they ignored the opponents. Again, this was a classic "echo chamber."

Or, consider the January 31, 2022 call, where Chris Dissain notes at the end of the meeting (page 41):

<https://gns0.icann.org/sites/default/files/policy/2022/transcript/transcript-gns0-epdp-igos-31jan22-en.pdf>

There is much work to be done on the list and as homework.

But, if you check that mailing list between January 31, 2022 and February 7, 2022 (the next meeting)

<https://mm.icann.org/pipermail/gns0-igo-wt/2022-January/date.html>

there's an email from Berry Cobb noting:

<https://mm.icann.org/pipermail/gns0-igo-wt/2022-January/000381.html>

saying:

Per today's call, please review the "other" comments as shown in the attached PCRT. **Please signal on the list any comments that the EPDP should review on our next few calls.**

As noted, most of these comments were not assigned to any one specific recommendation and were more general in nature. **A majority of the commentors**

opposed the draft recommendations as a whole. There are 35 rows among 29 unique commentors. [emphasis added]

So, there was a majority opposed! Members of the working group were asked to identify comments that should be reviewed. Let's look at the February 2022 mailing list (there were no further emails in January 2022 after the one from Berry Cobb):

<https://mm.icann.org/pipermail/gnso-igo-wt/2022-February/date.html>

There are literally zero emails from anyone that attempts to do that! **Zero!** Don't just take our word for it, go look at the February 7, 2022 transcript!

<https://gnso.icann.org/sites/default/files/policy/2022/transcript/transcript-gnso-epdp-igos-07feb22-en.pdf>

On page 52, Berry Cobb of ICANN staff said:

Part of the homework from last week was that the group was to review through the other comments page and send to the list if anything warranted extra discussion on the call. Nothing was sent, but I still feel compelled that [we've] at least go to run through it. And maybe we spend 10-15 minutes to do that on the next call.

So, "nothing was sent". **If you don't do your job in the real world, you get fired. Not at ICANN. In ICANN, folks who don't do their homework simply sit back and enjoy the ride.**

You can read the transcript of that next call (February 14, 2022):

<https://gnso.icann.org/sites/default/files/policy/2022/transcript/transcript-gnso-epdp-igo-14feb22-en.pdf>

from pages 4 to 23 to see how little discussion actually took place, despite that majority opposition in the comments. Indeed, when it was pointed out that Chris Disspain had a disproportionately high participation (49.8% as per the pie chart earlier in this document), he mocked that serious input saying (page 16):

I'm very disappointed. I was going for 50%.

In other words, they pretended to read the comments, but didn't analyze, rebut, digest or refute the arguments within those public comments.

Even when important points were made to be bookmarked, like our input on "metrics", they said (page 17):

Berry, it's Chris, two things. One, can you make sure that you refer us back to this particular comment when we deal with that section?

But, they never did circle back to that comment! Our input on metrics was ignored, as per the final report which contains no possible "metrics" that can be used to demonstrate that recommendations were having a damaging impact on registrants, where arbitrations were generating incorrect decisions, etc. On the February 28, 2022 call:

<https://gns0.icann.org/sites/default/files/policy/2022/transcript/transcript-gns0-epdp-igos-28feb22-en.pdf>

the topic of metrics was discussed on pages 27 through 38, but they simply ignored the only public comment that actually raised the topic, **our own**. They had said they would come back to it, but they didn't. All they did was discuss their own views on what was in the initial report, without actually referencing the **public input from us!**

I encourage folks to actually compare the serious input that was submitted through the public comments, and the actual superficial review that took place in those two dozen pages of the transcripts (pages 4 to 23 of that February 14, 2022 transcript), and in other transcripts. They certainly deserved far better than what transpired in the working group.

Again, this was a working group that focused entirely on comments that were supportive of their predetermined outcome. If anyone submitted well reasoned opposition, their comments were just not taken seriously. We have the "receipts" in the actual transcripts of the working group calls, the PCRT (as noted above in depth), and in the Final Report itself which makes no attempt to explain why they are correct and their opponents are incorrect. This is why the entire working group is such a sham, from start to finish. It was a captured group from the beginning (unlike the first working group, which had diverse participation and diverse views expressed throughout its work). And it was a captured working group at the end, which ultimately failed to answer the serious concerns of the affected stakeholders (domain name registrants) who were not fairly represented within the working group. **As such, their entire report should be discarded.**

8. PAUL KEATING WAS RIGHT: IGOs HAVE UNDERMINED THE LEGITIMACY OF THE ICANN MODEL

In a letter to ICANN in 2018,

<https://www.icann.org/en/system/files/correspondence/keating-to-icann-board-16aug18-en.pdf>

prominent attorney Paul Keating, who was a member of the original IGO working group that invested 4 years on the topic and which came to very different recommendations (that actually balanced the rights of registrants and IGO), told ICANN that:

To claim that the group was captured is simply nonsense.

