Memorandum

Date: 6/17/2016

To: Mary Wong, Senior Policy Director

Steve Chan, Senior Policy Manager

From: Edward Swaine

RE: IGO Immunity

---

1. Introduction and Summary

I was asked the following questions:

> *1. In relation to the requirement to select a "Mutual Jurisdiction" in the UDRP or URS context, is a complaining IGO entitled to immunity in connection with judicial action brought by a domain name registrant arising from an asserted conflict between the IGO's and the domain name registrant's rights – even when the IGO has initiated the dispute under a dispute resolution process that is in addition to, and not a replacement for, the registrant's legal rights under its applicable national law?*
>
> *2. Are there procedural or other mechanisms which an IGO may use to escape or avoid becoming subject to judicial action brought by a domain name registrant arising from an asserted conflict between the IGO's and the registrant's rights?*
>
> *3. To the best of your knowledge, how do IGOs generally handle standard commercial contractual clauses concerning submission to a particular jurisdiction or dispute resolution method?*
>
> *4. Are there additional principles, nuances or other relevant information (including to your knowledge general principles of law which have been applied by States) that are relevant to our work to find a solution and conclusion on domain name disputes related to IGOs?*

In addressing these questions, this memo makes some simplifying assumptions. First, while domain-related litigation involving an international or intergovernmental organization ("IGO") might arise in different ways, this focuses on the most likely scenario: that in which an

IGO, possessing rights in a name, abbreviation, emblem or the like arising under the Paris Convention ("name," for short), has complained and prevailed before an administrative panel in Uniform Domain Name Dispute Resolution Policy ("Policy" or "UDRP")[1] proceedings against a domain-name registrant—resulting in an order of cancellation or transfer to which the losing registrant objects by commencing a judicial action. Whether that action succeeds will depend on the facts, and the law of the jurisdiction concerned, but this memo assumes that a court would properly exercise jurisdiction over the action but for the possibility that the IGO is entitled to immunity.

Even focusing on immunity, some generalization is required. Immunity obligations vary by state and by the IGO concerned: immunity decisions are often based on organization-specific treaties to which not all states are party, and even states subject to the same international obligations implement them in varying ways. While jurisdictions in which IGOs are active may offer guidance, other jurisdictions offer much less, and there is no certain overlap between states with a developed IGO immunity jurisprudence and those hosting registrars or domain-name registrants. This memo will focus on jurisdictions in which follow-on litigation seems likely, particularly the United States—which hosts registrars and affords a clear statutory basis for so-called reverse domain name hijacking suits. Each jurisdiction will, however, resolve immunity questions according to its own law. Immunity concerns each state's exercise of its own jurisdiction, and as a jurisdictional question will presumptively be determined by the law of the forum, as informed by international law.

Putting these complications aside, the situation raises at least two distinct immunity issues. The first, more abstract question is whether—absent the Mutual Jurisdiction provision, which assents to court proceedings following certain UDRP proceedings—an IGO would in principle enjoy immunity from judicial process with respect to name-related rights it might assert in the UDRP proceedings. The answer depends on whether the jurisdiction in which the case arises would apply an absolute, functional, or restrictive immunity approach to the IGO in question. That may be hard to predict. In the United States, unless an IGO benefits from broader treaty protection—as the United Nations, but *not* its specialized agencies, does, because the United States is only party to a treaty governing the former's immunity—the question is addressed by the International Organizations Immunities Act (the "IOIA"), but some cases interpret the statute as establishing absolute immunity and others view it as establishing

[1] See https://www.icann.org/resources/pages/policy-2012-02-25-en/. The Policy, and this memo, focus on the circumstances of the generic Top Level Domains (gTLDs), as to which the UDRP applies. And for simplicity's sake, this memo will focus on the UDRP rather than the newer Uniform Rapid Suspension System (URS). Although the URS establishes a different administrative procedure, applicable to a different range of TLDs, it does not appear to pose distinct immunity issues—insofar as a party to URS proceedings may either follow with UDRP proceedings (with the possibility of later recourse to a Mutual Jurisdiction) or initiate judicial proceedings directly based on a similar jurisdictional commitment. See URS, §13, http://newgtlds.icann.org/en/applicants/urs/procedure-01mar13-en.pdf; URS Rules, Uniform Rapid Suspension System (URS) Rules, Rule 1 (defining "Mutual Jurisdiction"), Rule 3(b)(ix) (providing for complainant's submission that it "will submit, with respect to any challenges to a determination in the URS proceeding, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction"), http://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf.

restrictive immunity only. Other states tend to favor either an absolute or a functional approach. Which approach is taken may be material. If an IGO is entitled to absolute immunity, it would in principle be protected from a suit of the kind in question, and probably under a functional approach as well—because an IGO's protection of its name is likely to be deemed part of its functions. Immunity is less likely under a restrictive approach, which might regard this as more akin to trademark-related activity that is commercial in character.

The second, more relevant, question is whether—in light of an IGO's assent to Mutual Jurisdiction—its immunity remains. Here, the more likely answer is that it would not. IGOs are capable of waiving their immunity from suit, and if they do so, they may no longer interpose immunityas a defense if another party commences a judicial action falling within the scope of that waiver. The grant of Mutual Jurisdiction would likely establish such a waiver, as it would for a state entity otherwise entitled to foreign sovereign immunity. This waiver would be construed narrowly, but it would likely permit proceeding against an IGO in at least some domestic courts.

The overall answer, then, is contingent. If there were no Mutual Jurisdiction clause, an IGO might be entitled to immunity from judicial process; in the status quo, however, it likely would not. Equitable considerations might influence any judicial analysis. If the Mutual Jurisdiction obligation were altered to preserve IGO immunity, without any possibility of judicial recourse, it might be considered an insufficient remedy for domain registrants. And because the IGO would have availed itself of a procedure to which it would not otherwise be entitled, by initiating UDRP proceedings, it might seem unfair for it to invoke a defense unavailable to the other party. An IGO, on the other hand, might regard the present Mutual Jurisdiction clause as requiring it to make a greater compromise than the average complainant: not merely acquiescing in the choice of a particular jurisdiction, but also consenting to the very possibility of a judicial proceeding—more than anything required of parties that lack immunity in the first place.

Several alternatives may be considered. IGOs may be able to use an assignment of rights, or similar mechanism, to allow their interests to be expressed in UDRP proceedings while disassociating the IGO itself from any waiver. IGOs might also volunteer a non-judicial substitute, such as arbitration—for example, according to the United Nations Commission on International Trade Law ("UNCITRAL")—in lieu of follow-on judicial proceedings. While this is often employed in staff-related matters or commercial dealings, it translates imperfectly to the UDRP context. Unlike a potential employee or contract partner, who may decline to accept such an arrangement and take its business elsewhere, an arbitration alternative to Mutual Jurisdiction would likely force a domain-name registrant to accept that possibility (for any potential IGO matters) in order to register—essentially, shifting any immunity concession by IGOs into an arbitration concession by domain registrants, and raising judicial concerns about access to court. Other avenues may be available, but should be considered with sensitivity both to immunity-related concerns and to the legitimate interests of domain-name registrants.

2. Background

The UDRP provides that registrants must submit to a mandatory administrative proceeding, before a stipulated dispute resolution service provider,[2] upon submission of a complaint that the domain name is identical or confusingly similar to a mark in which the complainant has rights, the registrant has no rights or legitimate interests in respect of the domain name, and the domain name has been registered and is being used in bad faith. UDRP, para. 4(a).

