**DRAFT TEXT OF PROPOSED FINAL RECOMMENDATIONS (as of 24 February 2021)**

The GNSO Council voted not to approve the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP. The EPDP Team’s collective understanding is that the GNSO Council thereby rejected the original Recommendation #5 and, instead, tasked the RPM Phase 1 PDP Working Group to develop a policy solution for the problem that the original Recommendation #5 was intended to solve and that would be generally consistent with Recommendations #1 - #4 from that PDP. The EPDP Team believes that its final recommendations (below) address the issues raised by IGOs’ jurisdictional immunity in relation to court proceedings following a UDRP or URS decision, and that these recommendations are responsive to the GNSO Council’s directions that the proposed policy solution be “generally consistent” with Recommendations #1 - #4 from the IGO-INGO Access to Curative Rights PDP. As such, the EPDP Team recommends that the GNSO Council approve the following final Recommendations #1 - #5 from this EPDP.

To address the specific issue under Recommendation #5 from the IGO-INGO Access to Curative Rights PDP, the EPDP team is proposing a single package of recommendations (set forth below) that are intended to be “interdependent” (as contemplated by Section 13 of the GNSO’s PDP Manual[[1]](#footnote-1)).

The EPDP team wishes to emphasize that its recommendations are to be read in the following context:

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

**Recommendation #1: Definition of “IGO Complainant”**

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

1. Add a description of “IGO Complainant” to section 1 (i.e., the definitions section of both sets of Rules):

“‘IGO Complainant’ refers to:

(i) an international organization established by a treaty, and which possesses international legal personality; or

(ii) an ‘Intergovernmental organization’ having received a standing invitation, which remains in effect, to participate as an observer in the sessions and the work of the United Nations General Assembly; or

(iii) a Specialized Agency or distinct entity, organ or program of the United Nations[[2]](#footnote-2).”

1. Add the following explanatory text to UDRP Rules Section 3(b)(viii), URS Section 1.2.6 and URS Rules Section 3(b)(v):

“Where the Complainant is an IGO Complainant, it may show rights in a mark by demonstrating that the identifier which forms the basis for the complaint is used by the IGO Complainant to conduct public activities in accordance with its stated mission (as may be reflected in its treaty, charter, or governing document). Such use shall not be a token use.”

[For clarity, the EPDP Team emphasizes that this recommendation obviates Recommendation #2 in the IGO-INGO Access to Curative Rights Protection Mechanisms PDP that the GNSO Council approved on 18 April 2019. Thus, the ICANN Board no longer needs to consider it.]

**Recommendation #2: Exemption from Submission to “Mutual Jurisdiction”**

1. The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1) be exempt from the requirement under Section 3(b)(xii) of the UDRP Rules and Section 3(b)(ix) of the URS Rules.
2. The EPDP team recommends that, when forwarding a complaint filed by an IGO Complainant to the respondent (pursuant to Paragraph 2(a) of the UDRP or Paragraph 4.2 of the URS, as applicable), the relevant UDRP or URS provider must also include a notice informing the respondent: (i) of its right to challenge a UDRP decision canceling or transferring the domain name, or a URS Determination rendered in favor of an IGO Complainant, by filing a claim in court; (ii) that, in the event the respondent chooses to initiate court proceedings, the IGO Complainant may assert its privileges and immunities with the result that the court may decline to hear the merits of the case; and (iii) that it has the option to agree to binding arbitration to settle the dispute at any time, including in lieu of initiating court proceedings or, if it files a claim in court, where the court has declined to hear the merits of the case.

Explanatory Text:

This recommendation addresses the GNSO Council’s instructions that the EPDP team’s recommended policy solution must *“[account] for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances; … not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction whether following a UDRP/URS case or otherwise; and … [recognize] that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction”*.

Early in its deliberations, the EPDP team agreed on the need to balance the rights and interests of registrants and IGOs. In finalizing its recommendation to exempt IGO Complainants from the requirement to agree, with respect to any challenge to a UDRP decision or URS Determination, to submit to the jurisdiction of the courts in at least one specified Mutual Jurisdiction (as the term is defined in the UDRP Rules and URS Rules), the EPDP team thought it important to ensure that registrants who wish to challenge a UDRP or URS outcome in court be made aware that an IGO Complainant’s exercise of its privileges and immunities may mean that the court declines to hear the registrant’s case.