He also noted that:

The Mathias letter makes clear that the objective of the IGOs is to discredit the many years work of the Working Group and to undermine the bottom up policy-development process that is fundamental to the legitimacy of the ICANN model. As a diligent and fair-minded member of the Working Group who actually invested the time to examine the issues in incredible detail and reach sound recommendations, I simply cannot accept his attempt to circumvent the Policy Development Process.

Unfortunately, Paul Keating was right: IGOs have undermined the legitimacy of the ICANN model, by relitigating the issue excessively, and ignoring public input until they succumbed to the IGOs demand for removal of the “mutual jurisdiction” clause. As we’ve noted repeatedly, IGOs have been after this unreasonable policy change for two decades!

https://circleid.com/posts/why_wipo_does_not_like_the_udrp

Why did this happen? One reason is that the new IGO Working Group prevented us and others from participating, and instead was overwhelmingly dominated by those who have no interest in protecting registrants’ rights. This unbalanced representation led to this extremist outcome. We documented the unbalanced participation in an innovative review of the actual number of words spoken during calls, and posted on the mailing list, with the help of Kevin Ohashi. Those charts and the analysis were submitted to the working group via the public comment period (see pp. 27-30 of our October 23, 2021 comment submission). This concern was also raised by the Registrar Stakeholder Group, who stated:

<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp->

[specific-curative-rights-protections-igos-14-09-2021/submissions/registrars-stakeholder-group-rrsg-24-10-2021](https://www.icann.org/consultations/2021/09/14-specific-curative-rights-protections-igos-14-09-2021/submissions/registrars-stakeholder-group-rrsg-24-10-2021)

Second, the RrSG notes that the EPDP does not appear to contain any representatives from the RrSG, the Registry Stakeholder Group (RySG), and the Not-for-Profit Operational Concerns Constituency (NPOC), and some of the recommendations appear to have significant impact on those constituencies or domain name registrants. The absence of certain constituencies in the EPDP should not be rationale for drafting recommendations that could impact those constituencies. The RrSG strongly recommends that for the Final Report, the EPDP must consider and incorporate the feedback from constituencies not represented on the EPDP.

Let's take a look at the original IGO working group's mailing list archives.

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/>

The "consensus call" process took place in May 2018 and June 2018.

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-May/date.html>

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/date.html>

There was vigorous and active participation by numerous members of the working group. May 2018 had 75 posts, and June 2018 had 127 posts, for example. Members were active and engaged in the working group. Phil Corwin of Verisign falsely claimed "capture", as discussed on our blog:

<https://freespeech.com/2022/05/12/icann-gnso-council-was-misled-regarding-alleged-capture-of-the-original-igo-working-group/>

but look at the actual activity on the mailing list. Phil Corwin was a member of the registry constituency, but so were David Maher (of PIR) and Crystal Ondo (of Donuts, at the time). Both rejected Phil Corwin's preferred option (arbitration), and were part of the group's consensus (which the new working group is trying to relitigate). David Maher explained:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-May/001214.html>

I support Option 1. I understand staff's concern "that resolving a procedural question (immunity from jurisdiction) can automatically reverse a substantive panel finding, where the court has not had (and will not have) the opportunity to hear the case on its merits." This problem will only arise if an IGO takes advantage of a UDRP or URS proceeding and then hides behind immunity. It appears from this group's discussions that IGOs have had few or no problems in supporting their names and acronyms in court and administrative proceedings. For future proceedings, I believe it is justifiable to bar IGOs from invoking an intrinsically unfair legal maneuver.

Reg Levy of Tucows (representing herself, but obviously familiar with Registrar views) was also a participant, and was part of the consensus.

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001234.html>

Similarly, Mike Rodenbaugh, former counsel at Yahoo! and a member of the Intellectual Property Constituency, was part of the consensus (and opposed to the arbitration proposal that Phil Corwin desired).

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-May/001167.html>

We created an unofficial spreadsheet which summarized the input.

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180612/81203bdc/InitialConsensusLevelDesignationsanalysis--IGOPDP-Summary-2018June12-0001.pdf>

One can see that it closely aligns with the results by ICANN Staff which were produced later,

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180621/463d8ae6/UPDATEDInitialConsensusDesignations-21June2018-0001.docx>

and the final report (pp. 4-6, and pp. 18-22 which showed the designations of the alternative options which were rejected).

<https://community.icann.org/display/gnsoicrmpdp/Final+Report?preview=/89981342/89981344/FINAL%20VERSION%20Final%20Report%20-%202017%20July%202018.pdf>

Contrast the original working group with the sham nature of the new IGO working group. Their mailing list archives can be found here,

<https://mm.icann.org/pipermail/gnso-igo-wt/>

and their phony “consensus call” took place in March 2022.

