**QUESTIONS & RESPONSE FROM MR. HANS CORELL ON SOVEREIGN IMMUNITY FOR IGOs**

**6 March 2015**

The questions you are putting are very complex. Against this background, I must explain that I have not been actively involved in dealing with immunity questions since I left the United Nations in March 2004. This means that I do not know about the latest development with respect to the subject matter that you raise.

From my personal experiences, I can only recall two cases where I had to intervene with entities that had registered domain names that were very similar to the UN domain name. In one case, they attempted to have the UN pay for the registered domain name. I categorically refused, and eventually it was possible for us, in one case through an intermediary, to convince those who had registered the names that they were acting in very bad faith and in a manner that was unacceptable. So, in a sense, these matters were settled “amicably”.

This means that I have to be very careful in expressing any firm views in answering your questions. Also, when it comes to immunity, my focus was on the United Nations. Here we have a very clear provision in the Convention the Privileges and Immunities of the United Nations, which can be found at <http://www.un.org/en/ethics/pdf/convention.pdf>. Specifically, I would like to refer to the following provisions:

Article II

PROPERTY, FUNDS AND ASSETS

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Article VIII

SETTLEMENTS OF DISPUTES

SECTION 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the

United Nations is a party;

Basically, the latter provision means that if there is a dispute, the UN has to offer a settlement out of court. This is normally done through arbitration. During my tenure we had a few cases of arbitration, mainly relating to contracts that the UN had entered into. In such situations the UN is obliged to abide by the award handed down by the arbitration panel.

Whether this is a suitable method with respect to the disputes that you are referring to is not so easy to say. However, since the proceedings that you are applying resemble an arbitration procedure, maybe such procedures could be acceptable to IGOs. This is something that has to be discussed with those who are responsible for legal matters at present in different organizations.

My responses to your questions must be understood against the background of this information. **Answers to Questions:**

*Question 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?*

In my experience, an IGO does not submit to the jurisdiction of a national court. I refer to my general explanation above. Irrespective of whether the organization is defending itself, or whether it takes action itself, it would have to resort to the dispute settlement mechanisms that I just referred to.

*Question 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)?*

The answer to this question is really the same as my answer to question 1. An IGO is not compelled to waive this immunity as long as it offers another method of settling the dispute.

*Question 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?*

To be able to answer this question, I really need to know to what extent IGOs have accepted the UDRP proceedings and if they have done so without making any reference to the rules that apply with respect to their immunity against national jurisdictions. If they have accepted the UDRP proceedings, I am uncertain whether this acceptance could be seen as a waiver of immunity. I very much doubt that.

*Question 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)?*

I really do not feel confident answering this question for the simple reason that there has probably been a tremendous development in this field over the last few years. I refer to my comments towards the end.

*Question 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[[1]](#footnote-1)? 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?*

Again, I can only conclude that I did not encounter this situation except for the two cases I referred to at the outset. With respect to the footnote, I can only conclude that it would be natural in case there is a dispute involving the IGO to turn, at least informally, to governments to see whether they can find a solution. However, I am not sure that there are any predetermined mechanisms to deal with such situations. Attempts would rather be made to solve issues amicably. If that does not work, it would be necessary to resort to the kind of dispute settlement mechanisms foreseen under the existing immunity provisions, i.e. offering a method of solving disputes without waiving the immunity.

*Question 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?*

The immunity is there, and it is not a question of limiting it. On the other hand, depending on the circumstances, the IGO may have to work out a method of settling a dispute in an honorable manner. This very much depends on the subject matter. One issue that is presently under discussion is the immunity invoked by the UN in relation to the damages caused to the population in Haiti in the wake of the epidemic that UN troops are said to have brought with them into the country. As I understand it, the UN is trying to solve this question in a general manner, rather than subjecting itself to the jurisdiction of national courts in relation to individual claims.

