**DRAFT TEXT FOR PRELIMINARY RECOMMENDATIONS**

**EPDP on Specific Curative Rights Protections for IGOs**

**Draft as of 1 September 2021**

**Recommendation #1:**

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 Nations[[1]](#footnote-1).”

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 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).”

**Recommendation #2:**

If the GNSO Council approves the recommendations set out below in Recommendations #3, #4 and #5, then the EPDP team recommends that the original Recommendation #5 from the IGO-INGO Access to Curative Rights Protections PDP be rejected.

*\*\* A Note from the EPDP team on Recommendations #3, #4 & #5:*

*The EPDP team continues to deliberate on the text and final concept for these Recommendations. While the EPDP team is in general agreement that arbitration is an appropriate solution, it has not yet reached agreement on two specific aspects relevant to such an option (viz., (i) whether the option to arbitrate will remain available to a registrant following the outcome of a court proceeding initiated by the registrant where the court declined to exercise jurisdiction in the matter, and (ii) what should be the applicable choice of law for any arbitration that the parties may agree to). As such, the text that follows reflects proposals submitted by EPDP team members on these specific issues, as indicated by the square brackets around the relevant proposals and their text:*

* *In relation to arbitration following a UDRP proceeding, see Recommendation #3B(v);*
* *In relation to arbitration following a URS proceeding, see Recommendation #4; and*
* *In relation to the options under consideration relating to the applicable law for an arbitration, see Recommendation #5.*

**Recommendation #3A:**

3A: 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” under the UDRP[[2]](#footnote-2).

**Recommendation #3B**:

The EPDP team recommends that the following provisions be added to the UDRP to accommodate a review of an initial panel decision under the UDRP.

**Binding Arbitration Following a UDRP Panel Decision**

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 they agree that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules, which shall be determined by the Implementation Review Team. Existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR)[[3]](#footnote-3), the World Intellectual Property Organization (WIPO)[[4]](#footnote-4), the United Nations Commission for International Trade Law (UNCITRAL)[[5]](#footnote-5) and the Permanent Court of Arbitration (PCA)[[6]](#footnote-6) should be considered.
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 either initiated proceedings in court or agreed to 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. If the UDRP provider receives notice that an arbitration proceeding has been initiated, it shall promptly inform both parties and the relevant registrar.

**PROPOSAL UNDER CONSIDERATION AS REGARDS MAINTAINING AN ARBITRATION OPTION FOLLOWING INITIATION OF COURT PROCEEDINGS BY THE REGISTRANT. [[7]](#footnote-7)**

1. [Where the registrant initiates court proceedings and the IGO Complainant has not agreed to submit to Mutual Jurisdiction, and [if] the result is that the court is unable to proceed further, the registrant may submit the dispute to binding arbitration within ten (10) business days from the court order declining jurisdiction over the IGO, by submitting a request for or notice of arbitration[[8]](#footnote-8) to the competent arbitral institution with a copy to the relevant registrar 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 and the IGO Complainant) within ten (10) business days from the court order declining jurisdiction over the IGO, the original UDRP decision will be implemented by the registrar.]

*Note: With respect to this option under consideration, IGO members of the EPDP team have provided the following illustrative high-level potential court flow chart to explain the difference – in terms of added time and cost and legal uncertainty – when arbitration is not the direct path for review of a UDRP or URS decision:*



1. The Registrar shall continue to maintain the Lock on the disputed domain name during the pendency of any [judicial proceedings and] arbitration, as applicable.

**Recommendation #4A:**

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” under the URS[[9]](#footnote-9).

**Recommendation #4B:**

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

**Binding Arbitration following a Determination under the URS**

1. When submitting its complaint, an IGO Complainant shall also indicate whether it agrees that final determination of the outcome of the URS proceeding shall be through binding arbitration, in the event that the registrant also agrees to binding arbitration.
2. In communicating a URS Determination to the parties where the complainant is an IGO Complainant, the URS provider shall also request that the registrant indicate whether they wish to file an appeal under Section 13 of the URS and/or whether it wishes to seek a review of the URS Determination by way of binding arbitration. The request shall include information regarding the applicable arbitral rules, which shall be determined by the Implementation Review Team. Existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR)[[10]](#footnote-10), the World Intellectual Property Organization (WIPO)[[11]](#footnote-11), the United Nations Commission for International Trade Law (UNCITRAL)[[12]](#footnote-12) and the Permanent Court of Arbitration (PCA)[[13]](#footnote-13) should be considered.
3. **PROPOSAL UNDER CONSIDERATION AS REGARDS MAINTAINING AN ARBITRATION OPTION FOLLOWING INITIATION OF COURT PROCEEDINGS BY THE REGISTRANT** [Where the registrant initiates court proceedings and the IGO Complainant has not agreed to submit to Mutual Jurisdiction, and [if] the result is that the court is unable to proceed further, the registrant may submit the dispute to binding arbitration within ten (10) business days from the court order declining jurisdiction over the IGO, by submitting a request for or notice of arbitration[[14]](#footnote-14) to the competent arbitral institution, with a copy to the IGO Complainant.]

**Recommendation #5A:**

Any arbitration will be conducted in accordance with the law as mutually agreed to by the parties.

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.

**PROPOSAL UNDER CONSIDERATION REGARDING APPLICABLE LAW:** [If either party raises concerns to the arbitral tribunal that the law of the registrar’s principal office or the respondent’s place of residence 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.]

*(Note: With respect to the second sentence in the immediately above bracketed option, IGO members of the EPDP team have raised concerns that some jurisdictions may not have a substantive cause of action for the parties to invoke. However, other members of the EPDP team have noted that this concern may arise for all UDRP complainants; as such, it will be more appropriate to address this topic as part a general review of the UDRP.)*

**Recommendation #5B:**

In addition, the following non-exhaustive general principles (which can be further developed by the expected Implementation Review Team) shall govern all arbitral proceedings conducted through this process:

* 1. 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;
	2. The arbitral tribunal should consist of one or [three] neutral and independent decision makers, who cannot be the panelist(s) who rendered the initial UDRP [or URS] decision; and
	3. Both parties should be able to present their case in a complete manner. The arbitral tribunal should, for example, have the authority within reasonable discretion to allow for, or request, additional written submissions, and it should be possible to hold hearings (which may be conducted online).

In all cases, either party has the right to file proceedings in a court, up to the point in time when an arbitration proceeding is commenced (if any).

1. 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-1)
2. See Section 3(b)(xii) of the UDRP Rules. <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>. [↑](#footnote-ref-2)
3. See <https://www.icdr.org/rules_forms_fees>. [↑](#footnote-ref-3)
4. See <https://www.wipo.int/amc/en/arbitration/rules/index.html>. [↑](#footnote-ref-4)
5. See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>. [↑](#footnote-ref-5)
6. See <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>. [↑](#footnote-ref-6)
7. This option, if approved and implemented, will preserve the registrant’s ability to agree to binding arbitration throughout the duration of any judicial proceedings that it may file prior to such agreement. In the absence of this option, the registrant may only elect to pursue either judicial proceedings or binding arbitration within the ten (10) day period following the relevant registrar’s notification of the outcome of the initial UDRP decision. [↑](#footnote-ref-7)
8. The EPDP team is using the terms “notice of arbitration” and “request for arbitration” as the former is the term used by UNCITRAL while the latter is used for proceedings at the ICC and WIPO.] [↑](#footnote-ref-8)
9. See Section 3(b)(ix) of the URS Rules. <https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf>. [↑](#footnote-ref-9)
10. See <https://www.icdr.org/rules_forms_fees>. [↑](#footnote-ref-10)
11. See <https://www.wipo.int/amc/en/arbitration/rules/index.html>. [↑](#footnote-ref-11)
12. See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>. [↑](#footnote-ref-12)
13. See <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>. [↑](#footnote-ref-13)
14. The EPDP team is using the terms “notice of arbitration” and “request for arbitration” as the former is the term used by UNCITRAL while the latter is used for proceedings at the ICC and WIPO.] [↑](#footnote-ref-14)