<https://mm.icann.org/pipermail/gnso-igo-wt/2022-March/date.html>

As was noted by the Registrars Stakeholder Group above, there were no representatives from the registrars or registries who even participated in this working group! Contrast that with the original working group (which was open to anyone), which had wide and engaged membership. Their phony

“consensus call” amounted to a single email

<https://mm.icann.org/pipermail/gnso-igo-wt/2022-March/000425.html>

from the chair (Chris Disspain, who dominated the discussions throughout the working group, as noted previously) claiming “full consensus”. Take a look at the mailing list — was there widespread actual public support for that designation? Of course not — they simply manipulate the working group’s processes, to consider “silence” as being “acceptance.” Folks were complicit watchers of the process, unengaged and unrepresentative bystanders of a captured group, while affected stakeholders (namely domain name owners) had inadequate representation and were shut out.

Contrast this silence and complicity with the vigorous debate in the original working group, where members had to **affirmatively post their positions**, selecting between multiple options (rather than a single option) and many did so with their reasoning. This new working group with already unbalanced and limited participation didn’t even bother to do so, as they knew that their unengaged members couldn’t actually justify their positions. They simply “went along with whatever the chair decided”, and sat in silence. The original working group was a **model** for how all sides had an opportunity to participate, and all views were considered. The new working group's consensus call resembled a one-party election in an authoritative state, whereas the original working group resembled a vigorous democracy where a variety of options were debated and the best consensus emerged from those options.

Paul Keating was proven correct. In fact, it's the new working group that is guilty of what the original working group was falsely accused of by the IGOs. If this new working group's final report is adopted by the ICANN Board, it would further discredit the organization for years to come, as it would show that it is not a venue for legitimate policymaking. It would also stain the reputation of all those who pushed it through, despite reasoned opposition from affected stakeholders.

9. INTELLECTUAL DISHONESTY IN THE FINAL REPORT

The new working group's final recommendations are an insult to the intelligence of the ICANN community and to those who took the time to engage. Rather than considering the **serious deleterious impact** of their proposals on registrants' **rights to have the merits of their dispute decided by the courts**, the new working group instead decided to **double-down on their intellectual dishonesty**.

On page 8 of the final report, they assert that:

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

The working group seeks to **pull a fast one on the public**, by making this assertion, which did not alter the **actual impactful recommendation** (which eliminated the mutual jurisdiction clause for IGOs). i.e. **It's the elimination of the mutual jurisdiction clause for IGOs that has the negative impacts, not the inclusion of an arbitration option on its own!** Furthermore, there's a huge difference between "**filing proceedings**" in a court (anyone can file anything at any time), and having the ability to have a **meaningful court review on the merits** (which would in fact be prejudiced due to successful assertion of immunity, made more likely through the exemption of the mutual jurisdiction clause for IGOs).

We called this out explicitly on pages 40-42 of our October 23, 2021 comments. We quoted their own words! For example, Jay Chapman said:

So really what the problem is as I see it, the current proposal as written today, it doesn't provide for due process. It's a **forced process**. And at best, it seems to me to be somewhat **intellectually dishonest**. And I think **everyone kind of knows it** on the call.

With the mutual jurisdiction requirement also currently sought to be disposed of, it seems to be kind of a **wink-wink on the registrant being able to find relief or at least a decision on the merits I suppose by going to court**. It's kind of like the group wants to say, well, good luck with that, Mrs./Mr. Business Registrant. **There won't be any jurisdiction in the court and thus no remedy for you**. [emphasis added]

Without giving every example (we encourage folks to read our prior comment submission), Paul McGrady noted:

Thanks, Chris. It was just the nerdy thing that I put into the chat that **a waiver of the right to go to court, those rights that are being given up could really never fully be captured in an arbitration mechanism** because the rights in Poland are different than the rights in South Africa, which are different than the rights in the U.S. or whatever. So what we would be doing is creating some sort of amalgam of protections for registrants in the arbitration process that we, I guess, think best blend all the various rights around the world. Then we would be offering that to registrants in lieu of their local protections. And as I said before, I think in the chat, the optics of that, they're hard to get your arms around that. We don't want ICANN be accused of overreach, for what it's worth. Thanks. [emphasis added]

Instead, the new working group buries the truth in a word salad of obfuscatory text. It's a word salad that **they themselves do not even believe**. For example, even in March 2022, as the final report was being finalized, the chair of the working group was caught on transcript saying (on the March 14, 2022 call):

<https://gns0.icann.org/sites/default/files/policy/2022/transcript/transcript-gns0-epdp-igos-14mar22-en.pdf>

So I think what we're trying to do is to build a flexible process under which, a registrant ... Let's be clear. I think we all agree. We're talking about the edge of the edge cases. Who does want to go through that process **because we are effectively saying, you can't go to court?** To have the option to at least use it. Have the same opportunities that they would have in court. Now whether that extends to things like sanction and stuff, it's a different issue. I don't want to give in to that description on this call. That's what I think the small group needs to talk about. [emphasis added, pp. 20-21]

"We are effectively saying, you can't go to court". How is that consistent with anything that's actually in the final report? This is a working group that produced a dishonest final report, inconsistent with what they said during their own deliberations.