IGOs are among the possible parties to such proceedings. An IGO may register a domain name and, in theory, find itself a respondent to an administrative complaint brought by a mark's owner. In practice, however, IGOs are more likely to be complainants, alleging that another party has registered a domain name in bad faith. Article 6*ter* of the Paris Convention, as augmented by the Trademark Law Treaty of 1994 and the Singapore Treaty on the Law of Trademarks, extends to certain IGOs protections for, inter alia, their names and abbreviations, giving rise in appropriate circumstances to a protectable interest they may seek to vindicate.[3] Although Paragraph 4 of the Policy indicates that a UDRP complaint is to be framed in terms of "trademark or service mark," rather than names and other interests indicated in Article 6*ter*, such interests appear to suffice for purposes of initiating a complaint against a domain-name registrant.[4] Indeed, several IGOs—including the International Mobile Satellite Organization (INMARSAT), the International Bank for Reconstruction and Development (IBRD), and the Bank for International Settlement (BFIS)—have prevailed in UDRP complaints.[5]

---

[2] See https://www.icann.org/resources/pages/providers-6d-2012-02-25-en.

[3] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 6*ter*, 21 U.S.T. 1583, 828 U.N.T.S. 305; Trademark Law Treaty, Oct. 27, 1994, S. Treaty Doc. 105-35, 2037 U.N.T.S. 35; Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, S. Treaty Doc. No. 110-2. For discussion of the relevant preconditions, including notification of the relevant emblems and signs for which protection may be sought, see WIPO Secretariat, Article 6*ter* of the Paris Convention: Legal and Administrative Aspects (SCT/15/3) (2005), http://www.wipo.int/edocs/mdocs/sct/en/sct_15/sct_15_3.pdf. See also Agreement Between the World Intellectual Property Organization and the World Trade Organization (WTO-WIPO Cooperation Agreement), Dec. 22, 1995, at http:// www.wto.org/english/tratop_e/trips_e/wtowip_e.htm.

[4] See generally Gerald M. Levine, Domain Name Arbitration: A Practical Guide to Asserting and Defending Claims of Cybersquatting Under the Uniform Domain Name Dispute Resolution Policy 99-100 (2015) (noting "potentiality" approach to a complainant's interests).

[5] Respectively, in International Mobile Satellite Organisation and Inmarsat Ventures Limited (formerly known as Inmarsat Holdings Limited) v. Domains, EntreDomains Inc. and Brian Evans, D2000-1339 (WIPO Nov. 30, 2000); International Bank For Reconstruction and Development d/b/a The World Bank v. Yoo Jin Sohn, D2002-0222 (WIPO May 7, 2002); and Bank for International Settlements v. BFIS, D2003-0984 (WIPO March 1, 2004), Bank for International Settlements v. BIS, D2003-0986 (WIPO March 2, 2004), Bank for International Settlements v. James Elliott, D2003-0987 (WIPO March 3, 2004), Bank for International Settlements v. G.I Joe, D2004-0570 (WIPO (Sept. 27, 2004), Bank for International Settlements v. BIS, D2004-0571 (WIPO Oct. 1, 2004), and Bank for International Settlements v. Fortune Nwaiwu, D2004-0575 (WIPO Oct. 1, 2004). A few other matters are

Although the Policy describes this procedure as "mandatory" (para. 4), it is less coercive than that would suggest, and the fact that IGOs incorporated within the UDRP is not itself particularly problematic. An IGO solely interested in preventing a domain-name registrant from using its name or something confusingly similar may commence a judicial action in a relevant jurisdiction—just as it might in the absence of the UDRP.[6] In the United States, for example, an IGO could file an action under the Lanham Act, as modified by the Anticybersquatting Consumer Protection Act (ACPA), although that route may present hurdles for foreign parties like IGOs.[7]

For IGOs bound to use the UDRP process because they are domain-name registrants, that constraint is not especially onerous, nor does it severely limit even those IGOs who elect to employ it by filing UDRP complaints. Paragraph 4(k) provides that "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either [the registrant] or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded."[8] The obligation to submit to UDRP proceedings, or even the choice thereof, does not interfere unduly with the preexisting option to submit the matter to judicial proceedings.[9]

In these respects, the UDRP simply offers an alternative arbitral process to IGOs. What may be less welcome to IGOs, however, is the fact that the UDRP also *compels* consent to

---

catalogued in the Index of WIPO UDRP Panel Decisions, http://www.wipo.int/amc/en/domains/search/legalindex/, as involving IGOs. In one, involving the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), a decentralized agency of the European Union, the complaint was denied due to its failure to establish rights to marks or services. European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) v. Virtual Clicks / Registrant ID:CR36884430, Registration Private Domains by Proxy, Inc., D2010-0475 (WIPO July 7, 2010). In another, involving UNITAID, an IGO hosted by the World Health Organization (WHO), trademark rights were assigned by a fiduciary agreement to a private enterprise, which registered them on behalf of the WHO and UNITAID. Lenz & Staehelin Ltd v. Christopher Mikkelsen, D2012-1922 (WIPO Jan. 8, 2013).

[6] See Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 751 (E.D. Va. 2001) ("UDRP complainants, as strangers to the registration agreement, are under no obligation to avail themselves of the UDRP") (citing BroadBridge Media, L.L.C. v. Hypercd.com, 106 F. Supp. 2d 505, 509 (S.D.N.Y. 2000)); see also Oneida Tribe of Indians of Wisconsin v. Harms, 2005 WL 2758038 (E.D. Wis. 2005); GlobalSantaFe Corp. v. Globalsantafe.com, 250 F. Supp. 2d 610 (E.D. Va. 2003).

[7] See 5 U.S.C. §§ 1114, 1125. In addition to conventional hurdles, like proper venue and personal jurisdiction, an IGO with an interest in a foreign mark may not have a protectable interest under U.S. law. See *infra* note 15.

[8] For ease of discussion, the remaining discussion will generally assume that any litigation follows resolution of the administrative proceeding.

[9] This may also mean that if an IGO is unsatisfied with its initial choice of a judicial proceeding, it can initiate UDRP proceedings thereafter. In Gerolsteiner Brunnen GmbH & Co., KG v. R4L Privacy Advocate/Gero Leon Steiner, D2008-1450 (WIPO Nov. 7, 2008), a complainant initiated proceedings in order to object to the transfer of a domain name to a new registrant after it had received an order from a German court prohibiting the original registrant from using the domain name or allowing it to be used.

judicial proceedings if the losing party elects to pursue them—in the principal scenario, meaning that a complained-against domain-name registrant can take the IGO to court. According to the Rules for the Uniform Domain Name Dispute Resolution Policy ("Rules"),[10] a complaint must indicate that "Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction." Rules, ¶ 3(b)(xii). Such "Mutual Jurisdiction" is defined as either the principal office of the Registrar or the domain-name holder's stipulated address.[11] Accordingly, an IGO complainant will have consented to judicial proceedings if a losing respondent wishes to challenge a cancellation or transfer[12]—in a jurisdiction that the IGO will have selected, but from limited choices that the registrant can craft through its choice of registrar and its registering address.

How matters unfold from that point will depend on national law. Most follow-on actions have been filed in the United States, and the ACPA provides registrants with a cause of action enabling them, in appropriate circumstances, to restore domain names lost during the UDRP process.[13] Such follow-on litigation is expensive and may be infrequently pursued, but even so it may cause concern. The UDRP result receives no deference.[14] In addition, IGOs holding foreign marks, and certainly those seeking protection for names *not* protectable as marks at all, may be out of luck: some U.S. decisions have permitted the enforcement only of trademark

[10] See https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en.

[11] More specifically, "a court jurisdiction at the location of either (a) the principal office of the Registrar (provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name) or (b) the domain-name holder's address as shown for the registration of the domain name in Registrar's Whois database at the time the complaint is submitted to the Provider." Rules, ¶ 1.

