**Public Comment Review Tool – EPDPSPCR-IGO – Initial Report**

Updated 27 October 2021

# RECOMMENDATION 3

| **#** | **Comment** | **Contributor** | **EPDP Response / Action Taken** |
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| **Recommendation #3: Exemption from Agreement to Submit to Mutual Jurisdiction for IGO Complainants**   1. **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”. 2. **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”. | | | |
|  | We support the progress reflected in the proposed waiver or elimination of the mutual jurisdiction clause | WIPO | Support  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None.  [**COMPLETED**] |
|  | The Initial Report states at Page 5, that “IGOs are concerned that the agreement to this “Mutual Jurisdiction” clause could be considered as an express or implied waiver of the IGOs’ immunities under existing national laws”. Ostensibly this Preliminary Recommendation is intended to address that concern.  This potential policy proposal has already been carefully examined by Professor Swaine, an international law expert who was retained by the original PDP Working Group and whose legal opinion dated, June 17, 2016 was attached to its Final Report at Page 115.iii Professor Swaine stated therein that:  *“As a purely legal matter, it seems unlikely that the Mutual Jurisdiction provision, as it may be accepted by an IGO, establishes or occasions a violation of IGO immunity… [and] it may seem more appropriate to require an IGO to abide by a judicial process, given that it has elected to initiate UDRP proceedings, than it would be require a domain-name registrant to accept the IGO’s preferred alternative”.*  The EPDP appears to have assumed that the Mutual Jurisdiction would necessarily eliminate an IGO’s immunities when that does not appear to be the case. In the absence of a legal opinion    contradicting Professor Swaine’s conclusions, it appears that the EPDP has proposed a dramatic change to the existing UDRP without any legal basis.  Moreover, even if one were to incorrectly assume without any legal basis, that the Mutual Jurisdiction requirement in the UDRP would necessarily result in a broad waiver of IGO immunity, as Professor Swaine also pointed out, “an IGO [may be able to] to assign a right of use to another (or, at least, to appoint an agent to enforce its interest)” and that “it is presumably within ICANN’s authority to establish standing rules permitting such assignees to act as complainants.”  Indeed, Professor Swaine expressly states that:  *“No reform may be necessary: in at least one case, a panel permitted a legal representative of an IGO to proceed as the complainant”*  and;  *“Indeed, several IGOs—including the International Mobile Satellite Organization (INMARSAT), the International Bank for Reconstruction and Development (IBRD), and the Bank for International Settlement (BFIS)—have prevailed in UDRP complaints.”*  The Initial Report cites no legal basis or expert opinion for its professed concern about the Mutual Jurisdiction clause and apparently has solely relied upon representations made by IGOs themselves without any supporting evidence or independent legal basis. Accordingly, Preliminary Recommendation #3 – exempting IGOs from the usual requirement of agreeing to a Mutual Jurisdiction for a challenge to a UDRP transfer – is unjustified and should not be accepted by the GNSO which should insist upon evidence-based policy development rather than simply forming policy around the unsupported representations of a particular stakeholder group.  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 then 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 GNSO must not lose sight of the fact that when the UDRP was originally established in 1999, there was a “grand bargain” wherein trademark owners would be able to avail themselves of a streamlined and low-cost dispute resolution system for clear cut cases of abusive domain name registrations, but domain name owners would not have to give up their right to go to a national court in order to overturn a wrongly decided UDRP case. Preliminary Recommendation #3 improperly seeks to undo that foundational grand bargain. The UDRP and URS are convenient, expedited, and lower cost supplements to available judicial process, not preemptive substitutes, and ICANN has no authority to require a non-judicial appeal and thereby strip domain registrants of those legal rights that they may possess under relevant national law. One must not lose sight of the fact that IGOs are not compelled to use the UDRP or URS. Rather, they may employ these procedures as an alternative to the normal avenue of recourse available to them like all other parties, namely going to court. However, if an IGO does decide to avail itself of these alternative dispute resolution procedures, it should not come at the cost of registrants’ right to go to court to seek judicial review.  Finally, it also bears noting that this entire 14 year-long policy development process, originating from at least 2007, appears to be based largely upon a tempest in a teapot. Not only is there no apparent legal basis for the removal of the Mutual Jurisdiction provision, and not only can the UDRP be used in its current form (or as adapted by including a minor, specific acknowledgment that IGOs can use the UDRP via an agent, etc.), but there is no evidence that cybersquatting on IGO domain names is even happening on any significant basis. If there had been a significant issue of cybersquatting on IGO marks surely we would have seen the evidence of this after so many years. Moreover, if IGOs were truly unable to use the UDRP instead of merely reluctant, surely we would have seen them use the courts to deal with cybersquatting, yet we have seen no evidence of this in 21 years of the UDRP. In any event, the number of UDRP cases that have gone to court at the instance of the registrant is probably around a few dozen over the course of around 80,000 UDRPs in 21 years, meaning that the chances of a trademark owner, let alone an IGO, having to go to court are remarkably slim.  Accordingly, it really appears that this whole exercise is largely a solution in search of an actual problem. The GNSO should not permit any further expenditure of time, effort and resources on what appears to at most amount to a remote and edge contingency, without obtaining actual evidence beyond mere self-serving representations, to demonstrate that this is genuinely a problem that requires a comprehensive policy solution that dramatically eliminates the delicate balance of the UDRP.  iii <https://gnso.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf>  iv <https://circleid.com/posts/why_wipo_does_not_like_the_udrp/> | Internet Commerce Association | Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  The EPDP Team will make clear in its Final Report how it took into account the legal expert advice from Professor Edward Swaine.  [**COMPLETED / NOT COMPLETED**] – EPDP Team members (including IGOs) to provide clarity on the Swaine report. |
