Memorandum

Date: 2/28/2016

To: Mary Wong, Senior Policy Director

         Steve Chan, Senior Policy Manager

From: Edward Swaine

RE: Synopsis of IGO Immunity Issues

You asked that I provide a synopsis of my draft memo on intergovernmental organization (IGO) immunity, which will be completed after I take further account of your thoughtful input.

1. The central question concerns the scenario in which an IGO is sued in a "Mutual Jurisdiction" by a domain registrant following dispute resolution proceedings under the Uniform Domain Name Dispute Resolution Policy ("UDRP"). This raises at least two distinct immunity issues. The first, and more abstract, is whether the IGO is in principle entitled to immunity with respect to the mark or name-related rights it asserted in the UDRP. The answer is complicated. IGO immunity, which is different from (state) sovereign immunity or official immunity, differs depending upon the IGO in question, the international law basis for its immunity (which may be founded in a multilateral convention like the Convention on the Privileges and Immunities of the United Nations or the Convention on the Privileges and Immunities of the Specialized Agencies, a bilateral treaty, customary international law, or statutory law), and the national jurisdiction in which the question arises.

Depending on these variables, an IGO may be entitled to absolute immunity, functional immunity, or even restrictive immunity. In the United States, for example, resolution might depend on whether the IGO was one protected by the International Organizations Immunities Act (the IOIA), whether the United States had a germane treaty obligation, and whether the IGO in question could be viewed as having compromised its immunity in its establishing agreement. The result might also differ by the particular U.S. court in which the matter arose, since there is a well-established split relating to the scope of IOIA immunity that the Supreme Court has yet to resolve. The differences are material, though sometimes they blur in practice. If an IGO is entitled to absolute immunity, it would in principle be protected by a suit of this kind, as it probably would under a functional approach, but it probably would not under a restrictive approach—akin to the commercial activities exception applied to states.

The second, more immediately relevant question is whether—in light of an IGO's assent to Mutual Jurisdiction, either by virtue of registration or its initiation of UDRP proceedings—its immunity remains available. Here, the better answer is that it would not be. As a general proposition, international law and national law recognize the capacity of IGOs to waive their immunity from suit, and if they do so, they may no longer interpose immunity as a defense if

another party commences a judicial action falling within the scope of that waiver. The grant of Mutual Jurisdiction should establish such a waiver, just as it would for a state entity otherwise entitled to immunity. Such a waiver would be construed narrowly, but barring a novel argument it was compelled, it would permit proceeding against an IGO in a domestic court. This result, like the successful assertion of immunity, is completely orthodox.

Legal analysis depends, accordingly, on the baseline, and permits more than one result. Were there no Mutual Jurisdiction clause, an IGO might be entitled to immunity. If, on the other hand, the status quo were maintained, and Mutual Jurisdiction treated as a *fait accompli*, any immunity would be forfeited. Equitable considerations might play a role in any judicial analysis. For example, if the UDRP were left to stand on its own, without any possibility of judicial recourse, it might be considered an insufficient remedy for domain registrants. Where the IGO has initiated a UDRP complaint, moreover, it has been afforded a (compulsory) alternative recourse to which it would otherwise not be entitled. Still, for IGOs, the fact that they have formally elected to waive immunity is hardly a consolation.

2. There are alternatives to maintaining the status quo and waiver or, at the other extreme, maintaining (and potentially, exaggerating) immunity and stymying judicial recourse. IGOs conventionally resolve this dilemma by affording a non-judicial dispute resolution process, usually consisting of arbitration—according either to an internal procedure (e.g., for employees) or a third-party mechanism like the United Nations Commission on International Trade Law ("UNCITRAL") rules. This situation is different, though: unlike a contract partner who freely elects such an arrangement, as opposed to taking its business elsewhere, a domain registrant would be forced into this concession in order to accomplish registration—essentially, curing the immunity concession presently made by IGOs by imposing a concession on domain registrants, potentially awakening judicial concerns about access to courts. An alternative dispute resolution would also require compliance by a third party, ICANN, to a greater than conventional degree.

ICANN could also adopt a more sophisticated compromise. It could itself distinguish among IGOs, such as by permitting those conventionally entitled to maximum immunity (like the United Nations) to submit disputes to UNCITRAL arbitration or a comparable procedure, perhaps contingent on their agreement to subsidize costs. The Mutual Jurisdiction clause could also be rewritten to make an IGO's treatment depend on whether it would, *under the law applicable in the relevant jurisdiction*, enjoy immunity but for the presence of the Mutual Jurisdiction clause. This would avoid requiring ICANN to prejudge and potentially misconstrue immunity—for example, by respecting IGO immunity in circumstances in which a jurisdiction would not be inclined to afford it anyway—but at the same time, it would not require an IGO to waive immunity to which it would otherwise be entitled. Any immunity-conferring result could ameliorated by a requirement that the IGO submit to one of the above-discussed arbitration alternatives. The final memo will include a draft provision along these lines.

I hope this is of some assistance in the upcoming meetings.