The truth is this — the new working group was chartered to look at a very specific and limited scenario, namely:

1. An IGO wins a UDRP.
2. The domain name registrant decides to challenge the UDRP outcome, by going to court, as per the mutual jurisdiction clause.
3. Instead of deciding the case on the merits, the court decides that it cannot proceed due to the claimed immunity of the IGO.

As explained in our prior comments (of October 23, 2021), which reviewed the entire history of the UDRP, this scenario has never actually happened. The “expected outcome” was that a court should find that the “mutual jurisdiction” clause amounts to a waiver of immunity, and thus the court case can proceed. To attach some numbers, we would argue that if left unchanged, the current policy would result in 95%+ of such court cases to find that the IGO has waived immunity, and the court can decide the dispute on the merits. Our work was focused on deciding what to do about the “other 5%” of cases, that would theoretically fall through the cracks, and the original working group came up with a solution to that problem (i.e. vitiate the UDRP, and put both sides in the same position as they would be had the UDRP not taken place, so that the case can then proceed in the courts, mirroring the actual legal rights of the IGOs and respondents had ICANN never created the UDRP policy in the first place; as we noted in our comments, a “Notice of Objection” system would be an even better solution).

But, what did the new IGO working group do instead? Rather than focus on their limited mandate, they went far beyond the scope of their charter to relitigate already decided issues. We documented this on pages 31-35 of our October 23, 2021 comments. By removing the “mutual jurisdiction” requirement for IGOs, the working group **completely changes the likelihood of the scenario above**. Instead of focusing on a rare scenario, and what to do about it, they actually **transformed the rare scenario into the expected scenario!** Without the mutual jurisdiction clause for IGOs, instead of say 95% of courts deciding the case on the merits (leaving 5% of such cases undecided on the merits), the reverse would happen! Courts would **overwhelmingly find that domain owners could not proceed to a decision on the merits in a dispute with the IGOs**, as there was no waiver of immunity. So, 95% of cases (instead of 5%) would (under the new working group’s proposed elimination of mutual jurisdiction) now be in a state where the court could not proceed to a decision on the merits — i.e. the cases would be thrown out on a technicality, rather than be decided on the merits.

Instead of recognizing this perversion of justice, the new working group attempts to **obfuscate** things by claiming that nothing prevents a domain owner from **filing** a case in court. This is a ridiculous and misguided statement — it’s obvious ICANN can’t control anyone’s ability to make court filings, to initiate actions at court. But what ICANN shouldn't do (and will do, if these recommendations are adopted) is **prejudice the actual outcome of what happens at that court!** This working group turned an unlikely scenario into the most probable scenario, **thereby harming registrants’ rights to have their disputes decided on the merits by the courts.**

10. NEW ICANN IGO WORKING GROUP DIDN'T PRESERVE REGISTRANTS' RIGHTS TO JUDICIAL REVIEW

This is one of the most basic problems with the final report. Page 4 of the final report noted that the work was initiated to see:

“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.” [emphasis added]

Note in particular “c” that they must **PRESERVE** registrants’ rights to judicial review. But, their recommendations do NOT do this, when they exempt IGOs from the mutual jurisdiction clause. That was their: “Recommendation #2: Exemption from Submission to “Mutual Jurisdiction”” on page 10 of the report.

A careful reading of the report shows that they actually **sneaked in the word “seek”** in the summary of that recommendation, i.e. they wrote:

“2.1.2. Recommendations to Address IGO Immunities While Preserving a Registrant’s Right to **Seek** Review of a UDRP or URS Decision Issued Against It” [emphasis added]

It’s not enough to simply “seek” that review – one must actually have the review itself in the courts! And they **removed** the word “**judicial**” — it’s not just a “**review**” that matters, it’s a **judicial review** that must be allowed (in the courts).