|  | Digimedia does not support Recommendation 3. First, the mutual jurisdiction requirement was not mandated by the GNSO to be affected by this EPDP. Recommendation 3 stands in stark contrast to the previous IGO working group’s consensus - and GNSO approved - recommendations 1-4. Moreover, we agree with the BC in its Comments on the Final Report of the previous IGO/INGO Working Group, “claims of jurisdictional immunity to a court proceeding can and should be advanced before such national court and cannot be pre- determined by ICANN fashioning a blanket rule that does not take into account the facts and circumstances of each case (emphasis added).” Removing the Mutual Jurisdiction requirement from existing and longstanding consensus ICANN policy would be just that: an ICANN fashioned, blanket rule that cares not for the facts and circumstances of a particular situation. | Digimedia.com, LP | Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None.  [**COMPLETED**] |
|  | It’s crucial to study the origins of the UDRP, in order to understand the principles behind all curative rights mechanisms (including the URS) adopted by ICANN. Unfortunately, the current working group (whose transcripts and emails were carefully reviewed before making this submission) did not fully review those materials, putting its members at a disadvantage when trying to come up with solutions that respected the founding principles of the policies.  The history of the UDRP, is documented on ICANN’s website at: <https://www.icann.org/resources/pages/schedule-2012-02-25-en>  [https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-](https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en) [25-en](https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en)  "The proposals were designed to provide trademark holders with the **same rights** they have in the physical world, to ensure transparency, and to guarantee a dispute resolution mechanism **with resort to a court system**. [emphasis added]  Notice the “same rights” and “with resort to a court system” language. It can’t get much clearer than that.  The White Paper goes on to say:  Further, it should be clear that whatever dispute resolution mechanism is put in place by the new corporation, that mechanism should be directed toward disputes about cybersquatting and cyberpiracy and not to settling the disputes between two parties with legitimate competing interests in a particular mark. **Where legitimate competing rights are concerned, disputes are rightly settled in an appropriate court**. [emphasis added]  In simple language, no one is getting “extra rights” or “fewer rights”. The procedure was designed for simple clear cut cases, and “not to settling the disputes between two parties with legitimate competing interests in a particular mark.” In other words, complex hard fought disputes are best settled by the appropriate courts. **By design, it was not for all possible disputes**.  This is critical. Far too many folks have tried to expand the number of disputes that should be handled by the UDRP/URS, rather than realizing that it was never designed for all disputes. A diagram might be helpful. Figure A: UDRP intended for clearcut cases, whereas court is the forum for complex and/or high stakes disputes   Why is this so? It’s because the UDRP and the URS do not have all the safeguards and due process protections present in the rules of national courts. They are like an “online small claims court”.  Who in 1999, when the original policies were being developed, would have thought that domain names could be worth USD $30 million, for example, as per the Voice.com domain name transaction?[4](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark3) In a dispute over valuable domain names, it is essential that they can be fully litigated in the national courts. In the language of the White Paper noted above, that’s where those complex disputes are “rightly settled”, not by an “online small claims court.” One would not expect that the same rules/procedures would apply to disputes involving a $100 domain name compared with a domain name worth $100,000 or $10 million.  While some folks believe that **arbitration** is “just as good” as the national courts, **we strongly disagree**, and will discuss why in greater detail in a later section of this submission. But, just from a process/design perspective, one need only look at any addition of arbitration as being fundamentally different than what was intended by the UDRP – it’s no longer a simple, clearcut dispute, but is instead a complex case that belongs in the courts. An attempt to add arbitration only adds further complexity, rather than ensuring simplicity for simple and clearcut disputes.  The “mutual jurisdiction” clause of the UDRP (section 4(k) of the Policy[5](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark4)) was specifically added to **attempt** to ensure access to the courts was maintained for all sides, that neither party’s rights would be prejudiced by the use of the policy, and that both sides could have disputes decided on the merits in the courts if need be. [Unfortunately there were some **unintended consequences**, both on IGOs and others, which we’ll discuss later.] The URS has a similar clause, of course.  Indeed, if one goes to the Staff report at the time of the UDRP’s development:  <http://archive.icann.org/en/meetings/santiago/udrp-staff-report.htm>  "DNSO Recommendation 4(b): The need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from "appealing" the result in a court due to the absence of a cause of action in contract, tort, regulation, statute or constitutional right. It was noted that there is an imbalance in the WIPO process in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report; Staff Suggestion on DNSO Recommendation 4(b): The staff agrees that **both registrants and challengers should have equal opportunities to "appeal" an outcome of the administrative dispute-resolution procedure**. Some commentators have suggested that the DNSO-recommended **proposal would afford challengers significantly superior "appeal" rights**. The staff notes that **this result would be a** clearly unintended consequence of the DNSO proposal. The staff believes that this concern can and should be fully addressed in the implementation of the dispute-resolution policy, which should explicitly negate this possibility**. [emphasis added]** They were clearly focused on ensuring that any implementation had equal opportunities on both sides for an adverse outcome to be decided through the courts. They did not want to tip the balance in anyone’s favour and attempted to find a solution via insertion of the mutual jurisdiction clause.  To understand the specific development of UDRP's Section 4(k) (mutual jurisdiction), see:  <http://www.dnso.org/dnso/notes/19990729.NCwga-report.html>  The **need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from appealing** the result in a court due to the **absence of a cause of action** in contract, tort, regulation, statute or constitutional right. It was noted that there is **an imbalance in the WIPO process** in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report.  