Questions relating to Sovereign Immunity of IGOs

**BACKGROUND**

This ICANN Working Group (“WG”) is seeking to better understand the applicability of the principle of sovereign immunity to international intergovernmental organizations (“IGOs”). The WG recognizes that an IGO is an organization established by an international treaty and which possesses international legal personality of its own, with members that generally (though not universally) consist of sovereign nation states. As such, the WG acknowledges that an IGO would enjoy special privileges and immunities under international law, which would generally include immunity from the jurisdiction of a national court.

Under ICANN’s Uniform Dispute Resolution Policy (“UDRP”)[[1]](#footnote-1), a Complainant may file a complaint in order to have a third party’s domain name registration canceled or transferred to the Complainant, where that domain name is: (1) allegedly identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and (2) not one in which the Respondent has rights or legitimate interests; and (3) has been registered and is being used in bad faith by the Respondent. A number of IGOs have informed ICANN that they do not rely primarily on the UDRP to address situations where a third party has registered an IGO’s name or acronym as a domain name, because the Policy requires that a Complainant must agree to submit to the jurisdiction of a national court[[2]](#footnote-2) for purposes of appeal from the decision of a UDRP arbitrator.

Our initial research into the topic of sovereign immunity has revealed that for the most part this is no longer accepted as an absolute principle by all states, but is rather viewed today as restrictive in nature, in that a difference can be drawn between a state’s official, or public, acts, and its private ones. We understand, however, that there is no clear standard or test to determine the scope and limits of sovereign immunity as a result of this distinction. We understand further that there is a body of customary international law that also applies to questions of sovereign immunity, including the privileges and immunities enjoyed by IGOs.

We would therefore greatly appreciate your expertise in assisting us with developing answers to the specific questions below. Your knowledge and assistance will help the WG determine whether or not the UDRP and other dispute resolution mechanisms ought to be modified to address the needs and concerns of IGOs.

**QUESTIONS**

1. What, if any, is the difference when a claim of sovereign immunity is asserted by an IGO when defending a complaint brought against it (i.e. when used as a “shield” rather than as a “sword”), in contrast to a case when an IGO files the complaint itself and thereby arguably submits to the jurisdiction of a national court?
2. Is the specific instance described in Question 1 above – of an IGO’s needing to agree to submit to national jurisdiction under the UDRP – an example of a situation where an IGO would be compelled to waive its immunity in order to defend its rights (i.e. the “shield” argument)?
3. Is it relevant that the UDRP permits both the Complainant and Respondent to bring an action in a court of competent jurisdiction at any time, and that the pre-appeal filing of such an action immediately suspends the UDRP proceeding?
4. How do IGOs handle clauses providing for submission to jurisdiction and choice of law in standard form and mass-market contracts (e.g. when licensing software or entering into standard arrangements for the provision of goods and services)?
5. In view of the sovereign immunity issue, what are the generally recognized forms of action that IGOs are likely to pursue when they believe their rights (including beyond the domain name system or trademark law) are infringed[[3]](#footnote-3)? For example, are there inter-governmental, national or other legal or judicial mechanisms that IGOs can use and that do not involve a waiver of sovereign immunity?
6. What, if any, are the factors that may limit or impact the applicability of a sovereign immunity claim by an IGO? Is its mission or charter relevant to this determination?
1. The UDRP is a mandatory administrative proceeding designed to be faster and cheaper than most court proceedings; it is an optional addition to and not a preemptive substitute for a Complainant or Respondent’s under applicable law, including access to the judicial system. As an ICANN Consensus Policy, it is binding on all ICANN registries and registrars (who are contractually bound to ICANN) and thus applies to all registrants of domain names in the gTLD space. The Policy can be viewed in its entirety at <https://www.icann.org/resources/pages/policy-2012-02-25-en>. [↑](#footnote-ref-1)
2. In accordance with Paragraph 3(b)(xiii) of the Rules for UDRP, the Complainant has to submit, with respect to any challenges that may be made by the Respondent 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, meaning a court jurisdiction at the location of either a) the Registrar, or b) the Respondent’s address as shown in the Registrar’s Whois database. [↑](#footnote-ref-2)
3. The Working Group has been informed that some IGOs may rely on national governments or governmental agencies to bring suit, while in some appropriate cases an IGO may have assigned the relevant rights to a third party (e.g. an attorney) such that the complaint can be filed by that third party. Can you confirm and elaborate on such arrangements? [↑](#footnote-ref-3)