Notice that their “explanatory text” on page 11 actually **OMITS** the above section (c) wording! They wrote:

“...recommended policy solution must “[account] for the possibility that an IGO may

enjoy jurisdictional immunity in certain circumstances; ... not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction whether following a UDRP/URS case or otherwise; and ... [recognize] that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction”

i.e. they took the wording of point “b” above, but **didn’t** quote “c”, namely:

c. preserves registrants’ rights to judicial review of an initial [Uniform Domain Name Dispute Resolution Policy or Uniform Rapid Suspension decision

This is the outright dishonesty we’ve repeatedly written about concerning this new working group. It makes no sense to have removed the part (c) text (present on page 4) from the explanatory text on page 11, **unless the goal was to trick the reader. That's dishonest. Thus, they did not actually address GNSO Council's instructions!**

As noted in section 9 (immediately preceding this one) above, **the working group members themselves acknowledged during their deliberations that registrants’ rights are not being preserved!** This is so important, so go back to section 9 and read the words of Jay Chapman, Paul McGrady, and Chris Disspain. And if you go back to our October 23, 2021 comments, on pages 40-42 you'd find even more direct quotes.

The new working group's final report **falsely claims** on page 16 (Policy Change Impact Analysis) that they believe they’re “preserving existing registrant rights.” This concern was raised by many in the public comment period, not just myself. But, then they **misstate and misrepresent** the objections of the public, on page 21:

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

They emphasized that folks were concerned about the “registrant’s ability to **file** court proceedings” — that’s not the issue; instead, what matters is what would happen at court **after the case got filed** (i.e. it would be tossed out on a technicality, if IGOs asserted immunity, which they certainly would do if they were exempted from the mutual jurisdiction clause).

They added the ambiguous text “These commentators emphasized that the

outcomes of the EPDP should not reduce or otherwise adversely affect the rights of registrants.”, but then **didn't address those actual concerns, i.e. the prejudicial impact of what would happen once you got to court.**

To fake people out, then **the final report didn't actually CHANGE the substance of the recommendation** (i.e. final report vs. initial report). On page 22, they tried to pretend that they did:

Clarify that its proposal to exempt an IGO Complainant (as defined) from the requirement to agree to submit to a Mutual Jurisdiction does not alter or limit a registrant's ability and right to **initiate court proceedings**; [emphasis added]

But, that is simply “explanatory text” **that didn't actually change the recommendation itself!** And furthermore, that **explanatory text is misleading**, because **it was never in dispute that registrants could “initiate court proceedings” — what people were concerned about was what would happen at court once you got there (whether or not the case would be decided on the merits, or be tossed out on a technicality due to assertions of immunity).**

By **removing the mutual jurisdiction clause for IGOs, the expected outcome at court would be vastly different, as everyone knows** (that's why the IGOs have been fighting this issue for 2 decades, as they don't want the courts to ever be able to make a decision on the merits, even when they've initiated the overall dispute by filing a UDRP in the first place). **Registrants' rights would be severely prejudiced at court, not preserved.** Even the **working group itself acknowledge this prejudicial** impact, on page 20:

Conversely, the EPDP team acknowledged that removing this requirement for IGO Complainants could **prejudice a registrant's right and ability to have an initial UDRP or URS determination reviewed judicially**, in that a successful assertion of immunity by an IGO means that the court in question will decline to proceed with the case. [emphasis added]

That should have been the end of the working group's attempt to keep the exemption from the mutual jurisdiction recommendation! It's entirely inconsistent with the language on page 4 of their report, which required the working group to:

c. **preserves registrants' rights to judicial review** of an initial [Uniform Domain Name Dispute Resolution Policy or Uniform Rapid Suspension decision; and [emphasis added]

It's entirely inconsistent again with the language of page 16:

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**. [emphasis added]

There's no rational or credible basis for their claimed "belief" on page 16, when it's entirely contradicted and negated **by their own statement** on page 20. Did they not even read their own report? Did they not even read their own transcripts (which we quoted from above) where they documented that they did not actually have that belief that they pretended to have, and instead conceded that registrants would be harmed? **This is outright dishonesty and deception, within their own report and we're calling it out.** It cannot be allowed to stand.

To be clear, this is very serious. They have no rational or credible basis for "believing" that they're **preserving** registrant rights on page 16 of the report, when on page 20 they admit that they are **prejudicing** those same rights. This is amateur hour, and how could this possibly have achieved "full consensus" within the working group? How could it have achieved "unanimous support" at GNSO Council? The only way that happened is because **it's all a sham**. What the Board has to decide is whether they will perpetuate this shameful activity, bringing disgrace upon themselves and the entire institution, or whether they will bring this shameful activity to an end. We are here to say "The Emperor Has No Clothes."

A mathematics journal would not publish a paper that claimed to "believe" that $2+2=5$. It would be inconsistent with logic, and demonstrably false. How does ICANN think they can get away with adopting a Final Report that is so internally inconsistent and dishonest, one whose own statements on one page are proven false a few pages later? It's simply unconscionable.