One suggested **solution to this problem** which WG-A agrees merits further consideration, is the requirement that a **complainant enter into a contract** with the registrant (or the arbitral institution in a jurisdiction that recognizes third party beneficiary agreements) as a **condition of initiating ADR, that provides for consent to be sued in the jurisdiction where the registrant is ordinarily resident, and in the jurisdiction where the subject registrar is located** (assuming both parties do not agree to voluntarily contract out of the right to subsequent litigation).  **That was the genesis and motivation for the mutual jurisdiction clause** – it was a specific solution to an identifiable problem. **They were focused on a lack of cause of action, and thought that adding the mutual jurisdiction clause would solve the problem**.  As we’ll discuss later, though, it’s **not the only possible solution**. [Remarkably, it is possible to adopt a “Notice of Objection” system that allows us to **safely remove the mutual jurisdiction clause in its entirety**, **while still ensuring that complex disputes are decided by the courts**. We’ll discuss that in depth later, though.]  In the next section, we’ll discuss the unintended consequences of the UDRP and mutual jurisdiction clause, which affects IGOs and also registrants located in certain countries (or using registrars in certain countries).   1. MicroStrategy Sells Voice.com Domain Name for $30 Million, Businesswire.com press release, June 18, 2019, [https://www.businesswire.com/news/home/20190618005248/en/MicroStrategy-Sells-Voice.com-Domain-Name-for- 30-Million](https://www.businesswire.com/news/home/20190618005248/en/MicroStrategy-Sells-Voice.com-Domain-Name-for-30-Million) 2. Uniform Domain Name Dispute Resolution Policy, [https://www.icann.org/resources/pages/policy-2012-02-25- en](https://www.icann.org/resources/pages/policy-2012-02-25-en) | Leap of Faith Financial Services Inc. | Concerns  Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None. See #6 below.  [**COMPLETED**] |
|  | In order to truly understand the issues in play at a deep level, one needs to understand that there is a fundamental but subtle design flaw in the UDRP (and also the URS; when we refer to “UDRP” below, the argument applies equally to the URS).  If the UDRP didn’t exist, and an aggrieved party or rightsholder (e.g. IGO, trademark owner, etc.) initiates a dispute in the courts, that party would be the Plaintiff/Complainant in the domain dispute. The domain owner, on the other hand, would be the Defendant/Respondent. **Thus, the natural role of the initiator of the dispute (rightsholder, TM holdder, IGO, etc.) is as Plaintiff/Complainant, and the natural role of the domain owner is the Defendant/Respondent had the UDRP/URS never existed.**  Thus, this “Baseline Scenario" looks like the following (note that this is simplified):    This is simplified, but the key is that in the absence of the UDRP/URS, it's the TM holder or IGO that is generally going to be the plaintiff, the one on the offence attempting to get a court to order transfer of a domain name, or other remedies like damages (money). As plaintiff, they can conceivably pick from any court in the world, but generally need to pick one that will have some nexus with the domain name and/or registrant. So, often it would be the location of the registrar (given that domain name registration agreements specifically mention that as a valid jurisdiction), or the location of the registrant themselves (since a registrant could not credibly argue that such a court would not have jurisdiction over themselves). But, there is nothing stopping a plaintiff attempting to use some other court, and a defendant might dispute the jurisdiction as one of its defences.  In some situations, a domain name registrant might have a counterclaim available, if there is a larger dispute than just the domain name. This might be a real concern for an IGO (or other rightsholder), as the counterclaim might more than offset the value of the domain name (in which case the IGO would never have given up its immunity in the first place to file such a case, lest it risk the counterclaim).  But, let’s now add the UDRP/URS into the mix. Recall the "Figure A" chart -- the IGO or TM holder is picking the UDRP/URS path because they claim it's a "simple clearcut case" of cybersquatting. So, rather than going to court, the IGO or rightsholder becomes the Complainant in the UDRP/URS, and the domain owner becomes the Respondent. Furthermore, the IGO or rightsholder **must agree to the mutual jurisdiction clause** (for the historical reasons explained in the prior section, to allow an "appeal"). Now, there are 2 general situations, either the domain name registrant wins the UDRP/URS, or they lose the UDRP/URS.  **Situation #1** -- domain name registrant wins the UDRP/URS  If the rightsholder or IGO wants to challenge this outcome, they have **full recourse to the courts** as above Baseline Scenario without any prejudice or hindrance to their legal rights (because they will still be the plaintiffs in the court, as would have been the case had they not tried the UDRP/URS first). If the rightsholder or IGO doesn't want to challenge the outcome any further, once again there's no impact on their legal rights. So, to the extent any policy changes are necessary to the UDRP/URS, this situation is uninteresting.  **Situation #2** -- domain name registrant loses the UDRP/URS  This is where things get more interesting. If the domain name registrant accepts the outcome, then nothing interesting is required from a policy perspective. However, what happens if the domain name registrant doesn't accept the outcome? Under the current policies of the UDRP/URS, **the losing domain name registrant is expected to take court action**, to "appeal" the outcome. In tabular form, here's what it looks like:    Note that there is a big difference between the "Baseline Scenario" and this scenario, because now the domain name registrant is the plaintiff in court (whereas in the baseline, they were the defendant).  This is what we refer to as a **Role Reversal**. The natural role of plaintiff and defendant has been flipped around. This role reversal might not seem like a big deal, but in a few specific ways it can make an enormous difference. Unintended Consequence #1 -- lack of cause of action As the domain name registrant is now the plaintiff seeking a declaration that they're the rightful owner of the domain name, it's a prerequisite that they have a valid cause of action in the court where the case is being heard. If it's in the USA, that's not a problem (due to the ACPA). But, it turns out that this is a problem in the UK (and perhaps Australia) as discussed by David Maher in an article at CircleID.com[6](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark5). Had the TM holder or IGO filed a dispute directly in the UK court, for a claim of cybersquatting, the case would have proceeded as normal, and the domain name registrant would have had the ability to have the case decided on the merits, with full argument. But, the courts in that country have said that the domain name registrant lacks a cause of action to bring the case as a complaint, for a declaration that they're the rightful owner of the domain name. As discussed in the historical development of the UDRP section of this document and in the article by David Maher, this is **grossly unfair** to the domain name registrant, as they're deprived of their right to have the case decided on the merits by the court. [while some TM holders look upon this current result with glee, and seek to perpetuate it, it is truly an unfair outcome, as the UDRP was always intended to allow for court action; UDRP was never intended as the "final word" when deciding complex disputes that were heavily contested by both sides]  The root cause of this "lack of cause of action" problem is the **role reversal** and the manner by which the mutual jurisdiction clause was inserted into the UDRP historically. The designers of the UDRP simply did not anticipate this situation, and obviously ICANN lacks the ability to simply create a "cause of action" on its own (that's up to each nation in their laws).  **Unintended Consequence #2 -- quirk of process where court recognizes IGO immunity despite submitting to mutual jurisdiction** The second unintended consequence is the one we looked at in depth in the prior IGO working group, a theoretical possibility that has never happened (because a losing domain name registrant has never challenged the outcome in court with an IGO complainant). We explored the theoretical possibility that after an adverse UDRP/URS result, a losing domain name registrant might take an IGO to court as an "appeal" mechanism, to have the case decided on the merits at court. It is theoretically possible that, despite the mutual jurisdiction clause, a court might still refuse to hear the case if an IGO successfully asserted immunity.  This was seen as a "quirk of process", because it was always intended (via the historical development of the UDRP above) that the case could be heard in full at court, and so the domain owner would be denied its rights to a full hearing on the merits simply because the IGO launched the UDRP first (rather than having sued in court first). In essence, under this theoretical scenario, the IGO gained a tactical advantage which later prejudiced the domain name registrant at court.  Once again, the root cause of this "quirk of process" is the **role reversal**. It's because the IGO is the defendant at court (after having gone through the UDRP/URS) instead of a plaintiff, the IGO is now able to attempt to assert immunity (as plaintiff, an IGO can't assert immunity).  This odd theoretical scenario is what led to the year-long study and debate of "what to do, should it ever happen?", which eventually led to Recommendation #5 of the prior working group, which essentially said **"Put them back in the same situation they would be had the UDRP/URS not taken place."**  While some folks argued for other solutions, this is was seen as an appropriate solution, due to its simplicity, and also the fact that by vitiating (disregarding) the UDRP/URS outcome, it would be aligned with the historical design goal of the UDRP. It's NOT a circular solution, because if you look at things in tabular form, they would now look like this:    This chart is basically the same as the "Baseline Scenario", which was the scenario where the rights of both sides have not been affected (negatively or positively) by the UDRP. From a legal point of view (ignoring how they got there), both sides have their full legal rights/defences.  In other words, going back to "Figure A" above which delineated complex and simple cases, Recommendation #5 recognized that this "quirk of process" was a situation that was never "simple". Both sides were vigorously disputing who was the rightful owner of the domain name. If the dispute was to be taken any further, it would need to be handled by the courts.  In particular, Recommendation #5 reinforced that a "loss due to immunity" in the courts was really a **procedural loss**, rather than a loss on the merits. It would unfairly elevate the importance of the prior UDRP decision if it was to be left to stand, as it was expressly being challenged on the merits. The only good way to add weight to the UDRP outcome was to reinforce it via a **win on the merits** in the courts, rather than avoiding any decision on the merits in the courts. Perhaps with this additional context, those who have misunderstood Recommendation #5 will reexamine their position.  Notice that both unintended consequences (the "lack of cause of action" in the UK/Australia; and the "quirk of process" involving IGOs) **have at their root cause the role reversal**.  Is it possible to design a system so that the role reversal is eliminated, while still preserving the full legal rights of both sides? It turns out the answer is "**Yes**"! See the next section for an exciting solution that solves the problem for both parties, **eliminates those unintended consequences**, making it a "win-win" solution that should be able to be adopted on a consensus basis because it improves both sides. And as an important **side-benefit**, it **eliminates the need for a mutual jurisdiction clause** (thereby benefiting IGOs directly!). | Leap of Faith Financial Services Inc. | Concerns  Divergence  **EPDP Response:**  The EPDP Team has considered this comment and understands it as the background and context for the commentator’s specific suggestion (below.)  **Action Taken:**  None (see #6.)  [**COMPLETED**] |
|  | At a very late stage of the prior IGO PDP, in June 2018, too late for the working group to really consider it, I discovered that an elegant solution exists which completely eliminates the role reversal flaw discussed above. This was posted to the mailing list on June 7, 2018:  <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001226.html>  which documented a procedure within the rules of the “Civil Resolution Tribunal” an online tribunal that handles small claims and strata (condominium) disputes in the British Columbia, Canada.  In particular, they have a “Notice of Objection” system as their appeal mechanism:  [https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/](https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-a-final-decision) [#what-if-i-dont-agree-with-a-final-decision](https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-a-final-decision)  If you disagree with the CRT’s final decision on a small claims matter, including a default decision, you can pay a fee and file a Notice of Objection with the CRT. The Notice of Objection must be filed within 28 days after a party receives a CRT decision. The CRT cannot issue an order in a small claims dispute until the deadline for filing a Notice of Objection expires. **If a Notice of Objection is filed, the CRT decision is not enforceable. If any party wants to continue any of the claims that were included in the dispute, that party must file a Notice of CRT Claim in the BC Provincial Court.** [emphasis added]  Essentially, if one pays the appropriate fees and files a “Notice of Objection”, the decision is not enforceable, and further court action (in an established offline court) would be required.  Note that **I did not invent this procedure**, but immediately recognized that it eliminated the "role reversal" in its entirety! It's a real process designed by a real jurisdiction in the world.  