*The Intellectual Property Constituency (IPC) welcomes this opportunity to comment on the proposed* Recommendations of the IGO EPDP Initial Report. Taking each in turn:

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| Proposed Recommendation | IPC Reaction |
| Recommendation #1: Definition of “IGO Complainant” The EPDP team recommends that the UDRP Rules and URS Rules be modified in the following two ways: i. Add a description of “IGO Complainant” to section 1 (i.e., the definitions section of both sets of Rules): “‘IGO Complainant’ refers to: (a) an international organization established by a treaty and which possesses international legal personality; or (b) an ‘Intergovernmental organization’ having received a standing invitation to participate as an observer in the sessions and the work of the United Nations General Assembly; or (c) a Specialized Agency or distinct entity, organ or program of the United Nations3 .” AND ii. Add the following explanatory text to UDRP Rules Section 3(b)(viii), URS Section 1.2.6 and URS Rules Section 3(b)(v): “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 the IGO Complainant to conduct public activities in accordance with its stated mission (as may be reflected in its treaty, charter, or governing document).” | The IPC supports these proposed changes. Consider modifying “…having received a standing invitation to participate…” to “…having received, accepted, and is actively engaging in, a standing invitation to participate…” Consider adding “Such use shall not be a token use” at the end of the final sentence, such that the revised sentence reads ““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 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.” Consider specifying for the sake of clarity how this Recommendation #1 relates to the original Recommendation #2 from the IGO-INGO Access to Curative Rights Protections PDP (“Old 2”). From the Deliberations section it appears that the intent is to supplement Old 2 but from the Recommendation alone this may be misunderstood.Implementation Suggestion:  in order to ensure that the IGO's identification is applied consistently throughout policy development across the organization, we recommend that those keeping the IGO Identifier List use the identical system we set forth in this Recommendation going forward. |
| Recommendation #2: Cumulative Effect of Recommendations #3, #4, #5 & #6 If the GNSO Council approves the recommendations set out below in Recommendations #3, #4, #5 and #6, then the EPDP team recommends that the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protections PDP be rejected | The IPC believes this Recommendation is worded poorly as it implies that the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protections PDP (“Old 5”) was not already rejected. That Recommendation was not adopted by the GNSO Council. When a recommendation from a PDP is not adopted by Council, it is dead. Creating confusion that somehow the failure to adopt the recommendations of this EPDP would somehow resurrect (through non-rejection – whatever that may be) Old 5 simply doesn’t reflect how policy development works. This Recommendation needs to be reworked in order to tease out whatever concept the EPDP team was meaning to put forward..  |
| Recommendation #3: Exemption from Agreement to Submit to Mutual Jurisdiction for IGO Complainants i. In relation to the UDRP: The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1, above) be exempt from the requirement to state that it will “submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction”ii. In relation to the URS: The EPDP team recommends that an IGO Complainant (as defined under Recommendation #1, above) be exempt from the requirement to state that it will “submit, with respect to any challenges to a determination in the URS proceeding, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction” | The IPC supports this Recommendation so long as the other major concepts found in Recommendations 4 and 5 and IPC’s comments herein make their way into the final report. Additionally, the IPC believes that this Recommendation would have more support, both within the IPC and the community generally, if acronym domain names were carved out from the changes proposed, e.g. the World Health Organization should have no particular extra rights should it attempt to obtain transfer of a domain name from the famous band, The WHO. The IPC does not support this Recommendation in a vacuum.As an alternative, the IPC also supports proposed compromise language that an IGO “will submit, **without prejudice to an IGO Complainant’s privileges and sovereign immunity**, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction.” This proposed compromise language is intended to allow an IGO Complainant to abide by UDRP Rules Section 3(b)(xii), without expressly waiving its privileges and ability to assert sovereign immunity.  |
| 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: i. 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. ii. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall also request that the registrant indicate whether it agrees that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA). iii. As provided in Paragraph 4(k) of the UDRP, the relevant registrar shall wait ten (10) business days (as observed in the location of its principal office) before implementing a UDRP panel decision rendered in the IGO Complainant’s favor, and will stay implementation if, within that period, it receives official documentation that the registrant has submitted a request for or notice of arbitration, as described further below.iv. If it receives a request for or notice of arbitration, the registrar shall continue to stay implementation of the UDRP panel decision until it receives official documentation concerning the outcome of an arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute. v. [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.]vi. The Registrar shall continue to maintain the Lock on the disputed domain name during the pendency of any judicial proceedings and/or arbitration, as applicable. | 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. |
| Recommendation #6: Applicable Law in an Arbitration Proceeding i. Any arbitration will be conducted in accordance with the law as mutually agreed to by the parties.[OPTION 1: Where the parties cannot reach mutual agreement, the arbitration will be conducted in accordance with the law of the relevant registrar’s principal office or where the respondent is resident at the election of the IGO Complainant.] [OPTION 2: Where the parties cannot reach mutual agreement, the arbitral tribunal shall determine the applicable law.] ii. [POSSIBLE ADDITIONAL STEP UNDER CONSIDERATION: If either party raises concerns to the arbitral tribunal about applying the law of the registrar’s principal office or the respondent’s place of residence, e.g., because it does not have a satisfactory cause of action related to the parties’ dispute, the arbitral tribunal may request submissions from the parties as to the suggested applicable law or principles of law (which may include UDRP case precedent) to be applied.] | 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.i.The IPC does not support either option. There is no reason to over-engineer the arbitration process to make it UDRP-like in nature. It appears that the selection of venue found in the UDRP is being forced to morph into a selection of choice of law. We do not need to create new things not in the UDRP and then try to push them into what is meant to be a *de novo* arbitration process. ICANN should not interfere in the arbitration process and leave it to the parties to decide what claims and defenses they wish to bring to the arbitrator under which set of laws they wish to bring them.ii. Please see our comments on subsection i. above. This additional step, or any variants of the same, would be necessary if the arbitration process is allowed to proceed without pre-manipulation by baking in a choice of law provision. |
| iii. In addition, the following non-exhaustive general principles (to be further developed by the expected Implementation Review Team) shall govern all arbitral proceedings conducted through this process: a. The arbitration shall be conducted as a de novo review; i.e., the parties are permitted to restate their case completely anew, including making new factual and legal arguments and submit new evidence; b. The parties may select more than one arbitrator; c. The arbitrator(s) must be neutral and independent, and cannot be the panelist(s) who rendered the initial UDRP or URS decision; and d. Both parties should be able to present their case in a complete manner. | iii.The IPC supports all of the concepts found within this subsection. In addition, the EPDP’s final report should be very clear that these concepts, and indeed the general principle of an added binding arbitration option for UDRP appeals, applies only to IGO Complainants and not to the UDRP in general.  |