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

Updated 27 October 2021

# RECOMMENDATION 4

| **#** | **Comment** | **Contributor** | **EPDP Response / Action Taken** |
| --- | --- | --- | --- |
| **Recommendation #4: Arbitral Review following a UDRP Proceeding** The EPDP team recommends that the following provisions be added to the UDRP to accommodate the possibility of binding arbitration to review an initial panel decision issued under the UDRP:   1. When submitting its complaint, an IGO Complainant shall also indicate whether it agrees that final determination of the outcome of the UDRP proceeding shall be through binding arbitration, in the event that the registrant also agrees to binding arbitration. 2. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall also request that the registrant indicate whether it agrees that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA). 3. As provided in Paragraph 4(k) of the UDRP, the relevant registrar shall wait ten (10) business days (as observed in the location of its principal office) before implementing a UDRP panel decision rendered in the IGO Complainant’s favor, and will stay implementation if, within that period, it receives official documentation that the registrant has submitted a request for or notice of arbitration, as described further below. 4. If it receives a request for or notice of arbitration, the registrar shall continue to stay implementation of the UDRP panel decision until it receives official documentation concerning the outcome of an arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute. 5. *\*\* 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:*   [**OPTION 1**:  Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, the original UDRP decision will be implemented by the relevant registrar within ten (10) business days from the court order declining to hear the merits of the case.]  [**OPTION 2**:  Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, the registrant may submit the dispute to binding arbitration within ten (10) business days from the court order declining to hear the merits of the case, by submitting a request for or notice of arbitration to the competent arbitral institution with a copy to the relevant registrar, UDRP provider and the IGO Complainant. If the registrant does not submit a request for or notice of arbitration to the competent arbitral institution (with a copy to the registrar, UDRP provider and the IGO Complainant) within ten (10) business days from the court order declining to hear the merits of the case, the original UDRP decision will be implemented by the registrar.] | | | |
|  | We submit however that the Initial Report has not adequately accounted for the reality that arbitration is a globally-accepted means of resolving disputes as an alternative to court litigation. This is not only a matter of the comparative efficiency of arbitration, but also of its suitability as a process designed to cover multi-jurisdictional disputes.  Indeed, ICANN itself employs arbitration in its Registry and Registrar Accreditation Agreements (Articles 5 and 5.8 respectively), whereby the former specifically accounts for IGO privileges and immunities. The ICANN Registry Agreement provides for arbitration (following mediation) as the exclusive means of resolving disputes. In the case of the Registrar Accreditation Agreement, while the option of going to court is left open, either party may elect instead to have the dispute resolved by arbitration.  As other examples within the DNS framework, registrar GoDaddy invokes arbitration in its Registration Agreement,4 and websites such as those at “bobbleheads.com” and “peoplefinder.com” employ arbitration as a means of resolving disputes. In the case of the former, users agree to waive any rights to a trial by jury, and instead agree to submit any such dispute to binding arbitration.5 In the case of the latter, the Terms of Service stipulate that arbitration is the default option for resolving disputes, but that the parties can opt out within 30 days.6  If the EPDP effort continues to fail to recognize the tailored efficiency and multi-jurisdictional functionality of arbitration as an alternative to court, at minimum an arbitration-as-a-default with an opt-out provision should be considered.  Such option could be complemented by providing information about the benefits of arbitration as a party-driven process compared to the potential time and cost implications of court litigation (all the more when questions of immunities would be involved).  Indeed, given their status under international law, IGOs are expected to invoke their recognized immunities when faced with attempts to involve them in national court litigation. The discussion of the issue of arbitration or courts in the context of the Initial Report should take account of the likelihood that IGOs prevail on this immunity defense.  It is furthermore difficult to understand how, especially if provided with information about the time and expense of court and the IGO immunities issues involved (as illustrated in the flow chart in the Initial Report), a registrant which nevertheless tries its hand in court and fails, should be still permitted to then invoke arbitration.  The EPDP team will recall that the ICANN-commissioned Swaine Memo (p. 28) observes that “[t]he way that IGOs typically resolve the tension between immunity and judicial processes is to establish a non-judicial dispute resolution process, usually consisting of some form of arbitration.”  Privileges and immunities being at the core of their independence, IGOs have no room to abandon this internationally-recognized legal principle. Providing for arbitration respects IGOs’ international status while striking a fair balance in resolving disputes.  4 https://[www.godaddy.com/legal/agreements](http://www.godaddy.com/legal/agreements)  5 https://[www.bobbleheads.com/terms-and-conditions](http://www.bobbleheads.com/terms-and-conditions)  6 https://[www.intelius.com/terms-of-use/](http://www.intelius.com/terms-of-use/)  7 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. | WIPO | Concerns  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5. |
|  | Under the UDRP, a registrant may seek judicial review of a UDRP case; Prof Swaine therefore raises the issue in the context of striking the current UDRP “mutual jurisdiction” clause in light of IGO immunities, noting that “were an IGO able to secure from ICANN the transfer of another registrant’s domain, without adequate means of challenging that result, such proceedings might pose concerns.” Addressing this conflict between immunity and access to courts, Prof. Swaine notes that a material factor in a seminal case was “whether the [employees] had available to them reasonable alternative means to protect effectively their rights.”  Here, it is proposed that to (a) give registrants “reasonable alternative means to protect effectively their rights” and (b) respect IGOs’ immunities, an alternative to court in the form of arbitration is provided to the parties. Notably, in terms of similarities to court, arbitration processes routinely account for due process, impartiality of arbitrators (including challenge processes), documentary and evidentiary exchanges, the calling of witnesses, and (virtual) hearings. Arbitration provides all of these process protections but in less time, and involving less costs than a trial in court – let alone one involving the highly complex and potentially unpredictable nature of assessing the scope and application of IGO immunities.  Permitting arbitration after court proceedings (potentially involving multiple appeals) would create an overly complex, inefficient and costly process. It is noted in this context that in its Buenos Aires and Los Angeles Communiqués, GAC Advice stated that curative rights protections (such as the UDRP) should be at no or nominal cost to IGOs (notably given IGOs’ public interest missions and the fact that their budgets come from public funds). While arbitration would involve some cost, a court process would predictably and unnecessarily increase costs for both the IGO and the registrant. | GAC | Concerns  Divergence Support New Idea  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | **Proposal:** Arbitration should be the exclusive means of appeal.  **Rationale:** GAC Advice in the Hyderabad and Johannesburg Communiqués stated that the UDRP should not be amended and that IGO access to a curative dispute resolution mechanism should be modelled on but separate from the UDRP and respect IGOs’ jurisdictional status by facilitating appeals exclusively through arbitration. Arbitration is a globally-accepted and proven dispute resolution mechanism, which ICANN itself uses in its registry and registrar agreements, and many registrars (such as GoDaddy, the world’s largest) use it in their agreements with registrants. In an ordinary commercial setting, the parties choose a means of resolving disputes before they arise (i.e., dispute resolution before an arbitral tribunal, **or** before a court). Indeed, an arbitration clause is generally deemed to exclude the jurisdiction of the court. It is therefore inconsistent and at odds with regular commercial practice to insist that registrants also be afforded the right to bring court proceedings, particularly given that courts would normally be expected to uphold IGO immunities. Overall, providing appeals through arbitration, not courts, is a compromise which strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties. **If arbitration is not the exclusive means of resolving appeals from a curative rights protection mechanism (in this context, the UDRP and/or URS):**  * **Arbitration should at least be the default option, with the registrant permitted to opt out within a limited time period** * **If registrants are permitted to appeal in court, they should not also be able to subsequently commence arbitration if unsuccessful – whether for substantive or procedural reasons – in court.**   **Rationale:** Permitting arbitration after court proceedings (potentially involving multiple appeals) would create an overly complex, inefficient, and costly process. GAC Advice in the Buenos Aires and Los Angeles Communiqués reiterated that curative rights protections should be at no or nominal cost to IGOs. While the UDRP and/or URS and appeal via arbitration would each involve costs, a court process would introduce tremendously increased – and preventable – costs, both for registrants and for IGOs (which it is noted rely on public funding). | GAC | Concerns  Divergence Support New Idea  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5. |
|  | Of course, both “Options” assume that Recommendation #3 is approved, namely that IGOs are exempt from “Mutual Jurisdiction”, and therefore IGOs no longer must accept the jurisdiction of a court for post-UDRP remedial action. As aforesaid, once IGOs are exempted, registrants and courts will no longer be able to rely upon an IGO’s express submission to court jurisdiction, and an IGO will be free – and likely would – argue that they are immune from all court proceedings. That is the travesty that occasions Recommendation #4, since as a result of the exemption for IGOs, they could and likely would seek to avoid any post-UDRP recourse in court.  Option #1 is simply 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. What Option #1 purports to do – and it may not be readily apparent to some by simply reading it in a cursory manner without greater context – is leave registrants without any recourse after an errant UDRP decision, whatsoever, full stop.  If an IGO is permitted to commence a UDRP without having to agree to the Mutual Jurisdiction of a court, and the registrant unfortunately receives an incorrect or unfair UDRP transfer order, the registrant can file a court proceeding but if the IGO claims immunity (since it has not agreed to submit to a Mutual Jurisdiction) and the court finds that it cannot hear the case (since the IGO did not agree to a mutual jurisdiction), then the court case is dismissed and that is the end of the story. The registrant will not have any available avenue to revisit the UDRP transfer order on the merits, period. No court, no arbitration, no nothing. Moreover, depriving a registrant of all recourse on the merits this would appear to be in contravention of Article 10 of the Declaration of Human Rights which states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations.  Registrants have historically relied upon the courts to play an instrumental role in reversing UDRP injustice, such as in the respective cases of ADO.com and IMI.com wherein UDRP transfer orders were overturned following court proceedings, with legal scholars and UDRP observers taking particular note of the egregious UDRP panel decisions which led to court proceedings in the first place.v  How can that so-called “Option” possibly be considered when the GNSO’s unequivocal mandate was to ensure that any policy options ensure that a registrant had a right to go to court? It is    remarkably cynical and disingenuous to claim that Option 1 ‘does provide an option to go to court, but if it gets dismissed at the outset without any hearing on the merits, too bad’.  In contrast, Option 2 at least affords a registrant business, trademark owner, or individual, the natural right to obtain actual adjudication on the merits of the dispute, i.e. if a court declines to hear a post-UDRP or post-URS case against an IGO as a result of claimed “immunities” asserted by the IGO (after the IGO was exempted from submitting to a Mutual Jurisdiction as per Preliminary Recommendation #3), the registrant will nonetheless at least have the opportunity to seek redress on the merits through binding arbitration.  Although Option 2 is the only genuine option between it and so-called Option 1, it is unfortunately premised on the unfair and undesirable exemption from Mutual Jurisdiction under Recommendation 3. For that reason we cannot support Option 1 or Option 2, however as between the two, Option 2 at least does not unconscionably deprive the registrant of all recourse and therefore if it were a choice solely between these two “options”, then Option 2 would be our clear preference.  It is important to note, that if the GNSO were inclined to create new procedures for IGOs in accordance with Preliminary Recommendation #4, Option 2, it need not exempt IGOs from Mutual Jurisdiction. Option 2 is not reliant upon the removal of Mutual Jurisdiction for IGOs. An IGO complainant could submit to Mutual Jurisdiction, ‘subject to any arguments that it may make to a court regarding its claimed immunity’. That would still leave the door open to an IGO to claim immunity while not exempting IGOs entirely as proposed. The effect of maintaining the Mutual Jurisdiction provision with the ‘subject to’ caveat in conjunction with Recommendation #4, Option 2, would be to better preserve the ability for a registrant to go to court while enabling arbitration if a court refuses to hear the case due to IGO immunity despite the qualified submission to Mutual Jurisdiction.  Preliminary Recommendation #4 also references the nature of an arbitration following Option 2, as follows:  The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA).  Serious concerns exist with regard to the nature of any such arbitration. First, it is premature to ask stakeholders to comment on Option 1 and Option 2 without any idea of the nature of such arbitration being provided. The selection of an arbitration provider and the appointment of arbitrators are not minor features of an arbitration and can contribute to or even determine the outcome. The identification of an arbitration provider and the rules pertaining to the selection of an arbitration panel are therefore not minor details, and it cannot therefore be reasonably asked of stakeholders to provide an informed opinion on Recommendation #4 until such time as a complete proposal is in place. For example, if an arbitration procedure was fundamentally unfair    in terms of the provider and the rules, then that would surely impact the assessment of whether Recommendation #4 is even viable.  Any arbitral process (should that approach be taken by the GNSO despite our recommendation against it) should follow as close as possible the robust procedures and safeguards available in a credible national court, including but not limited to oral hearing, presentation of all available evidence, cross-examination of witnesses, discovery of evidence, availability of motions, etc. Furthermore, the question of which panelists are accredited to hear such an arbitration is a crucial one. To the extent possible, arbitration panelists should not be drawn from the rosters of current UDRP and URS providers and instead should be retired judges with extensive experience in intellectual property matters, drawn from the jurisdictions of the respective parties and/or the jurisdiction of the applicable law, to the extent possible.  Finally, as previously stated by the ICA in its Comment on the GNSO Initial Report on the IGO- INGO Access to Curative Rights Protection Mechanisms Policy Development Process on March 6, 2017,vi all UN-affiliated or non-affiliated entities that are themselves an IGO, must be prohibited from acting as an arbitration provider. Allowing such an entity to preside over an appeal brought by a fellow IGO would inevitably create an appearance, and might well encompass the reality, of bias against the registrant “appellant”. Moreover, allowing any accredited UDRP provider to be the subsequent arbitration provider might well result in a “confirmation by rehearing” by rather than a truly fresh “appeal” and would raise questions about the efficacy and fairness of the process.  v See <http://iplegalcorner.com/whats-so-outrageous-asking-high-prices-for-domain-names/>wherein noted UDRP scholar Gerald Levine stated, inter alia; “Regrettably, the distinguished Panel failed to examine the evidence carefully” and that “I think that criticism is fair [that] “the Panel put their combined fingers on the scale”, and “Unfortunately, the Panel in *Autobuses de Oriente* was also persuaded by false facts masquerading as elements (namely prices) and by incoherent reasoning of similarity of logos”); and also see <https://domainnamewire.com/2019/06/25/jury-overturns-horrible-cybersquatting-decision-for-imi-com/>(“Jury Overturns Horrible Cybersquatting Decision for IMI.COM”).  vi <https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/pdfb23CpD8fIN.pdf> | Internet Commerce Association | Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5.  “Our objections and concerns arising from Preliminary Recommendation #5 are the same as our objections and concerns with regard to Preliminary Recommendation #4, above.” |