In a UDRP/URS context, this means that there’d be no reversal of the roles of plaintiff/defendant in the court, compared with the complainant/respondent in the UDRP/URS procedure. Thus, the “quirk of process” involving IGOs discussed in prior section, where an IGO can become a defendant in the courts due to the role reversal and attempt to assert immunity, simply doesn’t exist under the Notice of Objection system. Instead, the IGO would continue to have their “natural role” as Complainant in the courts, as is the case had the UDRP/URS never existed.  The UK lack of “cause of action” issue mentioned in the prior section, caused by the role reversal, also doesn’t arise, as the trademark holder would be the complainant in the court case (if the UDRP/URS decision became not enforceable).  To see this in tabular form, it would look like this:    It's essentially the same as the "Baseline Scenario"!! What's truly **magical**, though, is that you **don't require any mutual jurisdiction clause when invoking the UDRP/URS**!! That clause can be taken out in its entirety, because it'll be the Trademark Holder (or IGO) filing the dispute in court (it would make no sense for the domain name owner to file in court as plaintiff, as they can simply set the adverse decision aside by invoking the Notice of Objection, making the loss not enforceable).  Furthermore, to prevent “gaming” of the notice of objections, various court costs can be assessed in the courts later on, if the party who filed the notice of objection did no better in the courts:  If the **person who filed the Notice of Objection does not have a better outcome** in the BC Provincial Court than in the CRT’s decision, the BC Provincial Court may **order that party to pay a penalty to the other party** [emphasis added]  What happens when you eliminate the mutual jurisdiction clause, and instead replace it with a "Notice of Objection" system"? Besides solving the quirk of process and cause of action issues, **it means that an IGO can invoke the UDRP/URS process without first having to give up its immunity!**  This is huge, because for the **99% of domain disputes** where the UDRP/URS results are accepted by both sides, and there's no further court action or "appeal" desired, the IGO has **protected and preserved its immunity**. But, the domain name owner is protected too, because in the rare cases that court action is needed, the results can be set aside via the Notice of Objection, and further court action can proceed (with the IGO or TM holder as plaintiff, and the domain name owner as defendant). Indeed, what's great for IGOs is that they can **decide at that later date**, after the "Notice of Objection" has been exercised, whether or not to go any further. They might choose to waive their immunity and go to the courts. Or they might decide that it's not important enough to them (after weighing their options having seen the domain owner's defence of the domain), and cease the dispute at that point.  As someone who went through all the transcripts of the calls carefully, this is actually something expressly desired by the IGOs! On pages 19-20 of the very first meeting (February 22, 2021), Alexandra Excoffier of the OECD said:  [https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcipt-igo-work-track-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcipt-igo-work-track-22Feb.en_.pdf) [22Feb.en\_.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcipt-igo-work-track-22Feb.en_.pdf)  Maybe two little points on small ways. It says that we cannot create a specific new dispute resolution procedure, but from my understanding we can tweak, a little bit, the UDRP. And one of the things … In terms of immunities, there's one thing to say that after the process is over and if there's an appeal to national courts, the IGO will have to essentially decide whether or not to waive immunities, or a court decides if we insist in our immunities.  But there's something preemptive, as well. **And the way that UDRP is phrased currently, it's [that] we have to decide this not at the time of the appeal, but at the time of actually deciding whether or not to launch a process because we have to actually decide to waive immunities in order to do the process.** And I think this is a small tweak that can be done which would allow the losing party to appeal; at the same time not require the IGO to waive its immunities at that outstart.  ...  That's all I wanted to say. A suggestion I hope that we can discuss around not having to waive immunities from the star[**sic; start**]. That will be already a good start for us. Thank you so much. [emphasis added]  Ms. Excoffier is describing the **exact feature** that the "Notice of Objection" has, namely that they can file the UDRP/URS without giving up their immunity at the start (because there's no mutual jurisdiction clause needed at all in a Notice of Objection based system, given that it's the TM holder or IGO that is always going to be the plaintiff in court when rulings of the UDRP/URS are not enforceable through invocation of the Notice of Objection). With a Notice of Objection system, the IGO can defer the decision as to waiver of immunity to such a time that the Notice of Objection has been exercised. And for 99% of cases, pragmatically it means they'll have gone through the UDRP/URS and not have had to waive immunity at all. In the 1% of cases where Notice of Objection is raised, the IGO can make a choice at that point whether or not to waive immunity (if the domain name is important enough, and the benefits outweigh the legal risks, they might decide to waive it -- it's their choice).  I personally put out an olive branch directly by email to Mr. Passaro of the OECD at the time of the first working group was active in 2018 to raise this as a possible solution, and we did have fruitful discussions. I strongly believe that this could form the basis for a global solution, and I didn’t invent it --- it’s modeled on a procedure created by others in an established legal system. While IGOs are obviously trying to convince ICANN to tilt the scales in their favour by creating an uneven playing field that advantages them via arbitration, this “Notice of Objection” system keeps things entirely neutral for all sides, and recognizes that ICANN isn’t the place to create “new law”, but instead it is the national courts that have supremacy. For IGOs, there's a particular advantage in that there would not need to be a “mutual jurisdiction” clause at the time of the filing of a UDRP/URS, because it’s no longer necessary. i.e. the Notice of Objection means the decision is unenforceable, so then it’s entirely up to the IGO to decide whether they wish to pursue the dispute in court (as the initiator of the court action). IGOs wouldn’t have to risk others dragging them into a court via the inherent waiver of immunity from the current mutual jurisdiction clause, in other words. Mr. Passaro’s main concern appeared to be the potential “gaming” by a malevolent domain owner (i.e. a true fraudster), if the cost of the “Notice of Objection” was too small. But, I believe a suitable figure could be determined that would fully address his concerns (on the order of several thousand dollars at risk -- it cannot be free, to ensure that potential legal costs are also covered if the objector simply doesn’t show up to defend in court). I think to be fair, the minimum level of the Notice of Objection fee should be the level of court costs to file a case in the domain owner's country (or an average globally, to simplify). So, that would be on the order of a few hundred dollars. At a maximum level, it should reflect the greater of the costs of the UDRP/URS procedure and the legal costs of filing a case (i.e. paying for lawyers to draft a statement of claim), so perhaps a few thousand dollars. Advocates on both sides of the debate (on one side, who want to ensure court access for the poorest domain name registrants who still have a legitimate case, but on the other side want to make sure that notice of objections are not used too often to force court action) can find a number that everyone can live with. Since the domain owner would be punished through costs orders if they don't have a better outcome in the courts, it would not be a decision taken lightly to invoke the Notice of Objection, having seen the decision in the UDRP/URS.  