Let me end by the following general reflections. Since I am not familiar with the development over the last decade with respect to the protection of domain names of IGOs I believe that it is very important to establish the facts. To what extent have IGOs accepted the dispute settlement mechanisms that you are applying? I have gone over the Uniform Domain Name Dispute Resolution Policy and the Rules for Uniform Domain Name Dispute Resolution Policy and conclude that they are fairly similar to arbitration procedures, except for the references to national jurisdictions. To what extent are IGOs customers of ICANN? I certainly understand that those who have a .int top level domain name are customers. But in their contacts with ICANN, to what extent have they accepted the UDRP procedures?

My spontaneous reaction is that it would be possible for them to use these procedures in case there are disputes on the understanding that the procedures cannot entail a general waiver of immunity. In other words, disputes would have to be settled exclusively by the panels nominated under the procedures.

I do not know what contacts you have had with the IGOs with respect to these questions. As I said, my experience in this field is basically limited to the United Nations. But it struck me that one avenue could be that you approach the organizations that belong to the United Nations system. During my tenure as UN Legal Counsel I had the privilege of chairing the meetings of the legal advisers of the organizations that belong to this system. They are quite a few: see the Annex. Many of these organizations have .int top level domain names.

Depending on the situation and the extent to which these organizations are your customers, one method could be to contact these legal advisers through the present UN Legal Counsel Miguel de Serpa Soares and ask him and his colleagues to look at your procedures and provide feedback

that could prove useful for your Working Group. Since your mandate obviously includes the option of modifying the procedures, it is always useful to listen to those who may have to resort to such procedures.

An additional element that ought to contribute to a productive interaction with the IGOs should be that I have great difficulties in believing that IGOs should register domain names in bad faith. On the contrary, their presence and their acronyms are so obvious that nobody can doubt the seriousness when they formulate possible domain names. This leads me to the conclusion that the typical dispute where an IGO is involved is when the organization has to defend its own integrity. In one of the cases I had to deal with the other party had registered, if I recall it correctly, “theunitednations” before the TLD. I therefore believe that it could be an interest among the

IGOs to have access to a dispute settlement mechanism that would provide an effective

remedium where their rights are violated, without them having to waive their immunity.

Finally, with respect to domain names of international NGOs I have no experience at all. However, irrespective of the fact that they are considered international, they still have to be registered somewhere, which means that they would be subject to the jurisdiction of their host state in the matters that we now discuss.

I hope that this information can be of use to you.

**Annex**

UNITED NATIONS

United Nations

United Nations Office of the High Commissioner for Human Rights (UNOHCHR) International Trade Centre (ITC)

United Nations Conference on Trade and Development (UNCTAD)

United Nations Development Programme (UNDP) United Nations Environment Programme (UNEP) United Nations Population Fund (UNFPA)

United Nations Human Settlements Programme (UNHABITAT) United Nations High Commissioner for Refugees (UNHCR) United Nations Children’s Fund (UNICEF)

United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

United Nations University (UNU) World Food Programme (WFP)

SPECIALIZED AGENCIES

Food and Agriculture Organization (FAO)

International Bank for Reconstruction and Development International Development Association

(IBRD/IDA)

International Civil Aviation Organization (ICAO) International Fund for Agricultural Development (IFAD) International Finance Corporation (IFC)

International Labour Organisation (ILO) International Maritime Organization (IMO) International Monetary Fund (IMF) International Telecommunication Union (ITU)

United Nations Educational, Scientific and Cultural Organization (UNESCO) United Nations Industrial Development Organization (UNIDO)

Universal Postal Union (UPU) World Health Organization (WHO)

World Intellectual Property Organization (WIPO)

World Meteorological Organization (WMO) World Tourism Organization (UNWTO)

RELATED AGENCIES

International Atomic Energy Agency (IAEA) International Criminal Court (ICC)

Organization for the Prohibition of Chemical Weapons (OPCW)

Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization

(CTBTO)

World Trade Organization (WTO)

TREATY BODIES

Secretariat of the UN Framework Convention on Climate Change (UNFCCC) Secretariat of the United Nations Convention to Combat Desertification (UNCCD)

REGIONAL COMMISSIONS

United Nations Economic Commission for Africa (ECA)

United Nations Economic and Social Commission for Western Asia (UNESCWA) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) United Nations Economic Commission for Latin America and the Caribbean (UNECLAC) United Nations Economic Commission for Europe (UNECE)

1. 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-1)