

MEMORANDUM

DATE: July 12, 2016

TO: Mary Wong, ICANN

FROM: Brian Beckham, WIPO
Jonathan Passaro, OECD
David Satola, World Bank

SUBJECT: **Comments of Certain IGOs on the memorandum of Prof. E. Swaine regarding “IGO Immunity”**



REDLINE - Swaine
memo 22 April v 17 J

The authors of this memorandum attended the meeting of GNSO Working Group on “IGO/INGO Curative Rights” on Tuesday June 28, 2016 at ICANN 56 in Helsinki. The memorandum referred to in the subject line was discussed at that meeting and is attached (the “Swaine Memo”). The views expressed here are those of the authors and may not be shared by all IGO Observers to the GAC and are subject to confirmation by respective management of the authors’ organizations.

The authors would like to thank the GNSO Working Group for the invitation to provide comments on the Swaine Memo.

We would take the opportunity to reiterate that the analysis in the Swaine Memo of IGO immunities was not requested by the IGOs. As indicated by the Chair of the Working Group and in other commentary during the meeting, the context in which the Swaine Memo was produced was with respect to “curative” rights that IGOs might have in an administrative dispute resolution (UDRP-like) process. However, we think it is important to remind the GNSO, in particular, and the wider ICANN community in general, of the broader context of the IGOs’ request for protections of their names and acronyms at the top and second levels.

The IGOs present at the meeting reminded participants that the question of IGO protections first arose out of the “new gTLD” process launched in 2012. From the outset, the IGOs requested that their names and acronyms be protected against their unauthorized use in the domain name system. Governmental Advisory Committee (“GAC”) Advice to the Board endorsed this policy approach in part by calling for independent third party review of potential conflicts between IGO acronyms and domain name registrations. The Board agreed to a permanent reserve list for full IGO names in April 2014; temporary reserve list protections remain in place for IGO acronyms. These protections have worked well.

Subsequent to the GAC’s Advice to the Board, the GNSO commenced two PDPs on the issue generally, suggesting that the IGOs should enjoy only limited preventative rights,

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with possible resort to "curative" rights through an administrative dispute resolution (UDRP-like) process.¹

In terms of the subject matter of the Swaine Memo, we agree with Prof. Swaine's view that the Paris Convention applies to IGOs' rights to confer standing in a curative processes. We also largely agree with Prof. Swaine's conclusion that construction of immunities is fact-specific and contextual. Nonetheless, the object of the Working Group's inquiry is not IGO immunities in general, but rather IGO immunities in the specific context of disputes involving IGO identifiers in the domain name system. In this context, Prof. Swaine concludes that a court will likely find that an IGO is entitled to exercise its immunities.² Having said that, however, no inference should be drawn as to the applicability of the questions posed in the Swaine Memo, or the adequacy, correctness or completeness of the analysis in the Swaine Memo in general or as applied or to be applied to any particular set of circumstances.

Prof. Swaine's statements regarding the differences between the sovereign immunity enjoyed by States and the immunities enjoyed by IGOs underline their central role in IGOs' fulfilment of their missions. For example, Prof. Swain's observation that "IGOs are considered more vulnerable than states, since they have no territory or population, and must conduct their affairs in jurisdictions and through persons not their own"³ is instructive. The broad immunities IGOs enjoy ensure that they can avoid interference from national courts. In this way, immunities shield IGOs from the undue influence of a single State and protect their independent character. This rationale was recently reaffirmed by the Supreme Court of Canada in the *World Bank vs Wallace* case in which the Court expressly noted that "without any sovereign territory of their own, international organizations are vulnerable to state interference. In light of this, member states often agree to grant international organizations various immunities and privileges to preserve their orderly, independent operation".

We also confirm Prof. Swain's observation that IGOs regularly provide for arbitration in commercial contracts in order to protect their immunities.⁴ Commercial entities, in turn, recognize this fact and, in light of the consistency of this practice, some commercial

¹ We are not commenting here on the issue of preventative or curative rights. We raise the issue only to put the motivation behind the Swaine Memo in the broader context.

² "Little may ride on the distinction between absolute and functional immunity, and ultimately little may depend on the potential scope of immunity at all". Swaine Memo, p. 15. Regarding a functional test: "an argument that it is part of an IGO's mission to maintain the distinctive character of its name, and avoid confusing domain-name registration, and thus deserving of immunity, seems colorable or even likely to prevail." Swaine Memo, p. 21.

³ Swaine Memo, p. 9.

⁴ "The way that IGOs typically resolve the tension between immunity and judicial processes is to establish a non-judicial dispute resolution process, usually consisting of some form of arbitration" Swaine Memo, p. 28.

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actors like Apple have introduced boilerplate arbitration clauses into their standard contracts to account for alternative dispute resolution where the counterparty is an IGO.⁵

Prof. Swaine has confirmed longstanding statements of the IGOs regarding the basic facts that preclude IGO recourse to the UDRP. IGOs enjoy certain immunities which they depend upon to carry out their missions. These immunities extend to the subject matter in question, *i.e.*, disputes related to the use of their names and acronyms in domain name disputes. The mutual jurisdiction provision of the UDRP means that IGOs cannot use this mechanism – at least without waiving immunities. One solution would be to create a mechanism which allows for “appeal” through arbitration, a mechanism which parties who contract with IGOs widely accept as an acceptable means for resolving disputes without compromising IGO immunities.

Turning to the present effort by the GNSO Working Group, three key points covered in the Swaine Memo in the context of a curative rights protection mechanism should be dispositive in the Working Group’s deliberations:

- (1) the acknowledgement of the existence of IGO “standing” rights under the Paris Convention should avoid any barriers to entry for IGOs,
- (2) the fact-specific nature of Privileges and Immunities of treaty-based IGOs suggests that in the context of disputes involving IGO identifiers in the DNS, a court will likely find that an IGO *is* entitled to the exercise of immunities,
- (3) the viability of a non-judicial substitute such as arbitration – following a determination under a curative administrative dispute resolution mechanism.

We hope the above is a useful contribution to the GNSO Working Group’s consideration of a dispute resolution mechanism that appropriately reflects the concerns raised by IGOs and governments.

⁵ Swaine Memo, p. 28.