|  | The RySG supports Option 2. Where the avenue of judicial challenge to the UDRP decision is not available to the registrant as a result of the IGO’s refusal to submit to the jurisdiction of the Court, and the Court thereby declining to hear the action, then fairness would support the registrant being able to avail themselves of the proposed arbitration alternative. | RySG | Concerns  Divergence Support New Idea  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5.  “The RySG supports Option 2. See our comments to Rec #4.” |
|  | I, Lucas Gimeno (Valencia, Spain), strongly associate myself with the comments submitted by the Internet Commerce Association and George Kirikos. | Lucas Gimeno | Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | To the extent Recommendation 3 is decoupled from Recommendation 4, Digimedia supports Recommendation 4 in conjunction with Option 2, as this is the substance for the existence of the present EPDP. We agree with the same BC statement in its Comments on the Final Report of the previous IGO/INGO PDP that “claims of jurisdictional immunity to a court proceeding can and should be advanced before such national court… (emphasis added).” Digimedia also aligns with the BC’s previous guidance, “namely that ‘in those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court’s jurisdiction…the decision rendered against the registrant in the predecessor UDRP or URS may be brought before a to-be-determined arbitration forum for de novo review and determination.’”  To the extent Recommendation 3 is decoupled from Recommendation 5, then similar to its support of Recommendation 4 in conjunction with Option 2, Digimedia would also support Recommendation 5 in conjunction with Option 2.  In the event Recommendation 3 is not decoupled from either or both of Recommendation 4 and/or Recommendation 5, Digimedia would support only Recommendation 4 or 5 in conjunction with Option 2. | Digimedia.com, LP | Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5. |
|  | Before we go deeply into the current working group's report, it's important that we address an **implicit assumption** by members of the current working group (of which I’m not a member, but I’ve read all the transcripts of calls and emails of their mailing list) that alleged cybersquatting is the **entirety of the dispute** between the complainant (in this case an IGO, but conceivably anybody initiating a domain dispute if some future arbitration system is added to the UDRP for non-IGO complainants) and the domain name owner. However, in many situations, that assumption will not be correct.  A domain name owner who seeks to challenge an adverse UDRP/URS decision in court is not limited to making their court dispute only about domain names. They are entitled to bring up **all potential claims** against the other side. For example, if the domain name owner who is seeking relief in the courts from an adverse UDRP/URS decision was an alleged victim of some IGO misbehaviour, **all of that would appear in their statement of claim at the court**. If the **IGO successfully asserts immunity** at that court, not only does it **prevent the domain name aspect of the case to be decided on the merits by the courts**, it also **prevents the court from hearing the rest of the case on the non-domain name portions**.  If the UDRP/URS had not existed, the IGO might not ever have taken the domain name owner to court, because they might have feared a counter- claim against them which would either partially or potentially more than offset the value of the domain name. (see the "Baseline Scenario" in section 3 above) [Indeed, it might not just be the domain name owner who would counter-claim in court…once the IGO submits to the jurisdiction of a court, other victims might appear and join the case.]  For example, suppose a rape victim of the World Health Organization [WHO] (there was a major scandal recently[7](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark6)) was prevented from getting civil damages, due to the WHO’s immunity. She registers a domain name such as WorldHealthOrganizationRapedMe.tld to tell her story. In the absence of the UDRP/URS, if the WHO wanted to challenge the ownership of that domain name in court, they’d have to give up their immunity and she could counter- sue them for damages related to the rape. Given the potential financial risk, the IGO would be very reluctant and unlikely to give up their immunity by taking cases to court, if the other side had a valid claim that would result in large damages against them.  But, suppose they still wanted to take the site down, for whatever reason, perhaps reputation management (this is a hypothetical related to rape, but the domain owner could be an unpaid supplier, or a victim of environmental damage, or some other victim with a valid grievance unable to get relief due to the IGO’s immunity normally). The IGO files a UDRP/URS, and amazingly wins (such strange outcomes plague the UDRP, as has been noted that some panels do not see free speech issues the ways those of us in Canada and the USA do). Regardless, if the domain name owner takes the case to court to challenge the adverse domain name outcome, **she can certainly also include the claim for damages related to her alleged sexual abuse**. [indeed, she might even file a class action lawsuit, and make things even more interesting with multiple complainants]  If the judge in the court case denied a full hearing, due to the IGO’s immunity, tossing it out on a “technicality” and not allowing for a decision on the merits, what happens next? That’s what the current working group is debating. They appear to be pushing for arbitration as a “solution”.  However, what would be the subject matter of the arbitration? **Fairness dictates that the rape victim should be able to state the full claim at such an arbitration panel, and not just be limited to domain name issues!**  It would be fundamentally unfair if the arbitration was limited just to domain names, because an IGO cannot **selectively carve out aspects of their immunity**, when they submit to the jurisdiction of a court. It’s all or nothing, as noted above (i.e. **which is why they never took her to court in the first place regarding the domain name, for fear of a counterclaim involving sexual misconduct civil damages**).  Indeed, in the prior working group, of which I was a member, we even offered IGOs the opportunity to have an express “limited waiver of immunity” provision as a modification of the current “mutual jurisdiction” clauses in the UDRP/URS. IGOs felt that wouldn’t protect them, **so by their own analysis and stated positions at ICANN**, it appears to be “all or nothing.” They don’t get to pick and choose. [if, on the other hand, they are able to pick and choose which aspects of their immunity they are able to give up, and limit things only to the domain name, then that would have been a complete solution to the IGOs’ alleged ‘problem’, and the working group would have completed its work years ago]  This is a huge unforeseen negative for those advocating arbitration, because it means that ICANN would have to create, for fairness, an arbitration system that would handle non-domain name disputes, **as long as domain names are a portion of the overall dispute between the parties**. This would mean building an arbitration panel that could also handle employment disputes, whistleblower cases, environmental cases, defamation actions, copyright cases, trademark cancellation cases, sexual misconduct cases, and any other potential court actions, as long as domain names were somehow involved as an element of a broader action. I think this goes far beyond ICANN’s capabilities, and shows that the new working group hasn’t fully considered the ramifications of their proposals.  