

**Minority Statement**  
**In support of Option 3 of Recommendation 5**

**STATEMENT:**

I, Petter Rindforth, fully support Option 3 of Recommendation 5, namely:

*Where a complainant IGO succeeds in a UDRP/URS proceeding, the losing registrant proceeds to file suit in a court of mutual jurisdiction, and the IGO subsequently succeeds in asserting jurisdictional immunity, the registrant shall have the option to transfer the dispute to an arbitration forum meeting certain pre-established criteria for determination under the national law that the original appeal was based upon, with such action limited to deciding the ownership of the domain name. The respondent shall be given 10 days (or a longer period of time if able to cite a national statute or procedure that grants a period longer than 10 days) to either: (1) inform the UDRP/URS provider [and the registrar] that it intends to seek arbitration under this limited mechanism; or (2) request that the UDRP/URS decision continue to be stayed, as the respondent has filed, or intends to file, a judicial appeal against the IGO's successful assertion of immunity. An IGO which files a complaint under the UDRP/URS shall be required to agree to this limited arbitration mechanism when filing the complaint. If, subsequently, it refuses to participate in the arbitration, the enforcement of the underlying UDRP/URS decision will be permanently stayed. The parties shall have the option to mutually agree to limit the original judicial proceedings to solely determining the ownership of the domain name. Subject to agreement by the registrant concerned, the parties shall also be free to utilize the limited arbitration mechanism described above at any time prior to the registrant filing suit in a court of mutual jurisdiction. In agreeing to utilize the limited arbitration mechanism, both the complainant and respondent are required to inform ICANN.*

**BACKGROUND AND EXPLANATION:**

As noted in the Executive Summary of the Report, the procedural rules for both the UDRP and URS require that the party filing the complaint agree to submit to the jurisdiction of a national court for purposes of a challenge to the initial panel determination. This requirement could potentially affect an IGO's ability to successfully claim immunity from national jurisdiction.

As Professor Swaine concluded in his final expert opinion, considered by the Working Group in June 2016:

*There is no single universal rule that is applicable to IGOs' jurisdictional immunity globally. Rather, such immunity is essentially contextual - IGOs generally enjoy immunity under international law, but different jurisdictions apply the law differently, and even within the same jurisdiction different IGOs may be treated differently.*

It is also interesting to note that already back in 2003, based on the WIPO Secretariat Paper on a Possible De Novo Appeal Mechanism for Country Names, the possibility to introduce allowance for IGOs to submit to a special appeal procedure by way of de novo arbitration was discussed.

However, another section of the same paper noted that, while the option of bringing the dispute before a court of competent jurisdiction is open to both parties, it is particularly important for a losing respondent, for whom the UDRP procedure initiated by the complainant was mandatory.

The paper further noted that the requirement for UDRP complainants to submit to a "mutual jurisdiction" does not prevent either party from initiating court litigation elsewhere and, similarly, a State's submission to de novo arbitration should not restrict either party's recourse to a national court of justice.

It is important to find a solution that has the possibility to recognize the legal rights of both IGO's and the domain name registrant (domain holder).

Option 1 does not solve that problem. IGO's have clearly referred to their right to claim jurisdictional immunity. It was advised by IGO's in their communication of January 15, 2015 to the WG, that they consider their claimed immunity from national jurisdiction to be fundamental to their role as international bodies. This was repeated in the Governmental Advisory Committee's reply of April 29, 2015, to the WG's questions on the topic, stating that: *"There are non-judicial means to ensure due process, such as arbitration, which the GAC believes should be considered in more detail"*.

As concluded in Prof. Swain's report: it is not clear how all national courts around would deal with the jurisdictional immunity. If they accept, and it is the domain holder that has taken the case to court, the system is indeed not neutral to both parties. Also the domain holders need to have the possibility to have the case handled by a court or arbitration forum.

Clause 4(k) of the UDRP Policy states that

*"The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded..."*

This is however not 100% clear for all jurisdictions and courts around the world.

One example of court decision based on a UDRP dispute is *Yoyo.Email Ltd v Royal Bank of Scotland Group Plc* [2015] EWHC 3509 (Ch) Case No: HC-2015-000379, of December 2, 2015, where the UK High Court of Justice held that "a proper construction of the UDRP clause [providing for independent court resolution of a controversy that is the subject of a UDRP proceeding] does not give rise to a separate cause of action in favour of the [registrant that is the losing party in that proceeding]." In conclusion: *"... it is trite law that an agreement cannot confer a jurisdiction on the court which it does not otherwise have. Under the [UDRP] the*

*Registrar will abide by a judicial decision, but the function of this Court is not as a judicial review or appellate body. The claimant must demonstrate some independent right of action justiciable in this Court. Thus if a complaint is dismissed, the complainant may refer the case to the Court for an order that its trade mark has been infringed. If, on the other hand, the complaint is upheld, the burden is not on the complainant to establish infringement. It is for the registrant to plead and prove a cause of action giving him an interest in retaining the domain name. An unsuccessful registrant therefore faces considerable difficulty in identifying a cause of action upon which the Panel's decision can be challenged..."*

Although the above case does not involve an IGO, it generally show that proceeding with a UDRP or URS case to a national court is not always a simple and clear way to finally solve a domain name dispute.

