

Further to our discussions on the call last Thursday:

As Mary hasn't yet had chance to post the latest version of the Swaine Memo I have used an extract from the version on the working group Wiki <https://community.icann.org/pages/viewpage.action?pageId=56131791> which is marked final and dated 6/17/2016.

From that document:

"3. Discussion (Bottom of page 8)

The core question is whether an IGO is "entitled to immunity," but the baseline assumptions may be disaggregated. The scope of IGO immunity would most clearly be at issue if the Mutual Jurisdiction provision were irrelevant and the IGO had not itself initiated judicial proceedings, since that would risk waiving any immunity to which it may be entitled, including to counterclaims.²⁰ This might be the case, for example, if a domain-name registrant sought a declaratory judgment against an IGO in relation to some actual or potential infringement.²¹ That scenario, though not otherwise of concern here, does usefully isolate the question as to whether an IGO has a legitimate expectation that it would be entitled to immunity absent the UDRP. If such immunity is minimal or uncertain, then any compromises required by the UDRP loom less large; if the IGO would otherwise be entitled to immunity, however, its potential sacrifice seems more substantial.

As explained in Part A, the answer depends. IGOs generally enjoy immunity under international law, but different jurisdictions apply the law differently, and even within the same jurisdiction different IGOs may be treated differently. Part B then introduces the complication that any such immunity may be waived through the Mutual Jurisdiction provision, and affording such waiver is not the same thing as violating an IGO's immunity. Part C then discusses alternative ways to resolve the situation. ... "

Green Initiating proceedings waives immunity including counterclaims
Blue Scenario (a) below
Red Transfers those rights of scenario (a) to scenario (b)

The rest of the memo is then based on the incorrect assumption that rights can be transferred between the two scenarios.

Proof

Absent UDRP there are two possible ways the immunity question could come before a court:

- (a) A TM owner seeks to acquire a domain which an IGO has registered
- (b) An IGO seeks to acquire a domain which a domain registrant has registered

In (a) the IGO would be entitled to raise an immunity defence
In (b) the IGO would be required to waive immunity for the court to consider the matter.

As the UDRP is an administrative procedure to help take less complex cases out of the judicial system if UDRP is to afford the same protections as any other forum then UDRP needs to take into account both cases.

- (a) A TM owner seeks to acquire a domain which an IGO has registered by bringing a UDRP
- (b) An IGO seeks to acquire a domain which a domain registrant has registered by bringing a UDRP

Conclusion

The working group has not considered (a) which hides the fact that in (b) an IGO is never entitled to jurisdictional immunity after choosing to initiate proceedings. The incorrect Swaine reasoning introduces irrelevant complexity which confuses rather than clarifies and should therefore have no place in the working group's final report.