Indeed, the current report proposes removal of the mutual jurisdiction clause in its entirety (without an adequate replacement), which is far beyond what the prior working group ever did, and is beyond the scope of the working group. This would allow “forum shopping” and tactical use of the UDRP/URS by IGOs, who would attempt to retain immunity from the non- domain name aspects of their overall dispute with the domain name owner. It invites abuse and misuse.  If ICANN ever contemplates binding arbitration for non-IGO disputes, similar situations might take place, where **counter-claims** by the domain name owner that would offset claims against them for alleged cybersquatting **would all need to be heard in arbitration, out of fairness** (to avoid tactical advantage for one side or the other, relative to the courts). So, trademark cancellation claims, for instance, might be natural counter-claims by domain owners, which would have to be heard by panelists. Employment disputes, anti-whistleblower claims, environmental claims, and so on. Should ICANN design arbitration systems to handle such complexity? Of course not.  Taken to the “extreme”, it could allow governments (since IGOs are the creation of government) to challenge domain names, and even perhaps registered trademarks or other disputes outside the court system, in an ICANN-designed arbitration system. For example, if the South American countries who were vehemently opposed to the dot-Amazon TLD created a treaty with an IGO which had rights to the term “Amazon”, what’s to stop them from challenging the ownership of the Amazon.com domain name? Would Jeff Bezos’ company be forced to an arbitration, where the laws and legal protections might be those of South America, and give up their rights to access the courts in the USA? Could Jeff Bezos’ company even be forced by an unaccountable panel to relinquish ownership of their prized domain name without any recourse to the courts to challenge what most would perceive to be a “perverse” outcome? (although, those in South America might see that as the “correct” outcome) Sometimes panels just make the wrong decision – would Amazon agree to put such power over its assets into the hands of a small number of panelists, who could be potentially bribed, or have some other bias against them, and whose incorrect decisions could not be challenged in the courts of the United States?  IGOs are the creation of governments, in some ways an unaccountable alter ego and amalgam of groups of them. It’s the national courts that protect citizens from abuses by their governments. Any form of involuntary arbitration risks being misused, given that they can lead to different outcomes than national courts.  7World Health Organization Says Its Staff Perpetrated 'Harrowing' Sexual Abuse In Congo, September 29, 2021, [https://www.npr.org/sections/goatsandsoda/2021/09/29/1020814023/world-health-organization-says-its-staff- perpetrated-harrowing-sexual-abuse-in-c](https://www.npr.org/sections/goatsandsoda/2021/09/29/1020814023/world-health-organization-says-its-staff-perpetrated-harrowing-sexual-abuse-in-c) | Leap of Faith Financial Services Inc. | Concerns  Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | The Internet Commerce Association submitted a decent response. We mainly concur with their analysis, as an initial statement. As they correctly noted, IGOs have been trying to impose arbitration upon registrants for a very long time, as far back as 2003 when Professor Wendy Seltzer wrote about it.[17](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark16)  WIPO doesn't like the UDRP as it stands, because its claimants must subject themselves to the jurisdiction of national courts. International Government Organizations (IGOs) would prefer international arbitration, where not only can they keep their sovereign immunity, but the procedural and substantive rules differ. **But the possibility of appeal to national courts is no minor detail, but part of the balance 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.** [emphasis added]  In other words, this is an issue that IGOs have litigated and relitigated ad nauseum at ICANN. They seek a one-sided unbalanced solution that would obliterate access to the courts. The IGOs have no new facts, no new law, and no new arguments. They want to create a forum for disputes where the odds are tilted in their favour. Such blatantly self-serving proposals by the IGOs are rejected repeatedly. Their only hope is to keep repeating their false narratives, and prevent the other side of the narrative (i.e. the truth) from showing up to present the other side of the argument.  Indeed, I specifically warned in my August 2019 comments to the ICANN Board that "capture" might take place in the future, on page 11:  Indeed, **they and other opponents of the final report hope to control the composition of any future working group on this topic** (e.g. via mechanisms like PDP 3.0 reform, which will be used to stifle debate, create censorship), as they simply cannot compete in the marketplace of ideas on a level playing field. The threat of “capture” is forward looking, where **capture is actively being contemplated** by those who've failed in their agenda for the past 15+ years. [emphasis added]  This clearly took place, as documented above in section 7.  There are numerous reasons why arbitration is unacceptable, as a forced alternative to the courts. To enumerate some of them:   1. It would lead to deviation from national law (as noted by Wendy Seltzer above). To the extent that arbitration can lead to different results than the courts, it would encourage forum shopping by complainants. Indeed, long rejected "theories" or "interpretations" such as the Octogen[18](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark17) line of cases could be revived under unchecked arbitration, and those decisions would be unable to be reversed if recourse to the courts was unavailable. 2. Arbitration is **more expensive than the courts** (not less), because taxpayers pay for judges, whereas parties to an arbitration must pay for the salaries/fees of the panelists. For example, the IRP costs in the .xxx saga with ICANN were nearly USD $500,000[19](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark18). It's a myth that arbitration costs are cheaper, perpetuated by those who wish to compel arbitration upon the uninformed. This was discussed at length in the prior working group, for example in the mailing list.[20](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark19) 3. Lack of multiple levels of appeal. In an arbitration, it's "one and done". In courts, in many jurisdictions one can appeal to one or more higher levels. For example, in Ontario, Canada, one can appeal from the provincial (first) court to the Court of Appeal, and then later appeal again to the Supreme Court of Canada. These multiple levels of appeal provide important protections in the event that the lower courts make incorrect decisions. 4. Lack of open court principle (and or "open justice"). In the courts, all documents are presumptively open for inspection by the public, and the entire case can be monitored by the public to ensure that justice took place. Many arbitrations are private, though, which can undermine justice and lead to mischief. 5. Discovery is often limited.[21](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark20) 6. There can be "repeat player bias" and other concerns about impartiality of panelists.[22](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark21) 7. Lack of amicus curiae. In a real court case, if important enough, others might intervene to lend assistance to the court on important issues, particularly if it gets to the higher courts. 8. In some jurisdictions (e.g. Ontario), mandatory arbitration is inconsistent with consumer protection law.[23](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark22) Thus, any attempt by ICANN to mandate such terms would be ineffective, and indeed might cause trouble for registrars. 9. As we've seen from infamous decisions like the ADO.com case[24](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark23) or the IMI.com dispute[25](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark24), even the most experienced panelists (ADO.com was a 3-person panel at WIPO, and IMI.com was Neil Anthony Brown at NAF) can get it completely wrong. Without the ability to have the case determined by the courts, an unfair arbitration panel ruling would stand and lead to consequence free reverse domain name hijacking. Indeed, rogue panelists would be emboldened to make outrageous decisions if they knew that no one could go to court to challenge the outcomes, as who could say that it was a "wrong decision"? 10. Actual courts are more flexible, and have an array of remedies other than merely the transfer of the domain name. For example, they can consider monetary damages, or requiring that the domain name registrant put a disclaimer in a footer, instead of transfer of a valuable domain name. 11. The rules about cross-examinations, and ability to compel outside (third party) witnesses to attend are much more developed in the actual legal system, compared with arbitration. 