**Recommendation #3: Arbitral Review following a UDRP Proceeding**

The EPDP team recommends that the following provisions be added to the UDRP to accommodate the possibility of binding arbitration to review an initial panel decision issued under the UDRP:

1. When submitting its complaint, an IGO Complainant shall indicate that it agrees, if the registrant also agrees, to have the final determination of the outcome of the UDRP proceeding settled through binding arbitration.
2. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall provide both parties with information regarding the applicable arbitral rules. 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. In accordance with Paragraph 4(k) of the UDRP, the relevant registrar shall wait ten (10) business days (as observed in the location of its principal office) before implementing a UDRP panel decision rendered in the IGO Complainant’s favor, and will stay implementation if, within that period, it receives official documentation that the registrant has initiated court proceedings in either its location or the location of the principal office of the relevant registrar or submitted a request for or notice of arbitration.
4. Where the relevant registrar has received a request for or notice of arbitration, it shall stay or continue to stay, as applicable, implementation of the UDRP panel decision until it receives official documentation concerning the outcome of an arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute.
5. Where the registrant initiates court proceedings and the court declines 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. Where the registrant does not submit a request for or notice of arbitration to the competent arbitral institution (with a copy to the registrar, UDRP provider and the IGO Complainant) within ten (10) business days from the court order declining to hear the merits of the case, the original UDRP decision will be implemented by the registrar.
6. Where a registrant decides to submit the dispute to binding arbitration, it shall notify the relevant registrar prior to initiating the arbitration proceeding with the competent arbitral tribunal. The registrar shall notify the IGO Complainant of the registrant’s decision to initiate arbitration.

**Recommendation #4: Arbitral Review following a URS Proceeding**

The EPDP team recommends that the following provisions be added to the URS to accommodate the possibility of binding arbitration to review a Determination made under the URS:

1. When submitting its complaint, an IGO Complainant shall indicate that it agrees, if the registrant also agrees, to have the final determination of the outcome of the URS proceeding settled through binding arbitration.
2. In communicating a URS Determination to the parties where the complainant is an IGO Complainant, the URS provider shall provide both parties with information regarding the applicable arbitral rules. 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. Where the registrant initiates court proceedings and the court declines to hear the merits of the case, the registrant may submit the dispute to binding arbitration within ten (10) business days from the date of the court order declining to hear the merits of the case, by submitting a request for or notice of arbitration to the competent arbitral institution, with a copy to the URS provider and IGO Complainant. The relevant domain name(s) will remain suspended throughout the pendency of any such arbitration proceeding.
4. Where the registrant files an appeal under URS Section 12 and does not prevail in the appeal, it may submit the dispute to binding arbitration within ten (10) business days from the date of the appeal panel’s decision, by submitting a request for or notice of arbitration to the competent arbitral institution, with a copy to the URS provider and the IGO Complainant. The relevant domain name(s) will remain suspended throughout the pendency of any such arbitration proceeding.
5. Where a registrant decides to submit the dispute to binding arbitration, it shall notify the relevant URS provider prior to initiating the arbitration proceeding with the competent arbitral tribunal. The URS provider shall notify the IGO Complainant of the registrant’s decision to initiate arbitration.

**Recommendation #5: Applicable Law for Arbitration Proceedings**

Arbitration will be conducted in accordance with the law as mutually agreed by the parties. Where the parties cannot reach mutual agreement, the IGO Complainant shall elect either the law of the relevant registrar’s principal office or the domain name holder's address as shown for the registration of the disputed domain name in the relevant registrar's Whois database at the time the complaint was submitted to the UDRP or URS provider. Where neither law provides for a suitable cause of action, the arbitral tribunal shall make a determination as to the law to be applied in accordance with the applicable arbitral rules.

1. Section 13 provides that “Although the GNSO Council may adopt all or any portion of the recommendations contained in the Final Report, it is recommended that the GNSO Council take into account whether the PDP Team has indicated that any recommendations contained in the Final Report are interdependent. The GNSO Council is strongly discouraged from itemizing recommendations that the PDP Team has identified interdependent or modifying recommendations wherever possible …” (see <https://gnso.icann.org/sites/default/files/file/field-file-attach/annex-2-pdp-manual-24oct19-en.pdf>, at p. 8). [↑](#footnote-ref-1)
2. A visual depiction of the United Nations system is available here, including its Specialized Agencies and various programs: <https://www.un.org/en/pdfs/un_system_chart.pdf>. [↑](#footnote-ref-2)