**QUESTIONS ON JURISDICTIONAL IMMUNITY FOR INTERNATIONAL GOVERNMENTAL ORGANIZATIONS**

**I. Background**

We write to seek your assistance in ensuring that we have an accurate understanding of the current position in public international law on the issue of immunity from the jurisdiction of national courts for international governmental organizations (“IGOs”).

We are the co-chairs of an ICANN Working Group (“WG), chartered to consider whether ICANN’s current dispute resolution processes - which enable trademark owners to seek either a transfer, cancellation or suspension of an identical or confusingly similar domain name registered by a third party in bad faith (among other criteria) – should be amended to better address the needs of IGOs and international non-governmental organizations. The dispute resolution processes in question are the Uniform Dispute Resolution Policy (“UDRP”), which has been in place since the inception of ICANN; and the Uniform Rapid Suspension procedure (“URS”), which was created recently as a rights protection mechanism for the new gTLD program. Both of these are mandatory administrative proceedings to which a registrant of a domain name has to agree when registering a domain name. In either proceeding, either a single panelist (UDRP & URS) or a three-member panel (at the respondent’s option in UDRP) determines the dispute in accordance with the criteria and rules applicable under the particular policy[[1]](#footnote-1), on the basis of electronically filed complaints and responses (if any) rather than in-person hearings. The general grounds for prevailing in a UDRP or URS is that: (1) the domain registrant has no legitimate rights or interests in the domain; (2) the domain name is identical or confusingly similar to a trademark owned by the complainant; and (3) the domain was both registered and is being used in bad faith. The complainant must demonstrate these factors by a preponderance of the evidence in a UDRP action, and by clear and convincing evidence in a URS.

IGOs have informed ICANN that they perceive certain challenges with using the existing dispute resolution processes. For purposes of this inquiry, some IGOs have highlighted difficulty with the requirement that, in order to file a complaint against a third party registrant of a domain name that uses the IGO’s name or acronym, the IGO-complainant must first agree to a “Mutual Jurisdiction” requirement when filing a UDRP. This requirement is that, for purposes of a possible appeal from the panel’s initial determination, an IGO must agree to submit to the jurisdiction of national courts either in the registrant’s (or her registrar’s) location[[2]](#footnote-2) in the event of an appeal of the panel decision (URS appeals go back to the arbitration provider, not a national court). Such an appeal is likely only in the rare circumstance that the domain registrant/respondent has lost a UDRP decision and is seeking judicial appeal.

The WG is currently seeking to better understand the application and scope of the principle of immunity to IGOs; specifically, jurisdictional immunity. 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.

In the course of our preliminary research, we came across a number of instances where, notwithstanding any jurisdictional concerns, IGOs have successfully filed complaints under the UDRP, based largely on trademark rights that each organization held in its name and/or acronym in certain national jurisdictions. Because these cases demonstrate that there are times (even if these turn out to be exceptional) when an IGO will decide to agree to the jurisdictional requirement of the UDRP, we are seeking to better understand the nature of IGOs’ concern over mandatory administrative proceedings in the context of jurisdictional immunity.

Our initial research into the topic of indicates to us that there is ***no universal legal rule that defines a single scope of jurisdictional immunity for IGOs***. Our sense is that modern public international law has evolved such that 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. involving a commercial transaction. It would appear to us that while States generally accept the abstract concept of IGO immunity, they differ on the extent to which they will grant the immunity in particular cases[[3]](#footnote-3). Further, an increasing 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.

The WG is further aware also that a distinction may need to be drawn between a State (or government) and an IGO, given their different natures and the diversity of types of IGOs. We are informed that the distinction may matter on issues such as the source of jurisdictional immunity – such as whether this is derived from treaty or from customary international law[[4]](#footnote-4) – and in relation to specific questions such as when a particular IGO will be recognized as possessing legal personality within a particular country.

 As a final background matter, our WG has reached a preliminary decision that an IGO may have the standing to file a UDRP or URS if it has opted for the protections afforded by Article 6ter of the Paris Convention, by filing a request with the World Intellectual Property Organization (“WIPO”). WIPO then notifies all signatories to the Paris Convention and all members of the World Trade organization (“WTO”) of that election – however, under Article 6ter any nation is free to object and refuse to provide protection to an IGO under its national trademark system.

The WG believes that it will be a rare case where a registrant-respondent who registers a domain name identical or confusingly similar to an IGO’s name or acronym and loses in the administrative proceeding will appeal a decision in which the domain is ordered transferred, canceled or suspended (as applicable). Nevertheless, we remain concerned that a potential policy recommendation that ICANN remove the ability to appeal to a national court could arguably preempt the right to judicial access of a losing respondent who wishes to seek court review and thus reduce the due process protections for domain name registrants. The UDRP and URS were created as alternatives to traditional litigation and, while ICANN endeavors to protect existing legal rights, it is not empowered to create or extinguish such rights.

We would therefore greatly welcome your expertise and advice on this matter, which would assist us in fully understanding the state of public international law in regards to jurisdictional immunity for IGOs.

