

Draft Final Report: Final Recommendations from the Expedited Policy Development Process on Specific Curative Rights Protections for Intergovernmental Organizations (IGOs)

Consultation with the At-Large Consolidated Policy WG

Yrjö Länsipuro

Justine Chew

23 March 2022



Agenda

- ⦿ Narrow remit & recap of problem statement
- ⦿ Effect of 5 Final Recommendations as a package
- ⦿ **Analysis of prior ALAC Statement on preliminary recommendations in Initial Report against final recommendations in Final Report**
- ⦿ **Input to our recommendations on Consensus Designations**

Narrow Remit & Recap of Problem Statement

Rec #5 from the IGO-INGO Curative Rights PDP WG:

“Where a losing registrant challenges the initial UDRP/URS decision by filing suit in a national court of mutual jurisdiction and the IGO that succeeded in its initial UDRP/URS complaint also succeeds in asserting jurisdictional immunity in that court, the decision rendered against the registrant in the predecessor UDRP or URS shall be set aside (i.e. invalidated).”

Essentially, this EPDP tasked to find a compromise solution allowing:-

- ⦿ **IGOs**
 - Use of UDRP or URS as dispute mechanism for DNs matching their acronym (identifier) without giving up right to assert privileges and immunities in post-UDRP/URS court proceedings

- ⦿ **Registrants**
 - Preserve right to initiate court proceedings in event they lose UDRP or URS proceedings
 - Opt for binding arbitral review of UDRP decision/URS determination where court declined to hear merits of registrant’s case

Effect of Package of 5 Recommendations

Use of UDPR / URS by IGOs as Complainant

Rec #1: how to Identify IGOs for UDRP and URS eligibility requirements

In event of review of UDRP decision or URS determination

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

- preserves losing registrant’s right to file court claim AND preserves IGO’s right to assert privileges & immunities therein
- losing registrant has option for binding arbitration instead of court claim

Possibility of Binding Arbitral Review of UDRP decision or URS determination **

Rec #3: re UDRP

- gives losing registrant option to file for arbitration **only** where its court claim not heard due to IGO’s privileges & immunities, **or in lieu of** court claim
- info re applicable arbitral rules to both parties (with IG to apply)
- choice of arbitral institution by losing registrant
- timelines for filing & process apply

Impact on End-Users:

With UDRP, as long as final outcome not established, DN is locked but remains accessible so risk of confusion or harm to end-users potentially subsists – however, seemingly very few cases – owing to compromise by IGOs, we may be inclined to acquiesce

Rec #4: re URS

- gives losing registrant option to file for arbitration **only** where its court claim not heard due to IGO’s privileges & immunities, **or in lieu of** court claim, **or loses appeal under Section 12**
- info re applicable arbitral rules to both parties (with IG to apply)
- choice of arbitral institution by losing registrant
- timelines for filing & process apply

** Indicative Process Flow is available at https://community.icann.org/download/attachments/180027711/EPDP_SCRP_IGO_flowchart_20220228.pdf

Applicable Law for Binding Arbitral Proceedings

Rec #5:

- parties to agree; if no agreement, IGO Complainant to select law of either of the Mutual Jurisdictions
- if neither law affords suitable cause of action, arbitral tribunal to decide per arbitral rules

Compare ALAC positions on Prelim Recs to Final Recs

Substantively,

Issue	Preliminary Recommendations (Oct 2021)	Final Recommendations (Mar 2022)
1. Definition of “IGO Complainant”	<ul style="list-style-type: none"> Agreed on need for clarity & reasonable certainty as to eligibility of IGO 	<ul style="list-style-type: none"> Provision for definition retained Now finalized with IGO input
2. Exemption from Submission to Mutual Jurisdiction	<ul style="list-style-type: none"> Supported removal of requirement for IGO to submit to Mutual Jurisdiction to preserve right to privileges & immunities 	<ul style="list-style-type: none"> Exemption retained Preserves losing registrant’s right to file court claim AND preserves IGO’s right to assert privileges & immunities therein
3. Possibility of Binding Arbitral Review of UDRP decision	<ul style="list-style-type: none"> Supported PR designed to introduce this possibility, more or less, immediately after decision rendered <i>Arbitration should not be sought to prolong a dispute for which a losing registrant has opted to initiate court claim and has exhausted all recourse in that court route</i> 	<p>Possibility reinforced with clarity given to:</p> <ul style="list-style-type: none"> When applicable – i.e. only where its court claim not heard due to IGO’s privileges & immunities, or in lieu of court claim Info on arbitral rules, choice of arbitral institution, timelines, process IG – principles regarding Arbitral Rules
4. Possibility of Binding Arbitral Review of URS decision	<ul style="list-style-type: none"> Supported PR designed to introduce this possibility, more or less, immediately after determination rendered <i>Arbitration should not be sought to prolong a dispute for which a losing registrant has opted to initiate court claim and has exhausted all recourse in that court route</i> 	<p>Possibility reinforced with clarity given to:</p> <ul style="list-style-type: none"> When applicable – i.e. only where its court claim not heard due to IGO’s privileges & immunities, or in lieu of court claim or post loss of appeal under Section 12 Info on arbitral rules, choice of arbitral institution, timelines, process IG – principles regarding Arbitral Rules
5. Applicable Law for Binding Arbitral Proceedings	<ul style="list-style-type: none"> Applicable to be mutually agreed by parties If parties can’t agree, Arbitral tribunal decides Arbitral tribunal to request submissions if either party raises concerns on applicable law selected by arbitral tribunal 	<ul style="list-style-type: none"> Parties to agree If no agreement, IGO Complainant to select law of either of the Mutual Jurisdictions If neither law affords suitable cause of action, arbitral tribunal to decide per arbitral rules

Consensus Designations for Input

EPDP Chair's consensus designation level for each final recommendation

Recommendation #	Chair Proposed Designation	Groups not supporting recommendation or part thereof
#1 - Definition of " <u>IGO Complainant</u> "	Full Consensus	
#2 - Exemption from Submission to " <u>Mutual Jurisdiction</u> "	Full Consensus	
#3 - <u>Arbitral Review following a UDRP Proceeding</u>	Full Consensus	
#4 - <u>Arbitral Review following a URS Proceeding</u>	Full Consensus	
#5 - <u>Applicable Law for Arbitration Proceedings</u>	Full Consensus	
<u>Metrics for Policy Impact Analysis</u>	Full Consensus	
<u>Principles for Arbitral Rules</u>	TBA	

We recommend that CPWG & ALAC:-

- Support the final recommendations #1 to #5
- Support the inclusion of the questions and metrics for Policy Impact Analysis as important future data points to review these recommendations post implementation **
- Acknowledge that Annex A - Principles for Arbitral Rules ** are being finalized with input from IGOs and that unless it is amended substantively, to support the same

Do you agree with us?

** These are found in the draft final report as at 18 Mar 2022:

https://community.icann.org/display/GNSO/WT/Final+Report?preview=/180027711/192218118/EPDP_SCRP_IGO_Final_Report_20220318.docx

**Thank you
for giving us your input.**