Follow Up Questions to the IGO Small Group: Sovereign Immunity Issues

This ICANN Working Group (“WG”) is currently seeking to better understand the applicability and appropriate scope of the principle of sovereign immunity to international intergovernmental organizations (“IGOs”). The WG is aware that an IGO is commonly viewed as an organization established by an international treaty and which may possess 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 can enjoy special privileges and immunities under international law. For purposes of this Policy Development Process (“PDP”), the immunity in question would be immunity from the jurisdiction of a national court, i.e. jurisdictional immunity.

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: (1) is allegedly identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and (2) is 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. IGOs have informed ICANN that they rarely and only exceptionally rely on the UDRP to address situations where a third party has registered an IGO’s name or acronym (or a confusingly similar variant) as a domain name, as the Policy requires a Complainant to agree to submit to the jurisdiction of a national court[[2]](#footnote-2) for purposes of a Respondent’s appeal from the decision of a UDRP panelist canceling or transferring the domain name in dispute.

In the course of our preliminary research, we came across two instances where IGOs on the GAC list of IGOs filed complaints under the UDRP, based on trademark rights that each organization held in certain national jurisdictions. While neither concerned the IGO’s acronym (the domain names in dispute were worldbank.net[[3]](#footnote-3) and bfois.org[[4]](#footnote-4)), the two cases demonstrate limited instances when an IGO will decide to agree to the jurisdictional requirement of the UDRP.

Our initial research into the topic of sovereign immunity indicates that in the evolution of modern public international law the concept of “absolute” immunity has largely given way to the more nuanced idea of “restricted” (or qualified) immunity, where the distinction will generally be drawn between whether the act in question is a public (or official) act or one of a more private character, e.g. if it involves a commercial transaction. It would appear that while states generally accept the abstract concept of sovereign immunity, they differ on the extent to which they will grant the immunity in particular cases, although there is recognition that immunity should respect the IGO’s essential purpose and related functions. Where IGOs are concerned, we are informed that a number of countries now consider such immunity to be functional only, i.e. to the extent necessary for the IGO to perform its functions and fulfill its objectives. We are aware that several countries have enacted legislation concerning the privileges and immunities to be granted to IGOs, and we understand that there is no clear single standard defining the scope and limits of jurisdictional immunity in all cases as a result of these developments. We also note that, under Article 6ter of the Paris Convention for the Protection of Industrial Property, protection for IGO names and abbreviations requires that an IGO first notify the World Intellectual Property Organization who, acting as intermediary, will communicate this to all States that are obligated to comply with the Convention; and a State may transmit an objection to extending such protection for up to twelve months following such communication.

The WG acknowledges the IGO Small Group’s note in its January 2015 response that the rare decisions by an IGO to agree to the Mutual Jurisdiction requirement of the UDRP are made at the highest levels of the organization’s governance structure. While the WG believes that it will be a rare case where a Respondent who registers a domain name that is identical or confusingly similar to an IGO’s name or acronym and who loses in a UDRP filing will appeal the decision, we understand that the IGOs’ central concern is likely the fact that the Mutual Jurisdiction requirement is a blanket requirement in all cases, and as such needs to be agreed to at the very initial stages of filing a Complaint. Nevertheless, without such an appeals mechanism the UDRP could arguably preempt the right to judicial access of a losing respondent who wishes to seek court review.

As the WG has begun our research and deliberations into the scope of and possible solutions for this problem, we would greatly appreciate the IGO Small Group’s assistance with the following questions. We believe that your response will be very helpful in enabling us to fully understand the nature of the issue. Similarly, we will also be reaching out to the GAC for its input on the topic.

1. ***How do IGOs handle standard contract clauses on jurisdiction and choice of law in mass-market and other standard form contracts (e.g. when licensing software or entering into standard arrangements for the provision of goods and services)?***
2. ***When IGOs register their own second level domain names, how do they handle standard clauses in domain name registration agreements covering the binding nature of the UDRP as an ICANN Consensus Policy, governing jurisdiction and choice of law?***
3. ***When IGOs decide whether or not to file a complaint in a UDRP proceeding, does it matter if the Mutual Jurisdiction specified is that of the registrar concerned or of the registrant/respondent?***
4. ***In view of the jurisdictional concerns, what are the forms of legal action that IGOs are likely to pursue when they believe their rights (including those beyond the domain name system or trademark law) are infringed[[5]](#footnote-5)? For example, are there inter-governmental, national or other legal or judicial mechanisms that IGOs can use that do not involve a waiver of immunity?***
5. ***Would removing the Mutual Jurisdiction requirement prejudice an individual’s right of access to courts, e.g. if the role of the court were replaced by a binding private arbitral mechanism? Would this change the nature of the UDRP from an optional supplement to national law to a preemptive procedure? Are there any safeguards that can be put into place that can adequately replace the diminution of such a right?***
6. ***Since the scope of immunity for IGOs can vary across different national jurisdictions, would removal of the Mutual Jurisdiction requirement amount to an endorsement of the old model of absolute immunity and thus not reflect the current state of international law?***

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 rights and remedies 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 applicable to the 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 in the location of either: (a) the Registrar (if this is what is agreed to by the Respondent in its Registration Agreement); or (b) the Respondent’s address at the time of the Complaint, as shown in the Registrar’s Whois database. [↑](#footnote-ref-2)
3. See <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0222.html> (International Bank for Reconstruction & Development d/b/a The World Bank v. Yoo Jin Sohn, Case No. D2002-0222). [↑](#footnote-ref-3)
4. See <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0570.html> (Bank for International Settlements v. G.I. Joe, Case No. D2004-0570). [↑](#footnote-ref-4)
5. 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-5)