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**II. Questions**

1. ***Is the Working Group’s understanding of the evolution and current status of IGO jurisdictional immunity (as summarized above) correct under public international law principles? Are there additional principles, nuances or other relevant information that you think may be helpful for us to be aware of as we continue our work?***
2. ***To the best of your knowledge, how do IGOs handle standard contractual clauses (e.g. in software or services agreements) concerning submission to a particular jurisdiction? Is it common practice, for example, for IGOs to insist on binding arbitration instead?***
3. ***To the best of your knowledge, would it be relevant whether the jurisdiction specified is the location of the other (non-IGO) party (which in the present case would be either that of the domain name registrant or her registrar), one selected by the IGO or the location of one of the IGO’s constituent member states? What if the Mutual Jurisdiction requirement specified that, to apply to IGOs, it has to be a jurisdiction of one of its member states? Is it common to expressly limit an IGO’s submission to jurisdiction only to that specific dispute (in this context for ICANN it would mean the dispute involving that specific domain name and registrant)?[[5]](#footnote-5)***
4. ***Are there other forms of legal action that IGOs can pursue when they believe their rights (including those going beyond the domain name system or trademark law) are infringed[[6]](#footnote-6)? 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? What would be the difficulties, if any, with a mechanism by which an IGO member state acts on the IGO’s behalf?***
5. ***Given that many states require proof of ‘use in commerce’ in granting a trademark, and that trademark disputes are primarily commercial in nature (although there are consumer protection aspects), how would this affect your view of the appropriate breadth of immunity for IGOs involved in trademark disputes?***
6. ***How does current International law and practice balance the immunity claims of IGOs against the legal rights of private parties, such as domain registrants?***

On behalf of our Working Group, we thank you in advance for your consideration of these questions. Your reply, as well as any additional comments/information that you may wish to make, will be an important base for our better understanding of IGOs’ needs and our eventual policy recommendations on how to solve any problems and/or ambiguities.

Sincerely,

Philip Corwin & Petter Rindforth (Working Group co-chairs)

**ANNEX A: LIST OF SELECTED COUNTRIES WITH LEGISLATION CONCERNING IGO IMMUNITIES**

***Australia*** – the *Foreign States Immunities Act* (1985), granting immunity to foreign States as well as individuals or corporations that are their agencies and instrumentalities, subject to certain exceptions (including a “commercial transactions” exception)

***Canada*** – the *State Immunity Act* (1985), granting immunity to foreign States, their political subdivisions and agencies, subject to certain exceptions (including a “commercial activity” exception); also the *Foreign Missions and International Organizations Act[[7]](#footnote-7)* (1991), granting immunity to IGOs[[8]](#footnote-8) similar to that enjoyed by the UN under the relevant UN Convention (see below)

***Malaysia*** – the *International Organizations (Privileges and Immunities) Act* (1992), applying the two Conventions protecting the UN and its specialized agencies (see below) as well as extending protection to other international organizations to be designated from time to time by the Minister for Foreign Affairs

***The United Kingdom*** – the *International Organisations Act (1968)*, granting immunity to those IGOs that the UK is a member[[9]](#footnote-9) of and that have been recognized to have legal personality by an Order in Council

***The United States*** – the *Foreign Sovereign Immunities Act* (1976), granting immunity to foreign States, their political subdivisions, agencies and instrumentalities, subject to certain exceptions (including a “commercial activity” exception); also, the *International Organizations Immunities Act* (1945), granting IGOs “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”.

Note: Because the IOIA predates the FSIA, we understand that there is some disagreement amongst US courts and academics as to whether the more restrictive provisions of the FSIA now apply also to IGOs – this arises because the IOIA was enacted when the prevailing theory of immunity was more of an absolute one.

1. These panelists are selected from a roster of independent individuals qualified for deciding such cases, and must confirm the absence of any potential conflict of interest before taking a case. See <http://www.wipo.int/amc/en/center/faq/domains.html#9>. Other ICANN-accredited arbitration providers have similar standards in place. [↑](#footnote-ref-1)
2. In accordance with Paragraph 3(b)(xiii) of the Rules applicable to the UDRP. The WG notes that 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>. The equivalent provision in the Uniform Rapid Suspension procedure is Paragraph 3(b)(ix) of the Rules applicable to the URS; the procedure in its entirety can be viewed here: <http://newgtlds.icann.org/en/applicants/urs>. The URS is not yet an ICANN Consensus Policy and was created as an additional protection for the new gTLD program. [↑](#footnote-ref-2)
3. See Appendix A for a list of illustrative laws in select countries that the WG came across as part of our research. [↑](#footnote-ref-3)
4. Our limited research on the case law on this seems to show the position to be rather fragmented, with conflicting decisions in some countries (e.g. Belgium, France, Germany, Italy) and a more prevalent view in others (e.g. the Netherlands courts have tended to recognize IGO immunity as being based on customary international law). [↑](#footnote-ref-4)
5. The WG understands that some of these possibilities may create broader immunity issues beyond the domain name context and is seeking to understand the impediments faced by IGOs in exploring these alternatives. [↑](#footnote-ref-5)
6. The WG has been informed that some IGOs may rely on national governments or governmental agencies to bring suit. In addition, we have found cases where a third party (e.g. a law firm) holds trademark rights in its own name for the benefit of an IGO and thus is able to file a UDRP complaint on behalf of that IGO. [↑](#footnote-ref-6)
7. We note that this statute contains a definition of “international organization”, meaning “an intergovernmental organization, whether or not established by treaty, of which two or more states are members”; this seems more specific than the definition used in the Vienna Convention. [↑](#footnote-ref-7)
8. We found the most current list of IGOs that have been granted protection in Canada at <http://laws-lois.justice.gc.ca/eng/acts/F-29.4/>. [↑](#footnote-ref-8)
9. For those IGOs where the UK is not a member, we note the Act can still apply if the organization “maintains or proposes to maintain an establishment in the UK”. [↑](#footnote-ref-9)