Indeed, one would expect mainly the most egregious decisions (like the ADO.com case) or the highest value domain names to be fought over in courts via a Notice of Objection. And if you go back to the chart in Figure A above, **those are exactly the kinds of cases that belong in the courts**!  On a pragmatic level, if IGOs limit their UDRP/URS disputes to the "criminals" they claim to be after (i.e. phishers, true cybersquatters, etc.), they have little fear that those domain name owners would ever invoke a notice of objection, as it would mean that authorities would be "on to them". (i.e. they'd have to show up in real court to defend the case, and the police could nab them; if they didn't show up, they'd lose by default, including losing any fees/security deposit they put up when invoking the notice of objection).  To see that this system is robust, suppose that, despite exercising the "Notice of Objection", the domain owner still tries to sue the IGO in court?  (Or they even try to sue in court before the UDRP/URS is decided) What would happen? Since the IGO hasn't agreed to mutual jurisdiction, the IGO can fully attempt to assert any immunities it might have in court, if the IGO was ever a defendant. The Notice of Objection system has not prejudiced the IGO's legal rights and in particular any claimed immunity.  All in all, this is an elegant solution that is a win-win for both IGOs and domain name registrants, and I hope that it will be seriously considered by the working group. Potentially, it is best suited for phase 2 of the RPM PDP (and can be adopted for the URS too simultaneously), but it can be accepted within this working group and be forwarded to the new working group as an acceptable outcome. | Leap of Faith Financial Services Inc. | New Idea  **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.  **Action Taken:**  The EPDP Team to return to this option, if necessary, following its review of the other comments relating to an arbitration option.  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | Before we go further and analyze the working group's recommendations in the report (in later sections of this submission), it's important to clear up misconceptions of "immunity".  There are a lot of misconceptions regarding the nature of IGO immunity. They often assert that it’s always absolute, but the precise nature of immunity will often depend on the specific IGO, the national jurisdiction (which may not even recognize a given IGO), specific terms of a treaty, and other factors.  However, at a more basic level, immunity is a **defense** to a dispute initiated by others against the IGO. It’s intended to protect the IGO when the IGO is the target of a dispute. **Whenever an IGO is the initiator of a dispute, though (when it’s the Plaintiff/Complainant), then it has waived any immunity. Immunity is simply not in play anymore.** This is such a basic thing, but has not been understood by some who’ve only read imperfect summaries of the debate.  The mutual jurisdiction clause of the existing UDRP, and similar clauses of the URS, which IGOs complain bitterly about, attempts to reflect the reality that they are the initiators (not the target) of the underlying dispute. There is simply no expectation of immunity when IGOs are the initiator of the dispute (rather than the target of the dispute).  This is evident in the "Baseline Scenario" above.  IGOs instead try to assert that there are **two** separate “disputes”, the dispute at the UDRP/URS provider, and then a second dispute if the decision goes to a national court (i.e. if the domain registrant loses at the UDRP/URS level, and seeks to challenge that outcome in the courts). This is simply nonsensical. It is clear that there is **one** overall dispute, which is split between potentially many steps/stages (UDRP/URS, and then courts if need be). IGOs want immunity in the second step of the dispute, in the courts, if they win at the initial UDRP/URS step of the process. That is simply untenable, and not consistent with the nature of immunity when the IGO is the initiator of the overall dispute concerning the domain name. It’s also inconsistent with the history of the development of the UDRP (discussed above), where it was never intended for the UDRP to be the “final say” on a dispute. Access to the national courts for a decision on the merits with full due process was never a right to be lost by any party to a dispute.  Thus, the argument has been made by some that **arbitration is required**  because of the IGOs' alleged immunities. This is simply not correct.  While IGOs are free to enter into direct contracts with parties they do business with (e.g. employees, contractors) which include arbitration clauses, IGOs have no contractual relationship whatsoever with most domain name registrants. [indeed, if they had such direct contractual relationships, they wouldn't need a UDRP/URS at all]  With those parties they have no contractual relationship with, they have no means of compelling arbitration, **nor should they have such a power**. That would be the creation of brand new law, and ICANN is not the forum for that. [ICANN needs to reflect actual law, and step aside and let all sides use their own national laws]  For instance, if someone had a bakery and put up a sign saying "UNESCO Cookies", there is absolutely no mechanism for the UN agency to compel binding arbitration. The UN agency could waive their immunity and go to court. They can contact the police and have the police do something. They can ignore the situation. But, they can't compel arbitration.  While this might seem unfair to some, it's the same thing as if someone at UNESCO broke a copyright law, or did something else "bad". The third party would have no recourse in the courts at all due to immunity of the UN agency, and a non-contracted party, couldn't impose arbitration either. So, in a way it's symmetric.  In a general sense, going back to "Figure A", these cases fit into the Complex and/or High Stakes category, and are ill suited to ICANN policymaking. To go beyond the UDRP/URS to create brand new complex systems is simply the wrong approach, as it would attempt to reinvent the courts, rather than recognizing that the courts already exist. | Leap of Faith Financial Services Inc. | Concerns  Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None, as the concerns expressed relate to #6 above.  [**COMPLETED**] |