[12] If the registrant actually prevailed in the UDRP proceeding, the IGO has two options. First, it can acquiesce in the adverse result, rather than initiate any judicial proceedings to reconsider it. Its immunity, in that scenario, is not directly at issue—only its refusal to *compromise* that immunity. Second, and alternatively, the IGO could commence judicial proceedings, per the Mutual Jurisdiction scheme. That option exists, however, much as it would absent the UDRP (at least so long as the UDRP receives no judicial deference in the relevant jurisdiction), and amounts to a decision to waive immunity.

[13] 15 U.S.C. § 1114(2)(D)(v) ("A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.").

[14] See Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 382–83 (2d Cir. 2003); Hawes v. Network Solutions, Inc., 337 F.3d 377, 386–87 (4th Cir. 2003); Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617, 626 (4th Cir. 2003); Dluhos v. Strasberg, 321 F.3d 365, 373–74 (3d Cir. 2003); Sallen v. Corinthians Licenciamentos LTDA, 273 F.3d 14, 28 (1st Cir. 2001).

rights protectable under U.S. law, notwithstanding any obligations that would appear to arise under Article 6*ter* of the Paris Convention.[15] Results may vary, of course, by jurisdiction.

In short, the Mutual Jurisdiction clause means that participating IGOs will have agreed to the possibility of a judicial process, notwithstanding any immunity to which they otherwise would be entitled. This will loom largest in cases in which the IGO is the complainant and benefited from an initial panel decision in its favor, such that the decision to resort to judicial proceedings against the IGO—and the risks that creates for adverse results—is made by the private party.

The remainder of the memo will focus on that scenario. There are other circumstances, however, in which the IGO or its domain-related interests might conceivably be drawn into litigation.[16] Some involve closely-related issues of IGO immunity. Parties registering domain

---

[15] Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617, 627-29 (4th Cir. 2003) (reversing decision in favor of Spanish-law mark, because "United States courts do not entertain actions seeking to enforce trademark rights that exist only under foreign law," and holding that the "City Council could not obtain a trademark interest in a purely descriptive geographical designation that refers only to the City of Barcelona" under U.S. law); see also International Finance Corporation v. Bravo Company, 64 U.S.P.Q.2d 1597 (Trademark Tr. & App. Bd. 2002) (rejecting opposition to trademark registration on the basis of Article 6t*er*). Domain-name registrants have been permitted at least provisionally to proceed against those holding an interest in a name not registered as U.S. marks, likely on the premise that the name was protectable. Sallen v. Corinthians Licenciamentos LTDA, 273 F.3d 14, 23-24 (1st Cir. 2001). Still, if the view expressed in *Barcelona.com* prevails, one commentator observed, "foreign mark owners will always lose UDRP review cases filed by domain name registrants" under the ACPA; "unless foreign mark owners can also demonstrate trademark rights under U.S. law, nothing will prevent registrants from proving that their use of the domain name embodying a foreign mark was lawful under the Lanham Act . . . even if their conduct . . . would qualify as cybersquatting under the UDRP or the ACPA (had it been challenged by a mark owner with U.S. rights)." Laurence R. Helfer, Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?, 12 Cardozo J. Int'l & Comp. L. 498-99 (2004).

Whatever these consequences, U.S. courts have consistently held that the Lanham Act, including its generally-applicable restrictions, are sufficient to discharge U.S. obligations under the Paris Convention—without giving additional weight to statutory provisions adverting to rights established by treaty. Grupo Gigante SA de CV v. Dallo & Co., 391 F.3d 1088, 1099-1100 (9th Cir. 2004); Barcelona.com, Inc., 330 F.3d at 628-29; International Cafe, S.A.L. v. Hard Rock Cafe Int'l (U.S.A.), Inc. 252 F.3d 1274, 1277-78 (11th Cir. 2001); see 5 U.S.C. § 1126(b). And the United States considers that it has discharged its Paris Convention obligations by enabling parties to initiate suit on their own behalf, declining to accept that it may be incumbent upon states to pursue in their courts relief against infringement on behalf of an IGO or other party concerned. U.S. Mission to the United Nations, Note on the Enforcement of Obligations under the Paris Convention for the Protection of Industrial Property (June 2002), 2002 Digest U.S. Prac. Int'l L. 389-91, http://www.state.gov/s/l/38648.htm.

[16] For example, in the event an IGO prevailed in the UDRP process, it might conceivably have to initiate a judicial action to compel cooperation by a registrar reluctant to effectuate a cancellation or transfer. Such an action might waive any immunity to which the IGO would otherwise be entitled. Alternatively, an original registrant may seek declaratory relief against a registrar with the aim of preventing the registrar's cooperation with UDRP-based relief; jurisdiction in such a case would likely be prescribed by the registration agreement, and need not directly involve the IGO. Finally, although this discussion assumes that a judicial proceeding would proceed *in personam*, the ACPA also allows *in rem* proceedings by a mark's owner against a domain name if the court finds that the owner either is not able to obtain *in personam* jurisdiction over an allowed defendant or was not able to find a person who would have been an allowed defendant. 15 U.S.C. § 1125(d)(2). To the extent the IGO has a property interest in a

names also consent, in similar terms, to Mutual Jurisdiction.[17] This may be relevant in two different scenarios. Most obviously, if an IGO registers a domain name in its own right, another party may initiate a UDRP complaint concerning that registration, which may ultimately implicate the IGO registrant's assent to Mutual Jurisdiction.[18] It may also be relevant, however, if an IGO—this time as a complainant, and one that prevails in that complaint against a domain-name registrant—receives an award transferring the domain-name registration to it, since that would likely entail the IGO's consent to Mutual Jurisdiction and to further judicial proceedings.[19] Accordingly, any reconsideration of the grant of Mutual Jurisdiction should probably be harmonized with the terms required for IGO registration, which will in turn require coordination with registrars and their current terms.

3. Discussion

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

---

transferred domain name, it is likely that similar immunity interests would arise. International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (establishing that "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments"); see Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011) (foreign sovereign immunity). If the IGO's property interest has not yet been perfected, an *in rem* action may instead bear more directly on the registrar.

[17] The "Mutual Jurisdiction" definition in paragraph 1 of the Rules indicates that a domain-name holder may have "submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name," and the Registrar Accreditation Agreement provides that "[f]or the adjudication of disputes concerning or arising from use of the Registered Name, the Registered Name Holder shall submit, without prejudice to other potentially applicable jurisdictions, to the jurisdiction of the courts (1) of the Registered Name Holder's domicile and (2) where Registrar is located." See 2013 Registrar Accreditation Agreement, para. 3.7.7.10, https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#raa; Levine, *supra* note 4, at 53 (2015).

[18] Consent to Mutual Jurisdiction would obviously be relevant in the event an IGO registrant prevailed in the UDRP proceeding and a complainant sought judicial review. If a complainant were successful, the options for the losing IGO registrant would be much the same as when an IGO complaint (against a domain-name registrant) is at first unsuccessful. See *supra* note 12.

[19] The precise basis for the IGO's consent may depend on the facts. The transfer of a registration to a prevailing IGO arguably establishes by itself the IGO's constructive consent to the prior registrant's terms, including Mutual Jurisdiction. A clearer basis might be afforded if subsequent re-registration by the IGO were required by ICANN or by the policy of an individual registrar, and certainly if the IGO elected itself to renew its registration or to change registrars afterward.

[20] For example, Libya was held to have waived any sovereign immunity to which it might be entitled under the FSIA in relation to particular types of counterclaims (those seeking monetary damages for tortious interference with contract and prospective business advantage) that arose out of the use of domain names that were the subject of an action, initiated by Libya itself, alleging violation of its rights under the Lanham Act and the Anticybersquatting

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.