12. Decisions rendered in arbitration have no precedential value in the legal system, and as such would not aid in the development of a body of law in a nation. There are relatively few domain name cases to begin with, so every case removed from the legal system damages the overall body of law in a nation. For example, the Tucows v. Renner case[26](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark25) established that domain names are property in Ontario, Canada. That happened at the Court of Appeal for Ontario. It would have deprived domain name registrants of an important development in their rights if that case had instead been forcibly diverted to arbitration, never establishing this important legal precedent. 13. It's 2021, not 1999. Back when the UDRP was being developed in the   late 1990s, there was a fear that cybersquatting cases would overwhelm the legal system. Similar fears were raised at the launch of the new gTLDs program (which led to the URS). However, we now know that those fears were overblown. Cybersquatting has long been in decline as a fraction of all registered domain names. And the number of times that cases ever get escalated to the courts has not skyrocketed over those years. The internet is no longer "shiny and new", and courts are more than capable of handling domain name disputes. The internet has matured, and the courts have also improved in the past 20 years, and are familiar with domain names. Thus, the need for alternate dispute resolution mechanisms that are specialized to a "new emerging technology" is just not there anymore (except perhaps in the view of those whose livelihood depends on diverting cases from the courts to ADR).   1. We should be informed by the CASE Act, which created a "small claims court" for US Copyright holders[27](file:///C:\Temp\LEAP-comments-IGO-ePDP-2021-final-20211023.docx#_bookmark26). In particular, it had an explicit opt out, recognizing the fundamental right to have cases determined on the merits in the courts. Domain names are not "special" and IGOs are not "special" either, that those fundamental due process rights should be eliminated. 2. As noted in section 6 above, to ensure justice for those situations where the dispute over the domain name is just one aspect of a larger dispute, it would require allowing arbitration over all potential causes of action and subject matters (employment law, defamation law, copyright law, trademark cancellation law, environmental law, sexual abuse law, and so on). This is far beyond ICANN's limited technical role in the DNS, and would represent mission creep to create a forum for any kind of dispute (as long as it touched upon domains in some manner). 3. ICANN has a poor track record when it comes to creating balanced accountability mechanisms, and would be unable to create a "fair" arbitration system. We've seen how the Independent Review cases have gone -- they can't be considered "fast and cheap" alternatives to the courts. And even then, parties have still tried to disregard the outcome or have gone to court afterwards. 4. Disproportionate response to a non-existent problem. While the new working group has suggested (on page 17) that arbitration is "proportionate to the problem", that's just not correct. How many actual UDRP/URS losses have IGOs had? Zero! They've won all the time. Similarly, how many times have they been dragged to court after they've won a UDRP/URS? Zero! So, either there's no actual problem (as per the actual data), or the **IGOs expect that they will be dragged into court in the future**. But, we can infer that it would not be "criminals" who would appeal cases to court (since criminals would never show up at court, lest they be immediately arrested by authorities). Instead, we can infer that IGOs would be going after non- criminals, trying to seize domain names that are the rightful property of legitimate registrants. **That's when innocent domain name registrants need the protection of the courts the most**, when creatures of government (IGOs are created by governments after all) with delusions of grandeur seek to take what they can by force. It is simply not credible for IGOs to claim they would only use any "new rights" to "target the bad guys". That's as believable as those who trusted Frank Schilling not to raise prices above inflation (as noted above). What matters is the actual words in the contract, not empty promises. **If IGOs are telling us that they "need" these new rights, we should be wary, as that implies that they would go overboard with the new rights and target legitimate domain name registrants with impunity**. 5. Expensive compliance costs for registrars and registry operators relative to alternatives. Both the existing Recommendation #5, and the newly proposed Notice of Objection system, are much simpler in terms of monitoring and other compliance for registrars and registry operators. Indeed, a registrant denied access to the courts, and denied justice, might feel compelled to sue the registrar and/or the registry (or even ICANN itself) as a tactical move as a form of escalation. This would add to everyone's expenses. One of the implicit goals of the UDRP/URS was to make it easier upon registrars, so that they didn't get dragged into the middle of a dispute. Attempting to bring in mandatory arbitration might have the opposite effect, undoing years of progress in that regard. 6. Real courts have serious penalties for witnesses who commit perjury (e.g. jail time or other forms of censure), or for lawyers who engage in misconduct (including getting lawyers disbarred), whereas arbitration has no meaningful penalties. 7. The prior working group not only rejected arbitration, but reached a "consensus against". That consensus should be respected.   One could see that this was a one-sided and biased report by all the little things in it that advantage IGOs at the expense of registrants. For example, on pages 12 and 14 (new Recommendations #4 & #5), the options hard- code a 10 business day period when a registrant must request arbitration after a court order declining to hear the merits of the case due to immunity. But, in real courts, parties can appeal to the next level (e.g. Court of Appeal, Supreme Court of Canada, Supreme Court of the US, etc.), and have explicit timelines to appeal (for example, it might be 30 days to appeal). Instead of waiting until all appeals have been exhausted, the proposal forecloses upon those appeal rights, requiring an arbitration decision to be made before any appeal to a higher court could be heard!  One might argue that the members of the working group simply hadn't contemplated the possibility of appeals to higher courts. But, **that's not the case**. In the diagram on page 13 of the report, it contains a flow chart that explicitly says that if an IGO loses at lower court, it would have the IGO appeal. And then if the IGO loses that appeal (at the higher court), it has another box saying "IGO goes to Supreme Court".  In other words, IGOs who have captured and dominated this current working group have looked at every angle to preserve their own rights to appeal to higher courts. It was explicitly on their mind, as per the diagram. [also in the transcript of the August 23, 2021 call, at page 14]. Yet, do their diagrams reflect the same logical and rational choices that a registrant might make, to preserve their legal rights? Not at all.  Another way to look at things is to weigh the two big "risks", namely:  A the risk of reverse domain name hijacking (that could not be undone through the courts), vs.  B the risk that "criminals" would take IGOs to court  That's really what this is all about. Domain name registrants want to make sure that the correct decision is rendered (and arbitration can lead to incorrect decisions). IGOs want to avoid court entirely.  But, we know that reverse domain name hijacking attempts take place repeatedly. There's an entire website at RDNH.com documenting decisions of that nature (and there are of course other cases which the panelist didn't make a reverse domain name hijacking determination, even though others would say it was such a case). That's a statistical fact (and it's telling that WIPO itself tracks all kinds of domain name statistics, but stopped tracking reverse domain name hijacking, lest it interfere with its narrative).  What are the statistical facts about IGOs being dragged to court after a UDRP/URS case? It's never happened.  That should be the end of the story, if the working group is basing its decisions on empirical facts rather than self-serving story telling by IGOs.  In conclusion, we are **strongly against** any imposed arbitration system. ICANN should not be involved at all in the creation of such a system. Parties are free to go to voluntary arbitration on their own, via a negotiated agreement, but do not need ICANN policymaking to compel such a system.  [For completeness, given there's a recommendation #6, which we reject entirely, Option 1 is the "best" of a bad group of choices. Recommendation #6 shouldn't be in play at all, though, as arbitration should be rejected.]   1. Why WIPO Does Not Like the UDRP, Wendy Seltzer, Deember 5, 2003, <https://circleid.com/posts/why_wipo_does_not_like_the_udrp/> 2. The Rise and Fall of the UDRP Theory of ‘Retroactive Bad Faith’, May 8, 2017, Internet Commerce Association, <https://circleid.com/posts/20170507_rise_and_fall_of_udrp_theory_of_retroactive_bad_faith> 3. XXX Saga Continues, Michele Neylon, February 20, 2010, <https://circleid.com/posts/4405/6276/> 4. Arbitration costs would be HIGHER than court cost, George Kirikos, November 22, 2017 (with links to many supporting articles), <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-November/000929.html> 5. Consumer Arbitration Agreements, Eighth Edition, chapter 1.4.6, <https://library.nclc.org/arb/010406> 6. Ibid, Chapter 1.4.4 7. Consumer Protection Act, 2002, Section 7(2), <https://www.ontario.ca/laws/statute/02c30#BK8>, "...any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act." 8. Ado.com domain dispute settled, January 10, 2019, Andrew Allemann, <https://domainnamewire.com/2019/01/10/ado-com-domain-dispute-settled/> 9. Jury overturns horrible cybersquatting decision for IMI.com, June 25, 2019, Andrew Allemann, <https://domainnamewire.com/2019/06/25/jury-overturns-horrible-cybersquatting-decision-for-imi-com/> 10. Tucows.Com Co. v. Lojas Renner S.A., 2011 ONCA 548, <https://www.ontariocourts.ca/decisions/2011/2011ONCA0548.htm> 11. Copyright Small Claims and the Copyright Claims Board, <https://www.copyright.gov/about/small-claims/> | Leap of Faith Financial Services Inc. | Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | Reviewing the transcripts of the new working group's calls, it's easy to see that they did not seriously consider any other alternatives other than arbitration. They were laser focused on it from the very beginning (within the first 5 calls), with no serious consideration or time spent researching alternatives. By March 29, 2021 (meeting #5), Chris Disspain was openly saying, on page 43,  [https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-29Mar.en_.pdf) [igo-work-track-29Mar.en\_.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-29Mar.en_.pdf)  So that’s a point which we need to consider, but I do think that we’re heading towards, **if we haven’t gotten there already**, an agreement that an **arbitration** as a **final solution**, a final ending to this, is acceptable. [emphasis added]  That's a clear product of the group dynamics involved, and lack of broad representation or participation as discussed above in the section documenting capture.  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. asignee 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.  In terms of implementation, the working group did not consider applying any policy changes only to newly created domain names (i.e. grandfathering already-registered domain names from any change), or restricting any changes to the new gTLD program (instead of legacy extensions like .com/net/org). This allows us to infer that IGOs seek to target valuable legacy domains (e.g. short and valuable acronyms in dot-com, which can be worth millions of dollars, and where legal protections are of paramount importance).  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.  Lastly, the new working group did not review past comments, or they would have already discovered the "Notice of Objection" system (discussed above), which would completely solve the IGO debate, given it can safely remove the mutual jurisdiction clause while still preserving full court access (because it eliminates the "role reversal"). | Leap of Faith Financial Services Inc. | Concerns  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | Of the recommendations made, Telepathy supports the ICA’s comment for the reasons given therein that Option 2 of Recommendation 4 is the least objectionable. | Telepathy, Inc. | Concerns  Divergence Support  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | The Organisation for Economic Co-operation and Development (OECD) fully endorses the comments made by the GAC and WIPO.We would reiterate that international organisations (IOs) are not seeking to deprive registrants of legitimately held domain names but merely seeking protections from abuse by cybersquatters which are consistent with their unique status under international law. As WIPO demonstrates, IOs are vulnerable to cybersquatting like any other entity. Failing to provide them access to curative rights puts the public at risk and hampers their ability to carry out their critical public missions.The OECD supports the solution entailing arbitration as either the exclusive or, if not agreed by the work track, the default mechanism for disputes with IOs with an opt out for registrants if they so wish. Arbitration should not also be available to registrants who unsuccessfully initiate court proceedings. Not only would such process be unfair, it would result in significant additional cost and time to IOs and registrants alike. Arbitration is a widely accepted method of dispute resolution and is routinely used by ICANN and registrars in their agreements. The contention that this solution would somehow deprive registrants of access to justice or due process is both baseless and highly inconsistent ICANN’s and registrars’ common practice. | Organisation for Economic Co-operation and Development | Support  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | The BC believes that registrants should be able to effectively pursue relief through litigation under national laws where a national court assumes jurisdiction despite any IGO claims of sovereign immunity, having regard to the particular circumstances of each case. The BC also believes however, that registrants should be able to alternatively, pursue relief through binding arbitration.  Furthermore, the BC believes that IGOs and registrants should be actively encouraged to mutually agree to avoid court litigation altogether and pursue resolution post-UDRP, through binding arbitration, as suggested by Recommendation #4, Paragraph (i).  The BC therefore supports Preliminary Recommendation 4 in conjunction with Option 2.  Importantly, under Option 2, a registrant business, trademark owner, or individual, retains the natural right to obtain actual adjudication on the merits of the dispute through their selection of either litigation in a court of competent mutual jurisdiction or binding arbitration. In contrast, Option 1 leaves no effective recourse on the merits if a registrant exercises its right to seek resolution through national courts rather than through arbitration and the court nevertheless declines jurisdiction based upon IGO immunity.  The BC therefore stands by its previous guidance, “that in those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court’s jurisdiction…the decision rendered against the registrant in the predecessor UDRP or URS may be brought before a to-be-determined arbitration forum for de novo review and  determination.”  The BC therefore recommends that the Working Group adopt and make clear, that there are two viable options for post-UDRP and post-URS disputes, namely;   1. The parties mutually agree to resolve a dispute arising from a UDRP or URS decision by binding arbitration; or 2. Either party may decide to resolve the post-UDRP or post-URS dispute by recourse to national courts. If the national court declines to assume jurisdiction based upon IGO immunity, then the registrant may seek recourse through binding arbitration.   As such, in any event, either a court or an arbitration tribunal will be able to resolve all such disputes on the merits. In other words, a registrant can choose to arbitrate instead of litigate, or can choose to litigate instead of arbitrate. But if the court won’t hear the dispute due to IGO immunity, then arbitration is really the only option and that should proceed as otherwise there would be no avenue to effectively “appeal” a URS or UDRP decision. | ICANN Business Constituency (BC) | Concerns  Support  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5.  “For the same reasons as the BC supports Option 2 of Recommendation #4, the BC supports Option 2 of Recommendation #5.” |