|  | We oppose this recommendation, and join with others like the Internet Commerce Association (ICA) who oppose it. Not only is it out of scope for this new working group, but it just reinforces how the new working group was captured. I support the ICA's analysis of this point, and won't repeat what they already submitted.  As argued above, if one wanted to actually eliminate the mutual jurisdiction clause, the right way to do it is via a Notice of Objection system. I strongly urge the new working group to examine that serious proposal, as it truly gives the IGOs an immense benefit, while also **fully maintaining** domain name registrants' rights to have complex disputes decided instead in the courts on the merits.  Instead, this new working group's recommendations are, in the words of its member Jay Chapman in the August 2, 2021 call, "intellectually dishonest." (see transcript,  [https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-02aug21-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-02aug21-en.pdf) [en.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-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.  No one is fooled by this proposal. It disrespects everyone in the community to think that registrants wouldn't notice. Page 17 of the working group's report even had the audacity to declare that they were "***preserving registrant rights***". That is clearly **false**, as was conceded three pages later on page 20, where "**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 determiniation reviewed judicially.**"  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://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-02aug21-en.pdf) [gnso-igo-wt-02aug21-en.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-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.  Similarly, on page 6 of the June 28, 2021 transcript by Chris Disspain:  [https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-28jun21-en.pdf) [gnso-igo-wt-28jun21-en.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-28jun21-en.pdf)  Or whether we should actually be talking to the GNSO Council first and saying, “This our proposed solution, but you may get pushback from the community that says that this is outside of the scope.”  Consider this submission yet another voice in the community, a very well informed voice, "pushing back".  At the April 19, 2021 meeting, in the main (oral) transcript, Jay Chapman and Chris Disspain had the following exchange at page 32:  [https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-19apr21-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-19apr21-en.pdf) [en.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-19apr21-en.pdf)  JAY CHAPMAN: ...I think the GNSO made clear that whatever happened here was **not supposed to interfere with the opportunity for a registrant to go to court**. I believe that’s what they said. Thanks.  CHRIS DISSPAIN: **Yes. That is in the documentation**. [emphasis added]  It doesn't get much clearer than that - working group members, including the chair via his own statements, knew the limited scope of the charter, but decided to throw caution to the wind and overstep their authority. And it wasn't a minor misstep - it's a huge leap to uncharted territory where registrants have lost fundamental rights.  Or similarly in that same April 19, 2021 meeting, but via chat transcripts by Paul McGrady:  [https://icann.zoom.us/rec/sdownload/Vyz6GUlqm\_8Xvg3DxR9JefG-](https://icann.zoom.us/rec/sdownload/Vyz6GUlqm_8Xvg3DxR9JefG-VqyGQPSYao4xOTlSPGNDWio5TJ0i9SsGIJo3EIKS_Q8FuMf_FIklWQlS.lI7ZspCvOf2vsbI1) [VqyGQPSYao4xOTlSPGNDWio5TJ0i9SsGIJo3EIKS\_Q8FuMf\_FIklWQlS.lI7ZspC](https://icann.zoom.us/rec/sdownload/Vyz6GUlqm_8Xvg3DxR9JefG-VqyGQPSYao4xOTlSPGNDWio5TJ0i9SsGIJo3EIKS_Q8FuMf_FIklWQlS.lI7ZspCvOf2vsbI1) [vOf2vsbI1](https://icann.zoom.us/rec/sdownload/Vyz6GUlqm_8Xvg3DxR9JefG-VqyGQPSYao4xOTlSPGNDWio5TJ0i9SsGIJo3EIKS_Q8FuMf_FIklWQlS.lI7ZspCvOf2vsbI1)  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]  Indeed, members of the working group argued they could "tweak" things, but this is no "tweak". Once again in that April 19, 2021 meeting, Chris Disspain personally said (on page 24):  "....regarding **the fact that there is a right to go to court**, come what may, and that therefore what we would presumably be doing  is **saying that you were requiring registrants to abandon that right**, which is **fairly significant step** and is, I think, **sitting significantly outside of tweaking**." [emphasis added]  All in all, this recommendation must be rejected. [The proper way to eliminate the mutual jurisdiction clause would be via adoption of a Notice of Objection system, because it retains full access to the courts for decisions on the merits via elimination of the "role reversal".] | Leap of Faith Financial Services Inc. | Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None, as the concerns expressed relate to #6, above.    [**COMPLETED**] |
|  | Privileges and immunities amongst IGOs are not simple, and the application of such by individual countries is not uniform. Thus, the BC stands by its prior position noted in its Comments on the Final Report of the previous IGO Working Group, “claims of jurisdictional immunity to a court  proceeding can and should be advanced before such national court and cannot be pre-determined by ICANN fashioning a blanket rule that does not take into account the facts and circumstances of each case.” Accordingly, one potential compromise alternative to exempting an IGO from the mandatory submission to a “Mutual Jurisdiction”, would be amending UDRP Rules Section 3(b)(xii) with an explicit caveat as follows: “State that Complainant, without prejudice to an IGO Complainant’s privileges and sovereign immunity, 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.”  As part and parcel of an IGO deciding to proceed with a UDRP or URS instead of court litigation, an IGO should – as it is currently required to do – submit to the jurisdiction of at least one location for subsequent court proceedings brought by a registrant. This ensures that a registrant who has a *bona fide* case to overturn an errant UDRP or URS decision has unfettered access to either, as provided for by current UDRP procedure, the courts of the registrant’s location or the location of the  registrant’s registrar. While recognizing that such cases would be extremely rare, by completely removing the requirement to submit to a “Mutual Jurisdiction,” trademark owners, businesses, and individuals who are on the receiving end of an errant UDRP or URS decision would be denied even the simple ability to contest IGO privileges and immunities in a court of competent jurisdiction under applicable national laws.  Nevertheless, removal of the “Mutual Jurisdiction” requirement must only be implemented in  accordance with Option 2 of Preliminary Recommendation 4, as discussed below. | ICANN Business Constituency (BC) | Concerns  Support  **EPDP Response:**  The EPDP Team has considered this comment and will clarify its intention that its recommendations do not alter or remove the right for a registrant to go to court in its Final Report. The EPDP Team notes that the BC believes that removing the requirement for an IGO Complainant to submit to Mutual Jurisdiction must only be implemented in accordance with Option 2 of Preliminary Recommendation #4.  **Action Taken:**  None. The EPDP Team’s preliminary recommendation to remove the requirement for an IGO Complainant to agree to submit to Mutual Jurisdiction does not affect a registrant’s right to go to court. Retaining the Mutual Jurisdiction requirement is likely to mean that many courts will consider that an IGO Complainant will thereby have waived its privileges and immunities as regards that court’s jurisdiction over the case.    [**COMPLETED**] – Complete as to Recommendation 3. |