Why is a decision in court so important? It was explained in depth in our detailed public comments of October 23, 2021, or in a much briefer and older article by Wendy Seltzer.

https://circleid.com/posts/why_wipo_does_not_like_the_udrp

Instead, this working group actually believes that it's "good enough" to allow someone who disagrees with the outcome of an ICANN-designed process (UDRP) to simply go to **yet another ICANN-designed process (an "arbitration" as an alternative to the courts)**. ICANN's UDRP has been criticized as being one-sided in favour of complainants for 20+ years, and

now they believe they can be trusted to come up with something superior to the courts? That's nonsense. **The fact that working groups and processes have been manipulated to even get to this stage shows that ICANN doesn't work, and that court processes are essential to ensure justice.**

Remember, not a single IGO has ever had a UDRP appealed to court! Why would an actual criminal fraudster engaged in cybersquatting, who IGOs pretend to be after, ever expose themselves? **IGOs truly want to prevent legitimate registrants who have faced an injustice at the UDRP (e.g. the ADO.com or IMI.com disputes) from obtaining justice through their national courts.**

In conclusion, this final report is a **sham**, an obscene attempt to deprive domain name registrants of basic and sacred rights that they've had since the inception of the UDRP. It is a demonstration of what happens when policymaking is dominated by a powerful and unrepresentative "few", at the expense of the underrepresented "many". It must be opposed to ensure justice and due process for domain name owners.

11. GNSO COUNCIL ATTEMPTS TO REWRITE HISTORY OF THE NEW IGO WORKING GROUP

As we documented on our blog:

<https://freespeech.com/2022/05/17/icann-registrars-constituency-attempts-to-rewrite-history-of-the-new-igo-working-group/>

the GNSO Council played some interesting games before they voted on the final report produced by the working group, particularly after we pointed out in blog posts how the rights to judicial review must be preserved.

They added some text which might be unprecedented within ICANN policymaking, claiming:

We believe it is important to have it on record (in the motion) that there are scope and principles stipulated by the Council at the outset and against which Council has evaluated and determined that the recommendations in the Final Report are consistent with such scope and principles.

and

10. The GNSO Council has determined that the five (5) final EPDP recommendations in the EPDP team's Final Report are consistent with the scope and principles set out in the Addendum to the RPMs PDP Charter and the subsequent EPDP Charter.

It's the actual content of the report that determines whether it's in scope or not. A "declaration" doesn't change the contents of that report at all.

Recognizing that we'd **proven** that the contents of the final report are deficient and do not actually preserve judicial review, as per section 10 of this submission (directly preceding this section), they attempted to simply wave their hands in the air and declare unilaterally that the recommendations are in scope. It was a **childish amendment**, akin to that mathematics journal (in the prior section) simply declaring that $2+2=5$. Their new text does nothing to rescue the deficient final report, but just goes to demonstrate their degree of desperation to **bamboozle and gaslight the public**. The facts are clear. The working group produced a document that is **internally inconsistent** and internally contradicts itself. It did not meet the parameters set out, which required preserving registrants' rights. We have the receipts, quoting the working group members repeatedly via their captured statements on transcripts, which confirms their true beliefs.

12. WORKING GROUP CHAIR ADMITS THEY WOULD BE SIGNIFICANTLY CHALLENGED ON SCOPE

In our review of the working group's transcripts, it's clear that the Chair of the Working Group, Chris Disspain, knew and understood that they had to preserve registrant rights to judicial review. In fact, on the January 10, 2022 working group call, here's what he had to say:

<https://gns0.icann.org/sites/default/files/policy/2022/transcript/transcript-gns0-epdp-igos-10jan22-en.pdf>

And the bottom line is, irrespective of all of that, that our charter, our instructions from the GNSO Council very clearly states that our solutions should not affect the rights and ability of registrants to quality judicial proceedings, a court of competent jurisdiction, whether following a UDRP or URS case or otherwise. [pp. 38-39, emphasis added]

Boom goes the dynamite! As we've demonstrated above conclusively, this very standard that they were entrusted to meet was simply not met. Rights to judicial review are **severely harmed**, and **not preserved**. "Quality judicial proceedings" and a "court of competent jurisdiction" are sacred – yet this final report, if adopted, would effectively be taking those rights away from registrants

The GNSO Council's childish "declaration" doesn't fix the problem, either. That declaration was something that could have appeared in George Orwell's 1984. They would declare that up is down, or down is up, or $2+2=5$.

"The Party told you to reject the evidence of your eyes and ears. It was their final, most essential command." -- George Orwell, 1984

Chris Disspain went on! On page 39, he continued:

So I would argue that we would be significantly challenged on scope, I suspect, if we were to make a recommendation that required an IGO to go to court and to not have a substantive hearing on the merits, which of course is what would happen if IGOs were successful in claiming their immunities.