|  | Arbitration to Appeal UDRP Decision and URS Determination  The RrSG has concerns regarding the arbitration process detailed in recommendations 4 and 5. First, Recommendation 4 refers to a UDRP Decision as an “initial panel decision”, which presumes that UDRP decisions are temporary and likely subject to appeal. Although there are no statistics readily available, it is the experience of members of the RrSG that only a very small number of UDRP decisions are subject to court proceedings, which is an extraordinary measure in domain name disputes.  Second, the wording used in recommendations 4 and 5 appear to imply that the complainant can utilize the appeal process, e.g. an IGO that loses a UDRP or URS could appeal that Decision or Determination. The recommendations should be clarified to ensure that the appeal process is for registrants only, and does not provide a new avenue for trademark owners to appeal UDRP Decisions or URS Determinations decided against them.  Third, the recommendations should be clarified to ensure that the default option for appealing a UDRP Decision or URS Decision is through a court proceeding initiated by the registrant. If the final recommendations include an arbitration appeal option, it should require informed and affirmative consent from the registrant, including an explanation of potential legal and financial impacts of accepting the arbitration appeal process (and foregoing the court proceeding). In no circumstances should arbitration be initiated without the consent of the registrant.  Fourth, the appeal process detailed in the charts in recommendations 4 and 5 appear to be incomplete and should be revised. Some deficiencies include (a) applying to a US-centric judicial system and not reflective of other jurisdictions around the world, (b) do not anticipate appeals by the registrant, (c) envisions domain disputes being appealed to the Supreme Court (which would be cost prohibitive for registrants), and (d) delay implementation until all appeals are exhausted (the UDRP allows implementation upon conclusion of the original court proceeding and does not extend to appeals).  Finally, the RrSG is concerned about the potential costs associated with the arbitration appeal process detailed in the Interim Report. Although the process is still to be defined, the Interim Report provides examples of four arbitration providers as guidance for their rules and processes. The costs associated with these processes are significant, and substantially exceed the resources available to almost every domain name registrant (with the exception of large corporations). Some require thousands of dollars for each hearing2, and others charge over  $40,000 for a hearing3 (including the requirement that the loser pay for all costs4). These enormous costs will severely prejudice domain name registrants, who are mostly individuals without unlimited resources for costly arbitration procedures (or multiple appeals to the highest court in the jurisdiction). Although court proceedings can have significant costs, certain jurisdictions (in particular those outside of North America or Europe) have significantly lower court costs. Although those costs may be significant compared to the median income in those jurisdictions, those costs are still substantially lower than the arbitration providers detailed in the Interim Report. | Registrar Stakeholder Group (RrSG) | Concerns  Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5. |
|  | The ALAC also welcomes the possibility of binding arbitration post a UDRP or URS proceeding involving an IGO and sees this as a favorable alternative and more direct route for a losing registrant to seek a review of an UDRP or URS decision, if the losing registrant so chooses.  To this end, the ALAC supports the following preliminary recommendations:   * Preliminary Recommendation #4(i) to #4(iv) and #4(vi), all of which are designed to introduce and facilitate the possibility of binding arbitral review of a UDRP decision, more or less, immediately after the said decision is rendered. * Preliminary Recommendation #5(i), #5(ii) and #5(iv), all of which are designed to introduce and facilitate the possibility of binding arbitral review of a URS decision, also, more or less, immediately after the said decision is rendered.   As for Preliminary Recommendations #4(v) and #5(iii), we opine that from the end-users’ perspective the quicker the parties (i.e. IGO Complainant and losing registrant) can arrive at a final outcome, the sooner the question of risk of confusion (or harm) to end-users can be addressed in finality (more so for UDRP cases). For this reason, Options 1 in both #4(v) and #5(ii) are preferred, such that arbitration should not be sought to prolong a dispute for which a losing registrant has opted to initiate through a relevant court and has exhausted all recourse in that (court) route. | ALAC | Support  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5. |
|  | In addressing how a determination of rights might be reviewed or appealed in a jurisdiction where an IGO enjoys immunity from suit, the EPDP team has recommended arbitration as an alternative to judicial review. Recommendations #4 and #5 suggest that when filing a complaint, an IGO complainant would need to indicate whether it agrees that the final outcome of a UDRP or URS proceeding would be determined through binding arbitration. As an initial matter, Recommendations #4 and #5 assume that an IGO complainant will participate in the UDRP or URS proceeding when seeking a determination of its rights, an option that is not mandatory.  More fundamentally, the EPDP team has expressly stated that arbitration would only apply if both parties agreed to it, but the recommendations are silent as to what would happen in the event that the IGO complainant does not agree to binding arbitration. Under the current scheme, if a non-IGO files a UDRP or URS complaint and wins, a registrant-respondent has the right to seek judicial review of the UDRP or URS determination in a court of Mutual Jurisdiction.  However, because an IGO may be immune from suit in a court of Mutual Jurisdiction, the EPDP team has suggested that arbitration take the place of judicial review, but only if both parties agree. Thus, if an IGO files a UDRP or URS complaint against a registrant and wins, a court may not exercise jurisdiction over the IGO, and if the IGO does not voluntarily agree to arbitration, then the registrant will be left with no opportunity for judicial review at all. This obvious loophole could result in almost no oversight or regulation of IGOs in exercising intellectual property rights for domain names. Moreover, these recommendations, if adopted, would amount to a due process violation with respect to the rights of the registrant, who would be deprived by the IGO of their otherwise available review/appeal rights where the UDRP is decided in favor of the IGO. On balance, a prevailing registrant would not be able to equally prevent an IGO’s exercise of its appeal rights. Such an anti-registrant result cannot possibly be an acceptable objective or result under the ICANN MSM.  Moreover, Section 4(k) of the UDRP confers an express right to submit a dispute to a court of competent jurisdiction. Indeed, if ICANN adopts the EPDP team’s recommendations, IGOs would have near complete control over the manner in which a dispute is resolved and/or reviewed. When laws of Mutual Jurisdiction are favorable to the IGO, it could waive its immunity and file suit in court. If unfavorable, the IGO could submit to arbitration under a different set of laws, for which for a registrant could be prohibitively expensive, particularly in a loser pays scenario. Worst case, in a situation where the IGO has received a favorable ruling from a UDRP or URS proceeding, and will enjoy immunity from court jurisdiction, the IGO could simply refuse to arbitrate, leaving the registrant with no available recourse.  The recommendations are additionally silent on whether the IGO complainant can file binding arbitration if the registrant-respondent wins. The right to appeal a UDRP or URS proceeding currently is reserved solely for the registrant-respondent (and should remain as such through the current court proceeding process). The specter of losing IGO complainants appealing a UDRP or URS is chilling, and represents a substantial threat to the rights of all domain name registrants. This would create additional uncertainty regarding the rights of domain name registrants, and provide an additional avenue to attempt reverse domain name hijacking.  Finally, the potential costs associated with the proposed voluntary arbitration process will significantly prejudice registrants. Although the Initial Report does not provide any specifics regarding the arbitration process, it identifies four arbitration providers as examples for rules and processes. Although Namecheap has not conducted a detailed review of the fees and attorney costs associated with these arbitration providers, they are likely to be significantly more than most domain name registrants can afford (except for large corporations). One provider requires over $40,000 for a hearing2, and also specifies that the losing party must pay all costs of the prevailing party. It is shocking that an ICANN working group would suggest an appeals process with staggering costs, and due to the unrepresentative nature of the EPDP’s composition, it appears no one on the EPDP identified this as a concern or result in significant harm to registrants. While these costly arbitration procedures may be accessible to well-funded IGOs, the proposed appeals process would ensure that no registrant could participate due to the staggering costs.   