A. Scope of IGO Immunity

1. Varied Bases for immunity

Immunity under international law is surprisingly contextual. To begin with, foreign states, IGOs, and officials enjoy varying types of immunity. (Even IGO immunity takes different forms; this memo will refer to IGO immunity as a shorthand for the basic immunity from judicial process, though the immunity of an IGO from enforcement or execution, or the immunity of IGO officials, may also be implicated.[22]) The differences are meaningful. IGO immunity is often likened to the foreign "sovereign" immunity of states, but they are distinct in their purposes and potential scope. 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. On the other hand, IGOs tend to be purpose-built, unlike states, and may

---

Consumer Protection Act (ACPA). Great Socialist People's Libyan Arab Jamahiriya v. Miski, 683 F. Supp. 2d 1 (D.D.C. 2010).

[21] A few cases have explored analogous circumstances involving foreign states. In one, a domain name registrant sought declaratory and injunctive relief in a U.S. court against the Republic of South Africa and its agency or instrumentality, which had announced its intention eventually to assert its rights under some (uncertain) process to secure second-level domains including the country's name. The district court dismissed the action on the basis of South Africa's sovereign immunity, reasoning that its press release was not "commercial activity" warranting an exception to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) nor anything with sufficient connection to the United States. Virtual Countries, Inc. v. Republic of South Africa, 148 F. Supp. 2d 256 (S.D.N.Y. 2001), aff'd, 300 F.3d 230 (2nd Cir. 2002) (assuming arguendo that the press release was "commercial activity" and affirming on the ground that the commercial activity, if any, lacked the requisite "direct effect" within the United States under the FSIA).

[22] As noted earlier, it is possible that *in rem*, property-oriented immunity might be involved. See *supra* note 16. IGO officials might in principle be subject to attempts to litigate rights in protectable marks—for example, through attempts to enjoin their exercise of mark-related functions.

more easily be restricted to fulfilling specific functions; these vary by organization, of course, and so may their immunity.[23]

Beyond that, the legal vehicle for immunity creates further variety. For IGOs, two multilateral treaties are of particular note. The most universally ratified—with 161 parties as of this date—is the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), which governs the immunity of the United Nations and its integral parts.[24] More IGOs are addressed by the Convention on the Privileges and Immunities of the Specialized Agencies ("Special Convention"), which governs the immunity of autonomous organizations that carry out various functions on behalf of the United Nations.[25] The Special Convention has been ratified by 127 parties—some states that loom large in IGO dealings (like Belgium and Switzerland, as of 2012) are parties, while others (notably, the United States) are not.[26] Like the General Convention, the Special Convention confers broad immunity on IGOs subject to it, but its scope is contingent: states parties have varied obligations,[27] and they may modify those obligations further with IGOs they host.[28]

---

[23] See, e.g., Hazel Fox & Philippa Webb, The Law of State Immunity 571 (3rd ed. 2015).

[24] Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 6900. The United States, among others, considers subsidiary organs of the United Nations—such as certain peacekeeping missions, and the United Nations Development Program—to enjoy the same scope of immunity as that conferred by the General Convention on the UN itself. See, e.g., Lempert v. Rice, 956 F. Supp. 2d 17, 23-24 (D.D.C. 2013) (applying absolute immunity under the General Convention to the United Nations Development Program as a subsidiary organ); Sadikoglu v. United Nations Development Programme, 2011 WL 4953994, *3-*4 (S.D.N.Y. 2011) (same). In some instances, the immunity afforded by the General Convention may be supplemented by agreements that incorporate General Convention standards. See Georges v. United Nations, 84 F. Supp. 3d 246, 248-49249 (S.D.N.Y. 2015) (concluding that both the United Nations and the United Nations Stabilization Mission in Haiti (MINUSTAH) were entitled to absolute immunity, the latter "as a subsidiary body of the UN," though it was also subject to a Status of Forces Agreement extending the privileges and immunities of the General Convention), appeal pending, No. 15-455; accord Brief for the United States as Amicus Curiae in Support of Affirmance at 8, Georges v. United Nations, No. 15-455 (2nd Cir. 2016) (describing both United Nations and MINUSTAH as subject to the General Convention).

[25] Nov. 21, 1947, 33 U.N.T.S. 261. The originally designated agencies are the International Labour Organization (ILO), Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Civil Aviation Organization (ICAO), the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the World Health Organization (WHO), the Universal Postal Union (UPU), and the International Telecommunication Union (ITU). Among those subsequently created and governed are the World Meteorological Organization (WMO), the International Maritime Organization (IMO), the International Finance Corporation (IFC), the International Development Association (IDA), the World Intellectual Property Organization (WIPO), the International Fund for Agricultural Development (IFAD), and the United Nations Industrial Development Organization (UNIDO).

[26] As made clearer below, these and other non-parties observe immunity for the agencies on other bases.

[27] States may file reservations when acceding, and in some cases these bear on privileges and immunities; the Special Convention also addresses particular agencies in annexes that are occasionally amended (Special Convention §§ 2, 36, 38), and states vary as to whether they accept the annexes as revised or only as originally tendered. For example, Norway and the United Kingdom have accepted revisions to the WHO's annex, but Algeria and Brazil have not. See Gian Luca Burci & Egle Granziera, Privileges and Immunities of the World Health

The Special Convention is not unique in accommodating bilateral arrangements. A number of IGOs subject to Article 6*ter* of the Paris Convention have their immunities governed at least in part by other treaties, like headquarters agreements, that defy easy generalization. The variety this introduces is all the more consequential in light of the fact that some states, like Italy, have intimated that IGO immunity can only be resolved on the basis of treaties.[29]

The differences due to international treaties are accentuated by national law, which is important in determining the immunity of international organizations. Of course, national law is usually aligned with international law. In the United Kingdom, for example, international obligations must be implemented in domestic law by statute—in the case of IGO immunity, by the International Organizations Act 1968 (as amended), which is applied to particular organizations by orders in Council.[30] The United States, in contrast, accords self-executing effect to some treaties (like the General Convention),[31] and implements other immunities—whether derived from non-self-executing treaties, treaties to which it is not a party (like the Special Convention), or customary international law—by means of the International Organizations Immunity Act (IOIA).[32] The IOIA provides privileges and immunities to international organizations that have been designated by the President through an executive

---

Organization: Practice and Challenges, in Immunity of International Organizations 93 (Niels Blokker & Nico Schrijver eds., 2015).

[28] See Special Convention, § 39. See, e.g., Diallo v. Strauss-Kahn, 2012 WL 1533179 (N.Y. Sup. 2012) (noting adaptation to IMF via its Articles of Agreement).

[29] See Beatrice Bonafè, Italian Courts and the Immunity of International Organizations, 10 Int'l Org. L. Rev. 505, 512 (2013); see also Eric De Brabandere, Belgian Courts and the Immunity of International Organizations, 10 Int'l Org. L. Rev. 464, 471-74 (2013) (noting similar tendency, subject to some ambiguity, in Belgium).

[30] A few organizations are addressed by separate legislation, as are those whose privileges and immunities arise under EU law. See generally Chanaka Wickremasinghe, The Immunity of International Organizations in the United Kingdom, 10 Int'l Org. L. Rev. 434, 437 & n.6 (2014); Dan Sarooshi & Antonios Tzanakopolous, United Kingdom, in The Privileges and Immunities of International Organizations in Domestic Courts 290 (August Reinisch ed., 2013). Litigating IGO immunities in U.K. courts poses certain idiosyncratic justiciability and legal personality issues that will not be explored here.

[31] See, e.g., Brzak v. United Nations, 597 F.3d 107, 111-12 (2d Cir. 2010). The UN was also designated by the President as receiving immunities under the International Organizations Immunity Act of 1945 (IOIA), discussed below. See Exec. Ord. No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946). This is potentially confusing because (as also discussed below) the scope of immunity under the IOIA may be less than that afforded under the General Convention. Some courts have sidestepped that question by noting that the General Convention might simply add to statutory protection (see, e.g., *Brzak*, 597 F.3d at 112), while others simply assume the same standard. Van Aggelen v. United Nations, 311 Fed. Appx. 407, 409 (2nd Circ. 2009) ("The United Nations enjoys absolute immunity under the U.N. Charter, the Convention on the Privileges and Immunities of the United Nations . . . . and the [IOIA]."). The better view seems to be that the General Convention, together with the Headquarters Agreement, were concluded subsequent to the IOIA and might be required to address the greater needs of the United Nations. See United States Statement of Interest, Begum v. Saleh, 99 Civ. 11834 (S.D.N.Y 2000), reprinted in 2000 Digest of United States Practice in International Law 602, 608 n.7.

[32] International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b).

order, which may also modify the privileges and immunities as the President considers appropriate.[33] Among the IGOs thus designated are some, like WIPO, which are subject in other jurisdictions to the Special Convention. Other national laws, like Austria's, are possibly even more complicated.[34]

The diversity among treaties and national laws is in principle constrained by customary international law, which consists of the practice of states acting out of a sense of legal obligation. Cases and commentary occasionally advert to customary international law of IGO immunity, particularly in situations not addressed by a treaty. But how readily and enthusiastically customary international law is applied depends to a great degree on the state concerned. In some jurisdictions, like the United States, it is treated as a last resort: that is, an IGO to which the United States owes no treaty obligations, and which has not been designated under the IOIA, might in theory have its immunities considered on the basis of customary international law, but that would pose difficult questions of enforceability.

Ultimately, it is unclear when customary international law doctrines of immunity will be asserted and prevail. Sometimes courts or commentators assert a customary norm without much (or any) evidence, and at least some of the underlying practice cited in support is better attributed to treaties or domestic law. Significantly, a recent expert survey concluded that "it cannot be said that 'there is 'a general practice accepted as law' establishing a customary rule of immunity" and that "it would be difficult to conclude that any such rule exists."[35] Even those cases recognizing a customary international law basis for immunity appear to differ on its extent.[36] Regardless, as a practical matter, a dispute about IGO immunity may arise in a court inclined to resolve it based on customary international law as that court perceives it.

---

[33] The IOIA formally distinguishes between IGOs in which the United States participates (either by virtue of a treaty, or under the authority of Congress authorizing participation or making appropriations for such), see 22 U.S.C. § 288, and IGOs and similar entities that according to statute are to be treated similarly for purposes of their privileges and immunities, see id. § 288 f-1 et seq. At present, approximately 80 IGOs have been designated. See 28 U.S.C.A. § 288 note (detailing organizations and executive orders).

[34] Kirsten Schmalenbach, Austrian Courts and the Immunity of International Organizations, 10 Int'l Org. L. Rev. 446, 448-54 (2013).

[35] Michael Wood, Do International Organizations Enjoy Immunity Under Customary International Law?, 10 Int'l Org. L. Rev. 287, 317 (2014).

[36] Compare, e.g., ZM v. Permanent Delegation of the League of Arab States to the UN, 116 ILR 643, 647 ¶¶ 22-23 (Labour Court (TPH) of Geneva, Nov. 17, 1993) (holding that "[c]ustomary international law recognizes that international organisations, whether universal or regional, enjoy absolute immunity," but noting that "[t]his privilege . . . arises from the purposes and functions assigned to them"), with Spaans v. Iran-US Claims Tribunal, 94 ILR 321, 327 ¶ 3(3)(4) (Hoge Raad der Nederlanden (Supreme Court), Dec. 20, 1985) (reporting "that, according to unwritten international law, as it stands at present, an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization in question").

2. Varied approaches to immunity

a. Absolute immunity

Some organizations, in some jurisdictions, are afforded comprehensive immunity from judicial process, irrespective of the nature of the IGO's activity, in the absence of an express (and strictly construed) waiver. The United Nations is the most certain example. Article 105(1) of the Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." Article 2 of the General Convention states more unequivocally that "[t]he 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." That is generally understood to require absolute immunity, subject to waiver, even in those jurisdictions that regulate (or ordinarily regulate) immunity by separate enactment.[37]

Other treaties may also establish absolute immunity, for those states bound by them. The Special Convention uses similar language, providing (in Article 3(4)) that "[t]he specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity." As noted previously, the Special Convention is less definitive in character—there are fewer states parties, and greater potential for variation in the treatment of particular IGOs—but the treaty language creates a presumption in favor of similarly broad immunity.[38] Bilateral agreements (such as headquarters agreements) may also establish immunity that appears comprehensive in scope.[39]

---

[37] For U.S. decisions treating United Nations immunity as absolute, see, e.g., Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010); Van Aggelen v. United Nations, 311 Fed. Appx. 407 (2nd Circ. 2009); Boimah v. United Nations General Assembly, 664 F. Supp. 69, 71 (E.D.N.Y.1987). These and other decisions typically treat the General Convention as self-executing and as affording immunity independent of any derived from statute. See *infra* notes 31-32. In the United Kingdom, the United Nations is simply subject to an Order in Council that respects the extent of immunity under the General Convention. See The United Nations and International Court of Justice (Immunities and Privileges) Order 1974/1261.

[38] See, for example, its broad treatment in United Kingdom: The Specialised Agencies of the United Nations (Immunities and Privileges) Order 1974/1260; Entico Corp. v. UNESCO, [2008] CLC 524, [2008] EWHC 531, 156 ILR 382.

[39] For example, the Restatement (Third) of Foreign Relations Law, which was otherwise open to affording immunity to IGOs on a restrictive basis only, appeared to consider that the Organization of American States (OAS)—the immunity of which is addressed, inter alia, in its Charter (see Article 139 of the Charter of Organization of American States, 2 UST 2394, TIAS 2361, as amended, 21 UST 607, TIAS 6849), in a 1975 bilateral agreement (see Article 2 of the Agreement Relating to Privileges and Immunities, 26 U.S.T. 1025, T.I.A.S. No. 8089), and subsequently in a 1992 bilateral agreement (see Article IV(1) of the Headquarters Agreement Between The Organization of American States and the Government of the United States of America, Treaty Doc. No. 102-40, entered into force Nov. 17, 1994)—might be due absolute immunity, given the comparability of its treaty terms to those used in the General

National law may also afford extremely broad immunity, but requires careful scrutiny. In the United States, for example, some (but not all) decisions treat the immunity conferred by IOIA designation as absolute in character,[40] and it remains contingent in some respects.[41] Other jurisdictions profess to apply an absolute standard, but justify it by noting that IGOs (unlike foreign states) act only in a manner confined to their purposes—which, while *not* spelling out when, how, and by what means such purposes are to be assessed, at least suggests the possibility of outer bounds to immunity.[42] Conversely, some jurisdictions that profess to apply a less robust scope of immunity apply it so reflexively and broadly that may, in practice, seem absolute.[43]

The customary international law of IGO immunity—which some courts tend to deny altogether[44]—is sometimes, where recognized, described as absolute. In practice, this too may be less clear as applied. Swiss decisions, for example, have suggested that all IGOs enjoyed absolute immunity, but have also premised that on their performance of functions appropriate to their mission—and proposed this absolutism in a context where treaty commitments, not benefiting all IGOs, play an inescapable role.[45]

Convention and the Special Convention. See Restatement (Third) of Foreign Relations Law § 467 cmt. f & rptrs. note 4.

[40] See, e.g, Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998); Price v. Unisea, Inc., 289 P.3d 914, 919-20 (Alaska 2012); Bro Tech Corp. v. European Bank for Reconstruction and Development, No. 00–CV–02160–CG, 2000 WL 1751094, at *3 (E.D. Pa. Nov. 29, 2000). As noted below, this position has in recent years become more controversial. See *infra* notes 54-57 (discussing *OSS Nokalva*).

[41] Notwithstanding the immunity conferred upon designated IGOs under the IOIA, it may be waived by the organization itself, it may be limited by the President when that organization is first designated as one entitled to enjoy IOIA immunity, and the President may modify, condition, or revoke the immunity by executive order. Mendaro v. World Bank, 717 F.2d 610, 613-14 (D.C. Cir. 1983).

[42] See Schmalenbach, *supra* note 34, at 457-58 (discussing Company Baumeister L. v. OPEC Fund, ILDC 362 (AT 2004)); Gregor Novak & August Reinisch, Austria, in Privileges and Immunities, *supra* note 30, at 47-49 (same).

[43] See, e.g., August Reinisch, Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations—An Introduction, in Privileges and Immunities, *supra* note 30, at 8 (concluding that "[i]t appears that, in practice, the concept of functional immunity frequently leads to *de facto* absolute immunity"); De Brabandere, *supra* note 29, at 474 ("International organization immunity has, unlike State immunity, remained absolute. When one defines the immunity of international organizations as *functional*, in practice this essentially boils down to absolute immunity").

[44] See Wood, *supra* note 35, especially at 299 & nn. 39-42.

[45] Thus, in Groupement D'Entreprises Fougerolle v. CERN, 102 ILR 209 (CH Dec. 21, 1992), the Swiss Federal Supreme Court stated categorically that "[i]nternational organizations enjoy absolute and complete immunity without any restriction," but at the same time said that this immunity is "is always based on an instrument of public international law in the form of either multilateral conventions between the Member States of such organizations, bilateral agreements, or most frequently headquarters agreements with the host State." In ZM v. Permanent Delegation of the League of Arab States to the United Nations, 116 ILR 643, 647 (CH 1993), a Swiss labor court stated more directly that "[c]ustomary international law recognizes that international organizations, whether universal or regional, enjoy absolute jurisdictional immunity." It also stated, however, that "[t]his privilege of international organisations arises from the purposes and functions assigned to them," since "[t]hey can only carry

In sum, the United Nations and its constituent elements are likely to be regarded as entitled to absolute immunity, as are the specialized agencies—at least to the extent the state concerned is a party to the Special Convention and has not modified its application. As to other IGOs, it would be difficult to state with confidence whether they are entitled to absolute immunity without particular information about the treaty obligations or national law of the jurisdiction in question. As discussed further below, however, in these circumstances little may ride on the distinction between absolute and functional immunity, and ultimately little may depend on the potential scope of immunity at all.

b. Restrictive immunity

With rare exception,[46] sovereign (state) immunity has evolved from an absolute standard to what is known as "restrictive" immunity. Under the restrictive approach, states retain immunity for acts *jure imperii*, which are fundamentally sovereign in character, but lack immunity for acts *jure gestionis*—in essence, carving an exception from immunity for litigation concerning commercial activities like those undertaken by private parties.

Relatively few states have shown interest in applying this restrictive approach to IGOs. As noted previously, IGO immunity has different premises than sovereign immunity, so there is no inherent reason why both would have exceptions of similar scope. One recent suggestion of a commercial activities exception—by a Belgian court of appeals, in a case concerning an employment dispute brought against the Arab League—was ignored by the Belgian Cour de Cassation, which resolved the case on other grounds.[47] Italian courts, in cases involving the Food and Agriculture Organization and the Bari Institute of the International Center for Advanced Mediterranean Agronomic Studies (ICAMAS), denied immunity for acts they regard as being of a private character, but such decisions may have been driven by a now-moot dispute over Italy's accession to the Special Convention[48]—with Italy's more recent cases being better characterized as entailing a narrower approach to functional immunity.[49]

---

out their tasks if they are beyond the censure of the courts of member states or their headquarters." See generally Thore Neumann & Anne Peters, Switzerland, in Privileges and Immunities, *supra* note 30, at 242-51.

[46] See International Decision: FG Hemisphere Associates v. Democratic Republic of the Congo, 108 Am. J. Int'l L. 776 (2014) (reporting decision of Hong Kong Court of Final Appeal applying absolute immunity approach).

[47] League of Arab States v TM, Appeal Judgment, Cass No S.99.0103.F, ILDC 42 (BE 2001), 12th March 2001, Court of Cassation, discussed in Cedric Ryngaert, The Immunity of International Organizations Before Domestic Courts: Recent Trends, 7 Int'l Org. L. Rev. 121, 124, 126 (2010).

[48] For discussion, see Ricccardo Pavoni, Italy, in Privileges and Immunities, *supra* note 30, at 157-62; August Reinisch, Accountability of International Organizations According to National Law, 36 Neth. Y.B. Int'l L. 119, 131-33 (2005); Peter Neumann, Immunity of International Organizations and Alternative Remedies Against the United Nations 5-7 (2006), http://ilmc.univie.ac.at/uploads/media/Neumann_-_Immunity_of_IOs_and_alternative_remedies_against_the_United_Nations.pdf.

[49] See Bonafè, *supra* note 29, at 508, 522-23, 537.

The United States is an important exception. There, some courts have followed a restrictive approach not because of a conviction about international law, but rather due to the text of the IOIA, which provides the statutory basis for IGO immunity in U.S. courts. The IOIA provides, in relevant part, that IGOs "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."[50] Because this emulated sovereign immunity, U.S. courts have wrestled with whether IGOs continue to enjoy the immunity afforded foreign states as of the time the IOIA was enacted in 1945 (when foreign sovereign immunity was generally understood to be absolute) or whether their immunity follows subsequent changes in foreign sovereign immunity (including the commercial activities exception, which was codified in the Foreign Sovereign Immunities Act in 1976).[51]

This puzzle remains unsolved. The Restatement (Third) of Foreign Relations Law, an influential compilation of U.S. law and practice, expressed two positions: first, that IGOs "generally" enjoyed functional immunity as a matter of international law (a standard addressed in the next section); and second, that as a matter of U.S. law, IGOs enjoyed the privileges and immunities provided "by international agreements to which the United States is party," and IGOs "designated by the President under the [IOIA] are entitled to the privileges and immunities provided in that Act." [52] This said little about the actual scope of immunity under the Act. In accompanying comments, however, the Restatement (Third) took the position that "[w]hether other international organizations enjoy absolute or restricted immunity under international law is unclear," but that "at least until that question is authoritatively resolved they will probably be accorded only restricted immunity under the law of the United States."[53]

That prediction as to the course of U.S. case law has not been clearly vindicated, but neither has it been repudiated. In 2010, one U.S. court of appeals—the Third Circuit, which exercises authority over federal cases arising from Pennsylvania, New Jersey, Delaware, and the Virgin Islands—construed the IOIA as incorporating the restrictive theory, basing its conclusion in part on an opinion expressed by the Legal Adviser to the U.S. Department of State.[54] The

[50] 22 U.S.C. § 288a(b).

[51] Under the FSIA, "commercial activity" means "means either a regular course of commercial conduct or a particular commercial transaction or act," with the commercial character "determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The exception to immunity, then, encompasses cases "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

[52] Restatement (Third) of the Foreign Relations Law of the United States § 467(2).

[53] Restatement (Third) of the Foreign Relations Law of the United States § 467 cmt. d. As noted earlier, the Restatement allowed that this restrictive theory "appears" not to apply "to the United Nations, to most of its Specialized Agencies, or to the Organization of American States."

[54] OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 763-64 (3rd Cir. 2010); see Letter from Roberts B. Owen, Legal Adviser, State Department, to Leroy D. Clark, General Counsel, Equal Employment Opportunity

court intentionally diverged from the D.C. Circuit, which over a decade earlier reached the conclusion that the IOIA conferred 1945-era, absolute immunity for IGOs that has not tracked changes in sovereign immunity.[55] For the foreseeable future, then,[56] U.S. cases arising in the Third Circuit are likely to be resolved according to the restrictive theory, while cases arising in the D.C. Circuit will be resolved based on the absolute immunity, and other jurisdictions will eventually side with one position or the other.[57] The D.C. Circuit may enjoy a degree of deference given its relative expertise concerning IGOs, but its approach has been criticized and appears inconsistent with the view espoused by the U.S. government.[58]

If the restrictive approach were taken, it might diminish the immunity owed an IGO. The defense of marks appears commercial in character, since it is just the sort of activity engaged in by private persons in their own commercial pursuits. Thus, for example, the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property—which addressed sovereign rather than IGO immunity—exempted the determination of a state's rights in intellectual and industrial property, including trademarks.[59] To be sure, this translates imperfectly to IGOs, and before the D.C. Circuit settled on an absolute standard, its decisions considering a commercial activities exception for IGOs adapted it to their perceived needs.[60] It

---

Commission (June 24, 1980) (emphasis added), reprinted in Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 917, 917–18 (1980); 1980 Digest U.S. Prac. Int'l L. 16.

[55] Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998).

[56] The U.S. Supreme Court is entrusted with resolving circuit conflicts, but has shown little interest in this particular dispute, which at present remains the subject of disagreement between the D.C. Circuit and Third Circuit only. See, e.g., Nyambal v. International Monetary Fund, 135 S. Ct. 2857 (Mem.) (2015) (denying certiorari).

[57] There has been little indication elsewhere, though a couple of decisions have followed the D.C. Circuit approach. See Price v. Unisea, Inc., 289 P.3d 914, 919-20 (Alaska 2012); Bro Tech Corp. v. European Bank for Reconstruction and Development, No. 00–CV–02160–CG, 2000 WL 1751094, at *3 (E.D. Pa. Nov. 29, 2000) (preceding *OSS Nokalva*). The Ninth Circuit Court of Appeals, which hears cases arising in California and the State of Washington, among others, has not established a position.

[58] See, e.g., Steven Herz, International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity, 31 Suffolk Transnat'l L. Rev. 471, 532 (2008) ("The broad immunity afforded by *Atkinson* far exceeds the legitimate functional needs of international organizations.").

[59] Rep. of the Int'l Law Comm'n: Draft Articles on Jurisdictional Immunities of States and Their Property, art. 14, 43d Sess., April 29-July 19, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10, pt. 2 (1991), http://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf.

[60] See, e.g., Broadbent v. Org. of Am. States, 628 F.2d 27, 33-34 (D.C. Cir. 1980) (distinguishing IGO immunity under an IOIA commercial activities exception from treatment under the FSIA—which would consider employment by a foreign state in the United States of diplomatic, civil service, or military personnel to be governmental, but the employment of American citizens or third country nationals to be commercial—on the ground that "[a] comparable exception is not applicable to international organizations, because their civil servants are inevitably drawn from either American citizens or 'third' country nations," meaning that for IGOs "such an exception would swallow up the rule of immunity for civil service employment disputes"). For similar outcomes in other employment cases, see Tuck v. Pan Am. Health Org., 668 F.2d 547, 550 (D.C. Cir. 1981); Mendaro v. World Bank, 717 F.2d 610, 620

is possible, therefore, that an IGO's registration of trademarks in the United States solely for defensive purposes might not be deemed commercial activity;[61] if an IGO could defend a transfer order in an action initiated by a registrant simply by invoking the IGO's interests in its name, without U.S. registration, the argument for deeming that non-commercial would seem still stronger. On the whole, however, a domain-name registrant seeking to reverse a UDRP cancellation or transfer may find the United States to be the friendliest jurisdiction in which to present that argument: if it could invoke a restrictive approach, it would the best basis for arguing that that name-related activities are outside IGO immunity.

c. Functional immunity

The idea that IGOs are limited by their functions, often recognized as a general principle of international law,[62] is frequently urged as a basis for assessing IGO immunity claims as well[63]—not least, because the governing treaties often contain language suggesting that IGO immunity should be limited by its purposes.[64] This may carry over into the national law

---

(D.C. Cir. 1983). Even in *Atkinson*, the court of appeals held *arguendo* that if there had been a commercial activities exception, wage garnishment proceedings would not fall within it. 156 F.3d at 1342-43.

[61] See In re Aluminum Warehousing Antitrust Litigation, 20014 WL 5801607 (S.D.N.Y. 2014) (FSIA).

[62] See, e.g., Advisory Opinion on the Legality of the Use of Nuclear Weapons, 1996 I.C.J. Reports 78, para. 25 ("International organizations . . . are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.").

[63] See generally Peter H.F. Bekker, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities (1994); Michael Singer, Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns, 36 Va. J. Int'l L. 65 (1996).

[64] See, for example, Article 40(a) of the Statute of the Council of Europe ("The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions."). Analysis is complicated by the potential relevance, depending on jurisdiction, of more than one treaty. As has previously been noted, while Article 105 of the UN Charter states that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes"), the General Convention states a less qualified immunity for states parties. Likewise, the agreements for particular specialized agencies may suggest a more qualified approach, focusing on the IGO's functions, than would be gleaned from a reading of the Special Convention. See, e.g., Article 67(a) of the Constitution of the World Health Organization ("The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions."); Article 40(1) of the ILO Constitution ("The International Labour Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."), as clarified by its Article 39 (defining ILO capacities); Article XII of the UNESCO Convention (incorporating the provisions of Article 105 of the UN Convention concerning privileges and immunities). Other IGOs may state the terms of their immunities in a basic instrument that is then augmented by a more focused agreement, either of which may be further varied by reservations. Compare Article XV of the IAEA Statute ("The Agency shall enjoy in the territory of each member such legal capacity and such privileges and immunities as are necessary for the exercise of its functions."), with § 3 of the Agreement on Privileges and Immunities of the International Atomic Energy Agency (providing that "The Agency [and all its property and assets] shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity").

mediating international obligations. Thus, in Canada and the United Kingdom, a functional test may be incorporated by an Order in Council that implements those states' international obligations (according to, respectively, the Foreign Missions and International Organizations Act and the International Organisations Act). In principle, the scope of immunity afforded by such orders is not supposed to exceed that required by an international agreement.[65]

Cases applying a functional test, whether derived from an agreement or elsewhere, typically look to whether immunity concerns activities immediately or directly related to the performance of tasks entrusted to the organization.[66] As noted below, however, applications of this principle vary considerably in their stringency. Important variables include, for example, whether (and how) the functional inquiry is stated in a relevant agreement, as well as where the burden of proof is placed. In one Canadian case, for example, both the lower courts and the Supreme Court agreed that the relevant agreements and their national implementation established a functional standard, but while the lower court placed the burden on the IGO to demonstrate that immunity was strictly necessary for its functioning, the Supreme Court's inquiry (which ultimately upheld the most substantial immunity defense) simply asked whether the suit concerned would amount to undue interference with the IGO's functions.[67]

Despite its appeal elsewhere, including under international law,[68] functional immunity has not been directly applied at the test in the United States. To be sure, U.S. courts will afford immunity at least sufficient to fulfill an IGO's purposes, and presumably they will be skeptical of protecting activities that bear a completely attenuated relationship with the IGO's mission—not unlike the commercial activities that are distinguished under the restrictive approach.[69] At the

---

[65] See Wickremasinghe, *supra* note 30, at 438. In Canada, nonetheless, these orders reportedly do not necessarily restrict immunities to functional necessity, see Phillip M. Saunders, Canada, in Privileges and Immunities, *supra* note 30, at 84-86, but at least sometimes they do. See, e.g., Amaratunga v. Northwest Atlantic Fisheries, 451 N.R. 1, 2013 N.R. TBEd. No. 020, ¶ 47-53 (Sup. Ct. Canada Nov. 29, 2013) (construing Northwest Atlantic Fisheries Organization order).