**Option 3 of Recommendation 5** is the best way to solve the issue.

It takes into consideration the legal aspects of both groups of interest: the IGOs as well as the domain holder. Especially if including the possibility for the parties to utilize the limited arbitration mechanism at any time prior to the registrant filing suit in a court of mutual jurisdiction, and further investigating the possibilities of made the decisions faster in order support both groups of interest (IGO's as well as domain holders).

The reason to keep the first step to file suit in a court of mutual jurisdiction is that some domain holders prefer this as the first step, as this is the traditional and open way, also in accordance with the current Policy.

However, arbitration is generally promoted as a way to resolve disputes efficiently, and proponents of arbitration commonly point to a number of advantages it offers over litigation, court hearings, and trials. As noted above, arbitration has also been suggested previously by IGO's and GAC, and gives at the same time a guarantee to the domain holder that the case will be fully considered.

Some examples of advantages of arbitration:

**Avoids hostility:** Because the parties in an arbitration are usually encouraged to participate fully and sometimes even to help structure the resolution, they are often more likely to work together peaceably rather than escalate their angst and hostility toward one another, as is often the case in litigation.

**Usually cheaper than litigation:** There are also developed possibilities for online arbitration, which can cut the costs and time, and will work out very well when it comes to domain name disputes.

**Faster than litigation:** A court case normally takes from 18 months to three years to wend its way through the courts. It should be possible to develop an online arbitration procedure that can be close to the time related for an UDRP case.

Flexible: Unlike trials, which must be worked into overcrowded court calendars, arbitration hearings can usually be scheduled around the needs and availabilities of those involved, including weekends and evenings.

Simplified rules of evidence and procedure: The often convoluted rules of evidence and procedure do not apply in arbitration proceedings -- making them less stilted and more easily adapted to the needs of those involved. This is important for both IGO's and domain holders.

Private: Arbitration proceedings are generally held in private. And parties sometimes agree to keep the proceedings and terms of the final resolution confidential. Both of these safeguards can be a boon if the subject matter of the dispute might cause some embarrassment or reveal private information, such the list of users of the domain holder, and thereby also fulfil the requirements of the General Data Protection Regulation (GDPR).

### ***Some suggested General Principles for Binding Arbitration:***

**Substantive law** – arbitrator decides dispute under the national law under which the judicial appeal was originally brought, not the UDRP/URS, but both parties can mutually agree to proceed under another national law (this is the normal practice in arbitration cases).

**Procedural rules** – same as in the applicable judicial system / different rules can be mutually agreed to by both parties.

**Venue** – to be conducted in an arbitration forum certified to meet certain basic criteria, and cannot be an IGO or the arbitration forum that decided the underlying UDRP, to assure lack of bias and de novo review.

**Panelist(s)** – Default option is a three-member panel, the chair of which must be a retired judge from that jurisdiction; explore possibility of creating a standing panel from which to choose the two panelists other than the chair (i.e. parties cannot choose the chair of the panel.)

**Language** – same language to be used as in national judicial forum (alternate language can be selected by mutual agreement of the parties).

**Discovery** – same as in judicial case.

**Interim remedies (e.g., domain locking)?** – same as if court case had continued.

**Remedies** – same as in judicial case.

**Costs** – seek to be the same as or lower than in a judicial case.

**Enforcement of award** – decision to uphold UDRP determination would result in domain transfer or extinguishment.

**Precedential value of decision** – While there's no way to fully replicate the precedent of a court decision, policy could state a distinct recommendation that any case shifted to arbitration should consider and seek to follow judicial precedent on similar cases brought under the same law, and also be consistent with prior arbitrations under that law (if any).

## **CONCLUSION AND RECOMMENDATION**

Option 3 of Recommendation 5 is a mid-way to solve the problem for both IGO's and domain holders. And it is indeed the most practical and best solution of all of the options discussed and suggested.

I strongly recommend GNSO Council to further consider Option 3, and to work together with GAC to finalize a solution based on Option 3 in order to solve the topic of our WG in a decent and practical way that will in fact solve the problem for all groups of interest.

Stockholm,  
July 10, 2018

Sincerely yours,



Petter Rindforth  
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Co-Chair (September 8, 2014 – May 11, 2018)  
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