1. 2 https://icsid.worldbank.org/services/arbitration/uncitral/fees | Namecheap, Inc. | Concerns  Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | IGOs Already Utilize the UDRP Although the Interim Report cites a report from an external expert regarding the need to resolve concerns regarding Mutual Jurisdiction, the EPDP apparently completely ignored the fact that IGOs have filed and prevailed in UDRPs. This information was available to the EPDP (e.g. as detailed in footnote 5 on p.118 of Final Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process3), and additional research by Namecheap identified approximately thirty UDRPs filed by IGOs (see Exhibit A). It is likely that this number is higher due to search limitations. INGOs have additionally filed more UDRPs, which demonstrate that these organizations are already able to sufficiently utilize the UDRP. It is not clear why such drastic recommendations are necessary, when it appears that IGOs already utilize the UDRP regularly. Unless there is a significant problem that will greatly impact the DNS, it is best to focus ICANN’s limited resources on more important matters (rather than making it slightly easier for a small number of IGOs to trademark rights).  3 https://gnso.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en\_0.pdf ICANN Should Consider Requiring IGOs to Waive Immunity When Asserting Intellectual Property Rights Against a Registrant The EPDP team has recognized the unique problem of eligibility of IGO registrants in asserting intellectual property rights – that is, due to national State obligations under the Paris Convention for the Protection of Industrial Property, IGOs may not hold registered trademarks in their names, acronyms, or other identifiers. Thus, through Recommendation #1, the EPDP team has proposed a special definition of “IGO Complainant” as a special exception that confers eligibility rights in IGOs to assert rights under the UDRP and the URS. The intent of Recommendation #1 is to put an IGO in the same footing as a non-IGO registrant in protecting its rights. Thus, if an IGO has the right to participate in UDRP and URS proceedings outside of the actual ownership requirements, then ICANN should consider requiring IGOs to abide by the same rules and constraints as non-IGO registrants – that is, IGOs should agree to waive immunity in courts of Mutual Jurisdiction as to the narrow issue of domain name ownership and review. As currently proposed in the EPDP team’s recommendations, waiver of immunity is voluntary, and is thus not so offensive as to be considered immutable. And mandatory waiver is the simplest way in which ICANN ensures that protections for IGO names and acronyms do not result in a broader scope of protection than is available under international treaties and national laws, including intellectual property laws.  As a practical consideration, there is nothing inherently unfair about the current framework for resolution of domain disputes through the UDRP and subsequent right of review within a place of Mutual Jurisdiction. This framework has protected the rights of IGO and non-IGO registrants in countless proceedings. Consequently, mandating that an IGO waive its immunity in order to participate in a UDRP proceeding does not prejudice the IGO, particularly so where it always has the option of sidestepping the UDRP proceeding and corresponding contractual right of review altogether and, instead, commence a Court proceeding in the first instance with respect to a contested domain. | Namecheap, Inc. | Concerns  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | This proposal also suggests introducing arbitration - but we feel that this is a very low benefit with a very high implementation/compliance cost. What about the additional compliance costs on registrars of implementing a new system (having to deal with new arbitration providers, changing communications protocols, etc.) for any new system that this working group proposes. Creating a new compliance nightmare for registrars, and a new set of contracts for accrediting arbitration providers, and the fact that one would have to review them every X number of years, have staff oversight, complaints about them, etc.Being forced into arbitration without mutual agreement could leave room for tactical selection of the arbitration party in a manner that might bias the outcome for the complainant or create such a high-cost burden for the respondent that they might be forced to make pragmatic decisions about their legitimate rights but need to abandon them as they cannot afford defense, or other similar duress-based decisions.The cost and work and effort will certainly add up, and this seems stacked to disadvantage individual registrants.The UDRP/URS was not designed to replace the law but was instead put forth as a fast low- cost alternative procedure for clear cut cases of cybersquatting that fully preserved the rights of all parties to pursue their dispute in the courts, before, during, or after a UDRP/URS decision. Depriving a domain name registrant recourse to the courts through compulsory arbitration represents a denial of due process to those domain name registrants. | TurnCommerce Inc. | Concerns  Divergence  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.] |
|  | Since this Recommendation seems incomplete, the IPC will react to its constituent elements rather than to the Recommendation as a whole and, therefore, express no reaction to the Recommendation as a whole at this time.Subsection i.The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration? It seems to us that the combination of this option for IGOs found in this subsection combined with the “opt out” concept in Recommendation 3 above could work together to give a registrant little or no recourse following an incorrect decision by a panelist. The IPC recommends the EPDP team take another look at this subsection and rework. For example, make it clear that if an IGO chooses not to submit to binding arbitration, the UDRP would be handled like a regular UDRP and the IGO would have to submit to the jurisdiction of either the registrar or registrant’s home location for any post-decision action that a losing registrant may file. Conversely, the EPDP could implement the IPC’s above-proposed compromise language in UDRP Rules Section 3(b)(xii) to address this issue..ii.The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration (as discussed in Subsection i. immediately above). Does the Provider still request that the registrant indicate its willingness to submit to arbitration? If the IGO hasn’t done so, why would the registrant? The IPC recommends the EPDP team take another look at this subsection and rework, as it is likely it only applies where an IGO has already indicated its willingness to have a final determination through binding arbitration.iii.So long as the ten (10) business day delay and following stay of decision implementation is not exclusive to the filing of arbitration, i.e. the filing of a court action by the respondent also still triggers the stay of implementation, the IPC supports this subsection. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity.iv.The IPC express the same concerns regarding court actions also triggering the stay as it did for subsection iii. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity.v.The IPC can support OPTION 2 subject to a couple caveats. Option 2 seems to us to be a reasonable safeguard designed to prevent undue pressure for a losing respondent to seek relief from the courts (which is in many jurisdictions, a basic human right). That said, the IPC does not support any mandatory, automatic, de novo appeals mechanisms for UDRP cases filed by non-IGO Complainants. Moreover, any such appeal or arbitration mechanisms under the UDRP, such as under Option 2, must incorporate appropriate safeguards, like reasonable filing fees, to prevent gaming and abuse by respondents. The IPC recommends that the EPDP team take another look at this subsection to supplement it with such safeguards.vi.The IPC supports this subsection and believes that it makes much of subsection iii. and all of subsection iv. redundant and therefore confusing. The IPC recommends the EPDP team take another look at those subsections and enhance their clarity. | IPC | Concerns  **EPDP Response:**  **Action Taken:**  [**COMPLETED / NOT COMPLETED**] – [Instruction of what was done.]  Note: this comment is applicable to Rec#5 for URS but not duplicated in the PCRT on Rec#5 |