By exempting IGOs from the mutual jurisdiction clause, **they enhanced the ability of IGOs to successfully assert immunity (as the mutual jurisdiction clause would usually be interpreted as a waiver of immunity)**. They are in violation of their mission. They would and should be

“significantly challenged on scope.” There would be no **“substantive hearing on the merits”** at courts. As the Final Report itself concedes on page 20:

Conversely, the EPDP team acknowledged that removing this requirement for IGO Complainants could **prejudice a registrant’s right and ability to have an initial UDRP or URS determination reviewed judicially**, in that a successful assertion of immunity by an IGO means that the court in question will decline to proceed with the case. [emphasis added]

They “prejudiced” the rights to judicial review – the working group failed to preserve them.

As the Internet Commerce Association argued in their own comment submission in October 2021:

<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021/submissions/internet-commerce-association-22-10-2021>

Preliminary Recommendation #3 – exempting IGOs from the usual requirement of agreeing to a Mutual Jurisdiction for a challenge to a UDRP transfer without guaranteeing the right of a registrant to have its case heard on the merits – is unjustified and should not be accepted by the GNSO. By exempting IGOs from agreeing to the Mutual Jurisdiction requirement, registrants are left with the very real possibility that a national court will refuse to assume jurisdiction in a post-UDRP action to overturn a UDRP transfer order; leaving the registrant without any meaningful redress or ability to have its case heard on the merits.

The proposal (Option 1 under Recommendation #4) to eliminate all substantive recourse for errant UDRP and URS decisions in the event that an IGO successfully avoids a court proceeding by asserting immunity after ICANN has stripped away the Mutual Jurisdiction requirement, is unconscionable and effectively repudiates the GNSO’s mandate to the EPDP which inter alia, requires that any policy option preserve registrants’ rights to judicial review. Such right to judicial review can only entail a substantive review, not merely an opportunity to receive a dismissal. [page 1]
[NB: the recommendations were renumbered in the final report]

By ignoring this, not only did the working group fail to listen to the affected stakeholders. They also, by **Chris Disspain’s own words**, violated their charter.

13. LIMITING THE DAMAGE OF A BAD FINAL REPORT

If the ICANN Board doesn't reject the Final Report outright, they can certainly limit the damage by grandfathering existing domain name registrations. Or by limiting the policy change to new gTLDs, as per pages 49-50 of our October 23, 2021 comment submission.

Furthermore, the issue of metrics is a serious one, and must be reconsidered beyond what was in the final report. If the metrics can't be used to determine whether a policy change has harmed domain name registrants, then those metrics are completely useless. We've seen horrible UDRP decisions like ADO.COM, which required court action to ensure justice for the registrants. An arbitration system that perpetuates injustices of the UDRP/URS system is unacceptable, and there must be real safeguards.

Another option is to create a "supergroup" combining the first working group and the newer working group, to determine whether a true consensus can emerge, rather than the sham produced by the newer working group.

Serious consideration should be given to the "Notice of Objection" system, which would have actually allowed for the elimination of the mutual jurisdiction clause for all complainants, as it would be replaced by a court action started by the complainant in the UDRP/URS (rather than the respondent). [i.e. it solves the underlying "role reversal" root cause of the problem directly!] As we noted on pages 17-18 of our October 23, 2021 comments, this was actually something that was acceptable to the IGOs! (we quoted Ms. Excoffier of the OECD) [Unfortunately, they all got too greedy and produced this sham report that violated their instructions to preserve the rights of registrants.]

As the prior working group found, the agent, assignee or licensee approach has proven effective by IGOs in the past. There is successful precedent, as a way to bring a case via a "proxy" complainant instead of the IGO directly. Every attempt to bring that up in the new working group simply led to it being summarily rejected, without argument (simply with statements like "No, we don't believe that would work." or words to that effect, with no further legal explanation). Critics don't even attempt to distinguish between agent vs. assignee vs. licensee but instead lump them all in as "unacceptable" ending the discussions without explanation.

Similarly, the related idea of an Independent Objector (brought up in the May 3, 2021 meeting), modeled on a similar Independent Objector used in the new gTLDs program, was summarily dismissed. No research, no debate, no pros and cons, just a few words and it's off the table. That was typical of

the "workflow" of this new working group, which was instead fixated on a single solution (arbitration), to the exclusion of all others.

The first working group explored potential subsidies of IGO complaints by ICANN (with equal corresponding financial aid for registrants in those cases). One novel idea might be to make any corresponding financial legal aid to a registrant contingent upon the registrant waiving the right to go to court. Some registrants (particularly of lower value domain names) might take that offer, and IGO risk would then be lower in those cases.