|  | Mutual Jurisdiction  Recommendations 3 and 4 propose to exempt IGOs from the requirements in the UDRP Decisions and URS Determinations that complainants must submit to a mutual jurisdiction for appeals of UDRP and URS proceedings. Although later recommendations provide for an arbitration method to appeal decisions, the Interim Report is silent about how a registrant can file a court proceeding in mutual jurisdiction to appeal an adverse outcome from a UDRP or URS. It is imperative that any recommendations that may potentially impact the rights of domain name registrants should clearly specify if and how registrants are still legally protected. If these recommendations are adopted, the EPDP should confirm that domain name registrants will still be able to utilize court proceedings to appeal a UDRP Decision or URS Determination, and ensure that any final policy recommendations reflect this vital registrant right. | Registrar Stakeholder Group (RrSG) | Concerns  **EPDP Response:**  The EPDP Team has considered this comment and will clarify its intention that its recommendations do not alter or remove the right for a registrant to go to court in its Final Report.  **Action Taken:**  EPDP leadership to consider reaching out to RrSG leadership to clarify the RrSG comments.  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | To this end the ALAC supports the following preliminary recommendations:  Preliminary Recommendation #3 which seeks to remove the requirement for an IGO to submit to Mutual Jurisdiction in order to avail itself to the UDRP and URS, thereby preserving its privileges and immunities in the course of such proceedings.. | ALAC | Support  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None.  [**COMPLETED**] |
|  | Section 3(b)(xii) of the UDRP Rules and Section 3(b)(ix) of the URS Rules require that a Complainant, with respect to any challenges to a decision in a UDRP or URS proceeding, submit to the jurisdiction of the court in at least one Mutual Jurisdiction which is either (1) the location of the principal office of the Registrar or (2) the domain name registrant’s address used for registration of the domain name. The clear purpose of this rule is to protect a registrant from the application of foreign law to which a registrant has not and does not submit to as a jurisdiction. Further, the secondary purpose of the rule is to protect a registrant from the obligation to litigate in a forum to which there is no connection. However, in Recommendation #3 (i) and (ii), the EPDP team proposes that IGO Complainants be exempt from the Mutual Jurisdiction requirements of the UDRP and the URS.  Through this exemption, the EPDP team is inviting IGOs to exercise legal dominion over unsuspecting or unsophisticated registrants. Indeed, the EPDP team acknowledges this fact under Recommendation #6 (ii), suggesting that if an IGO does not have a satisfactory cause of action in the registrar’s principal office or the respondent’s place of residence, the arbitral tribunal might determine the applicable law. As a result, an IGO could assert a substantive cause of action against a registrant entirely unknown to the registrant when it registered the domain name, creating obligations far exceeding those to which the registrant chose to accept. Stated differently, this is an open invitation for IGOS to forum shop with a direct adverse impact to registrants  Moreover, a non-IGO complainant would not have this jurisdictional freedom in enforcing its rights against an IGO. The inherent inequity in the EPDP team’s recommendation is apparent from its Note on the subject, recognizing that insufficient causes of action in a registrant’s Mutual Jurisdiction would be a concern for all UDRP complainants, not just IGOs. Thus, by exempting IGOs from Mutual Jurisdiction, the EPDP is expressly advocating that IGOs have broader protection for IGO names and acronyms than those of non-IGO registrants.  In addition to clarifying these concerns regarding mutual jurisdiction, the EPDP team should affirmatively state in the Final Report that registrants will continue to be able to file court proceedings as currently enshrined in the UDRP and the URS. Failure to do so would erode a fundamental (and long established) right of domain name registrants. | Namecheap, Inc. | Concerns  **EPDP Response:**  The EPDP Team has considered this comment and will clarify its intention that its recommendations do not alter or remove the right for a registrant to go to court in its Final Report.  **Action Taken:**  None.  [**COMPLETED**] |
|  | Mutual Jurisdiction  Removal of the mutual jurisdiction requirement is a fundamental change in UDRP  policy. Mutual jurisdiction has worked extremely well and taking this away, without registrant representation and voice, is not appropriate. It makes no sense to remove mutual jurisdiction for one small group of IGO-INGO’s who have been entirely un-impacted by the current system in place today.  Offering Immunity  Why would ICANN want to grant IGO-INGO’s immunity when they are the ones that are pursuing a UDRP / URS action, but have no consequence of initiating that action? Is this fair and balanced? | TurnCommerce Inc. | Divergence  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  None.  [**COMPLETED**] |
|  | The IPC supports this Recommendation so long as the other major concepts found in Recommendations 4 and 5 and IPC’s comments herein make their way into the final report. Additionally, the IPC believes that this Recommendation would have more support, both within the IPC and the community generally, if acronym domain names were carved out from the changes proposed, e.g. the World Health Organization should have no particular extra rights should it attempt to obtain transfer of a domain name from the famous band, The WHO. The IPC does not support this Recommendation in a vacuum.  As an alternative, the IPC also supports proposed compromise language that an IGO “will submit, **without prejudice to an IGO Complainant’s privileges and sovereign immunity**, 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.” This proposed compromise language is intended to allow an IGO Complainant to abide by UDRP Rules Section 3(b)(xii), without expressly waiving its privileges and ability to assert sovereign immunity. | IPC | Concerns  Support  **EPDP Response:**  The EPDP Team has considered this comment.  **Action Taken:**  IPC representatives to clarify comment on compromise language.  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |