5IGO WORK TRACK: PROPOSED RECOMMENDATIONS
Draft as of 20 July 2021

Problem Statement:
International Governmental Organizations (IGOs) currently face two challenges when considering whether to file a complaint under either the Uniform Domain Name Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension procedure (URS). These challenges arise because of the requirements that:

(1) A complainant must demonstrate that the domain name at issue is identical or confusingly similar to a trademark in which the complainant has rights; and
(2) A complainant must agree to submit to Mutual Jurisdiction, which can compromise an IGO's immunities and privileges in relation to the jurisdiction of a court, in the event that a losing registrant files suit against the IGO which prevailed in the initial UDRP or URS decision phase.

The IGO Work Track has deliberated on both issues and considered possible policy solutions in light of the GNSO Council's instructions, which were that the Work Track's final recommendations should be "generally consistent" with the four IGO-INGO Curative Rights Policy Development Process (PDP) recommendations that the GNSO Council has already approved, including a restriction against developing a new and separate dispute resolution process for IGOs.

Proposed Solution:
As a result of its discussions, the IGO Work Track recommends addressing the two issues noted above in the following manner.

1. **How IGO Complainants May Demonstrate the Requisite Rights to Proceed Against a Domain Name Registrant**

Recommendation 1: The IGO Work Track 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 (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 distinct entity, organ or program of the United Nations."

(ii) Additionally, 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)."

Rationale for Recommendation 1:

The IGO Work Track's scope of work in reference to IGO-INGO Curative Rights Recommendation #5, as instructed by the GNSO Council had specifically directed that the work should focus on *"whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1, 2, 3 & 4 of the PDP Final Report and:*

A. *accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;*
B. *does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;*
C. *preserves registrants' rights to judicial review of an initial UDRP or URS decision; and*
D. *recognizes 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.*

The IGO Work Track has kept Recommendation #5 (regarding IGO jurisdictional immunity) at the forefront in its work. However, it concluded that a feasible and appropriate policy solution cannot be crafted simply by looking at that recommendation in isolation. Since Recommendation #5 is concerned with the outcome of a dispute resolution process where the affected IGO claims immunity from the jurisdiction of a court, the IGO Work Track believes it is necessary to first determine how and which IGOs are able to gain entry into the dispute mechanism in the first place, especially as IGOs may not own trademarks in their names or acronyms; in other words, concentrating on the end of the process only is not meaningful if the IGOs will not be in a position to ever use the mechanism in the first place. In this context, the Work Track:

- Considered addressing the jurisdictional issue presented by Recommendation #5 by proposing that IGOs be exempt from the current requirement to agree to a Mutual Jurisdiction (as defined by the Uniform Domain Name Dispute Resolution Policy), as indicated in Recommendation 2A.
- Established better defined and determinative eligibility requirements to demonstrate unregistered rights under the UDRP.

This solution seems to preserve a losing registrant's right to file court proceedings while allowing for both parties to agree to binding voluntary arbitration, which are consistent with the direction from the Council's guidance.

2. **How to Recognize IGO Jurisdictional Immunity While Preserving a Registrant's Right to File Proceedings in a Court of Mutual Jurisdiction**

Recommendation 2A: If the below recommendations are adopted by the GNSO Council, then the IGO WT recommends that the original Recommendation #5 should be rejected.

Recommendation 2B: The IGO Work Track recommends that IGO Complainants (as defined under the proposed modifications to the UDRP and URS Rules) be exempt from the requirement to agree to submit to Mutual Jurisdiction when filing a complaint under the UDRP or URS.

Recommendation 2C: The IGO Work Track recommends that the following be added to the UDRP and URS in order to serve as a judicial review of an initial dispute resolution determination.

Binding Arbitration **Following the Initial Panel Determination**

- In communicating a UDRP or URS panel determination to the parties where the complainant is an IGO Complainant, the UDRP or URS 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 like ICDR, WIPO, UNCITRAL should be considered.
- If the UDRP or URS provider receives an affirmative response from the registrant within ten business days, it shall promptly inform both parties and the relevant registrar. The relevant registrar shall stay the implementation of the initial UDRP or URS decision until it has received official documentation concerning the outcome of the arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute (including that the registrant did not wish to invoke any right to appeal).
- The Registrar shall continue to maintain the Lock on the disputed domain name during the pendency of the arbitration.
- The arbitration will be conducted in accordance with the law as mutually agreed to by the parties; if the parties are unable to agree, then the IGO Complainant may nominate the applicable law to be either that of the relevant registrar's principal office or where the respondent is resident.
- In addition, the following but not exhaustive (can be further developed by the Implementation Review Team), general principles 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;

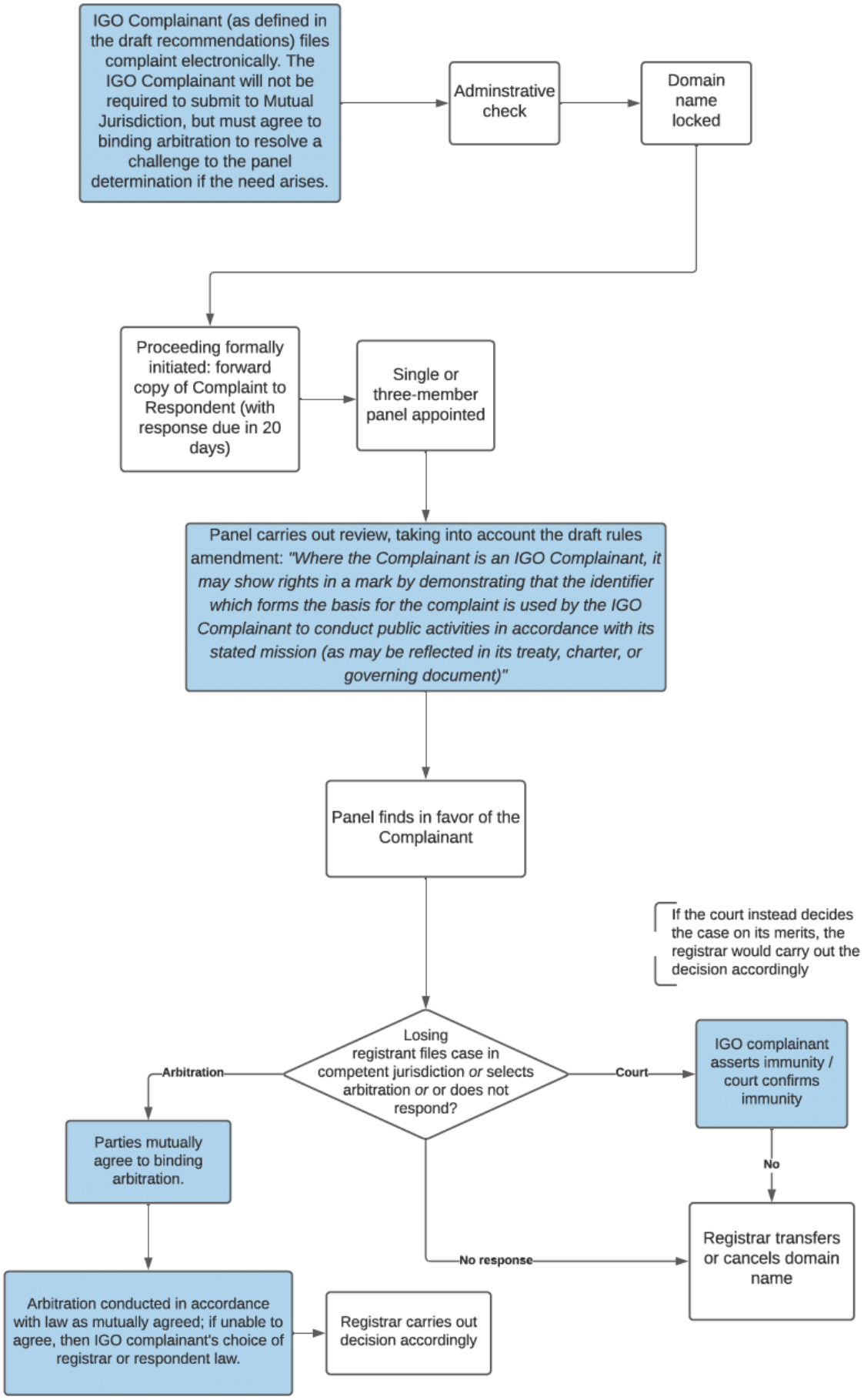
2. The arbitral tribunal should consist of one or [three] neutral and independent decision makers, who should not be panelist(s) who rendered the initial UDRP or URS decision; and
3. Both parties should be able to present their case in a complete manner. The arbitral tribunal should, for example, have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

- Either party has the right to file proceedings in a court of competent jurisdiction, up to the point in time when it informs the UDRP or URS provider of its agreement to submit to binding arbitration.

Rationale for Recommendation 2:

TBD, will be completed after WT deliberation.

Text of Recommendation 5 from the IGO-INGO Access to Curative Rights PDP Final Report: 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).


IGO Complainant (as defined in the draft recommendations) files complaint electronically. The IGO Complainant will not be required to submit to Mutual Jurisdiction, but must agree to binding arbitration to resolve a challenge to the panel determination if the need arises.
Adminstrative check
Domain name locked
Proceeding formally initiated: forward copy of Complaint to Respondent (with response due in 20 days)
Single or three-member panel appointed
Panel carries out review, taking into account the draft rules amendment: "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)"
Panel finds in favor of the Complainant
If the court instead decides the case on its merits, the registrar would carry out the decision accordingly
Losing registrant files case in competent jurisdiction or selects arbitration or or does not respond?
Arbitration
Court
IGO complainant asserts immunity / court confirms immunity
No
Parties mutually agree to binding arbitration.
No response
Registrar transfers or cancels domain name
Arbitration conducted in accordance with law as mutually agreed; if unable to agree, then IGO complainant's choice of registrar or respondent law.
Registrar carries out decision accordingly