Another policy option would allow legitimate registrants to opt out of the UDRP/URS completely, by posting a security bond (or some other mechanism that is "expensive for the bad guys, but cheap for the good guys -- basic signaling theory from economics). In the event of cybersquatting, rightsholders would have access to the security bond. For a company like our own that does not engage in cybersquatting, posting such a bond in order to ensure that a valuable domain name's fate is only determined by the courts (rather than a dubious UDRP/URS system) would make a lot of sense.

14. EQUAL TIME

The ICANN Board and the GNSO Council had a joint meeting to discuss the working group's Final Report on January 11, 2023:

<https://mm.icann.org/pipermail/council/2023-January/026418.html>

Similarly, the GNSO Council met with the co-chairs of the first working group who were opposed to and undermined the report, rather than the remaining members who formed a consensus.

We suggest that the ICANN Board actually have a dialogue with the members of the first working group (including ourselves), whose efforts were sabotaged, to attempt to find real solutions that protect registrants while simultaneously helping IGOs. The best path forward is to try to reach **real consensus of all affected stakeholders**, rather than the sham consensus in this final report. The ICANN Board needs to give equal time to registrant concerns, by meeting directly. IGOs have special access to the Board via the GAC, whereas domain name registrants do not.

Working with folks from the Internet Commerce Association (ICA), whose interests tend to be aligned with our own (although we differ in our analysis of the report at times) and others who represent the interests of domain name registrants, we can hopefully come to a satisfactory outcome for all sides. [NB: we are not members of the ICA]

Otherwise, this process will get ugly. An Implementation Review Team will not be able to satisfy opponents of the policy. In the event that registrants are deprived of their judicial rights after an adverse UDRP, many will be compelled to sue those who deprived them of those fundamental rights, including registrars, registries, ICANN, and those who pushed forth this policy change. A court may even conclude that the UDRP and URS themselves must be considered contracts of adhesion if the changes are so one-sided, and simply make them void (which would upset many others who have legitimate need for those tools).

To see the dangers of the current path, which would create a new method to reverse hijack valuable domain names without judicial recourse, potentially, a biased (or rogue) arbitration panel that is not subject to court oversight might escalate the dot-Amazon situation. While that **might seem a stretch**, (people said it was a stretch when we warned about private equity buying dot-ORG!) stranger things have happened in UDRPs in the past. For example, in the OpenTime.com UDRP:

<https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2016-2328>

a panelist ignored the fact that the domain owner had a legitimate trademark (which should be a complete defence to a UDRP!) in Japan. With that kind of precedent in hand, why wouldn't the Amazonian countries create an IGO that would then attempt to usurp the Amazon.com domain name from the ecommerce giant? That IGO might claim rights that predate the ecommerce giant. By the OpenTime precedent, a panel might hand over the domain despite its USA trademark, with the American company unable to use the courts to rectify this injustice. Would an arbitration panel find in their favour, or would it similarly yield a "crazy" result? ("crazy" to some would be "justice" for others in South American countries!)

FYI, the OpenTime.com UDRP, wrongly decided by panelist Georges Nahitchevansky, had an appeal to the US courts:

<https://mm.icann.org/pipermail/gnso-rpm-wg/2018-August/003219.html>

and the outcome was that the domain name stayed with the owner. This demonstrates the importance of having access to real courts, as a safeguard against rogue and unaccountable panelists or arbitrators. ICANN is unable to credibly claim they can design a system equal to or superior to the national courts of Canada, the US, or other developed nations for handling important disputes.

15. FINAL THOUGHTS

In conclusion, the Board should **reject the final report in its entirety**. It's the product of a demonstrably captured group. The final report itself is internally inconsistent. As discussed in section 10 above, the working group has no rational or credible basis for "believing" that they're **preserving** registrant rights on page 16 of the final report, when on page 20 they admit that they are **prejudicing** those same rights. It shocks the conscience that they could even put forth such a fatally flawed final report that contradicts itself. It's a **fundamentally dishonest** document, that cannot be repaired or tweaked. It must be discarded. Those who advanced this final report should be held accountable for wasting the time and resources of the organization, and for disrespecting the public's input.

The working group did not meaningfully review the public comments to the initial report. They can't "show their work" in how they arrived at their recommendations in light of the feedback to their initial report, as they simply **didn't do** the work.

The working group ignored the Board's own past guidance to not provide IGOs with rights greater than that which exists under international law. Instead, the recommendations directly harm domain name registrants, adopting a "win-lose" approach rather than a "win-win" approach.

As a way forward, we strongly urge consideration and adoption of a "Notice of Objection" system, as it can provide strong benefits to IGOs, while simultaneously preserving the full legal rights of domain name registrants. It's a true win-win solution, and we would be willing to assist ICANN and the community to design a solution that all stakeholders can support.