[66] See Spaans v. Iran-US Claims Tribunal, 94 ILR 321, 327 ¶ 3(3)(4) (Neth. Sup. Ct. Dec. 20, 1985); accord Stichting Greenpeace Nederland v. Euratom, 136 ILR 429, 434-35 ¶¶ 6.2-6.4 (Neth. Sup. Ct. Nov. 13, 2007); Eckhardt v. European Org. for the Safety of Air Navigation (No. 2), 94 ILR 331, 333 (Maastricht D. Ct. Jan. 12, 1984).

[67] See Amaratunga, *supra* note 65, ¶ 53; see also Saunders, *supra* note 65, at 94-98 (discussing lower court proceedings).

[68] The Restatement (Third), while predicting that U.S. courts might be inclined toward a restrictive approach, reported that "[u]nder international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process." Restatement (Third) of the Foreign Relations Law of the United States § 467(1).

[69] See, e.g., Int'l Bank for Reconstruction & Dev. v. District of Columbia, 996 F. Supp. 31, 36 & n.3 (D.D.C. 1998) (invoking functional necessity approach of the Restatement (Third)), rev'd, Int'l Bank for Reconstruction & Dev. v. District of Columbia, 171 F.3d 687 (D.C. Cir. 1999) (reversing on the ground that tax immunity appropriate to the IBRD did not extend to activities of its independent contractor, even if the IBRD would itself have been immune were it to have conducted them).

same time, because the IOIA does not describe immunities in functional terms, and because presidential designation orders do not typically alter the default scope of immunity afforded by the IOIA, U.S. courts do not generally devote much attention to assessing whether immunity is necessary to fulfill the organization's purposes. As a consequence, there is little U.S. law directly endorsing and applying a functional approach as a general method for reckoning IGO immunity.

If a functional approach were employed, how would it apply in these circumstances? Those jurisdictions employing a functional test have demonstrated its flexibility and unpredictability. The Dutch Supreme Court has rejected as inappropriate the criterion of whether the IGO could have fulfilled its task without committing an offense for which immunity is being invoked; the question, instead, is whether "the actions in question are directly related to the fulfillment of [the IGO's] tasks."[70] Some courts seem to have been satisfied with assessing whether immunity is, in general and as a whole, necessary for the organization to achieve its objectives—which approaches the elaboration sometimes provided by states that prefer a nominally absolute standard[71]—while others have more readily classified matters that are private and less diplomatic in character as falling outside functional immunity.[72]

In an arbitration involving the European Molecular Biology Laboratory, an IGO headquartered in Germany, the arbitrators had to determine whether the operation of a cafeteria and guest-house were "official activities" for purposes of resolving whether they were immune from national taxation according to the relevant headquarters agreement, and construed that agreement "in the light of its primary purpose of enabling the EMBL . . . fully and efficiently to discharge its responsibilities and fulfill its purposes." It found that the conduct of scientific seminars, and providing meals and accommodations to participants, were official activities. On the other hand, supplying meals and accommodation for payment was not, because those functions could not be inferred from the agreement establishing the EMBL, nor was supplying meals or accommodations for EMBL staff.[73]

As *EMBL* suggests, there may be considerable overlap between the kinds of activities excluded from immunity under a restrictive approach (because they are commercial in nature) and those excluded under a functional approach (because activities that are commercial are not part of the IGO's mission), but the distinction may be critical here. An IGO would argue that the

[70] *Euratom*, *supra* note 66, ¶¶ 6.3-6.4; see Ryngaert, *supra* note 47, at 130-32.

[71] See Neumann & Peters, *supra* note 45, at 248-50. In NML Capital Ltd. v. Bank for International Settlements and Debt Enforcement Office Basel Stadt, ILDC 1547 (Swiss Federal Supreme Court July 12, 2010), the Federal Supreme Court applied an absolute immunity standard, derived from a headquarters agreement, but arguably assessed the functional relevance of garnishment to the Bank for International Settlement's mission.

[72] For the range of results from the Netherlands, see Rosanne van Alebeek & Andre Nollkaemper, The Netherlands, in Privileges and Immunities, *supra* note 30, at 179, 190-93 (contrasting decisions in Pichon-Duverger v. PCA and Stichting Mothers of Srebrenica).

[73] EMBL v. Germany, Arbitration Award, 105 ILR 1, 41-44 (1997).

noninfringed use of its name (including, if it so chooses, in maintaining a domain and making available the information on it) is related to fulfillment of its mission, not unlike the physical seminars at issue in *EMBL*. Registrants would try to distinguish that case, insofar as the agreement establishing the EMBL specifically referenced hosting visiting scientists, training, teaching, and the like,[74] and much would turn on the nature of the IGO as articulated by its founding instruments and any treaties relating to immunity. But 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.

B. Waiver of immunity

Assuming that an IGO is entitled to immunity, that immunity may be waived. This may be done through the IGO's governing instruments or through a particular agreement or pleading.

1. Waiver by governing instrument

International financial institutions like the IBRD, the IFC, and the Inter-American Development Bank provide in their Articles of Agreement or comparable instrument for the waiver of immunity with respect to particular suits. The one for the Inter-American Development Bank, for example, provides: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."[75] In the United States, at least, this is understood as a waiver of immunity and a designation of venue, not merely a provision establishing venue in the event of individual waivers.[76]

The scope of this waiver, however, is not entirely clear. A number of D.C. Circuit decisions take a functional approach to construing such waivers—one that preceded, but now exists alongside, that court's precedent upholding an absolute immunity standard that governs in the *absence* of waiver[77]—which assumes that waiver would have been intended to secure "a corresponding benefit which would further the organization's goals" or "when an insistence on

[74] Id. at 42.

[75] Agreement Establishing the Inter–American Development Bank, Apr. 8, 1959, Art. XI, Section 3, 10 U.S.T. 3068, 3095. For similar provisions relating to the World Bank Organizations, see http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html.

[76] Lutcher S.A. Celulose e Papel v. Inter–American Development Bank, 382 F.2d 454, 457 (D.C. Cir. 1967).

[77] The early cases suggest a view of immunity that is less absolute. See, e.g., Mendaro v. World Bank, 717 F.2d 610, 615 (D.C. Cir. 1983) (indicating that under international law IGOs enjoy "such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization") (citing and quoting a tentative draft of the Restatement (Third) of the Foreign Relations Law of the United States). With regard to the issue of waiver, however, cases like *Mendaro* are broadly reconcilable with the later cases premised on absolute immunity. See, e.g., Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338-39 (D.C. Cir. 1998).

immunity would actually prevent or hinder the organization from conducting its activities."[78] The presumption is against waiver,[79] and asks "whether a waiver of immunity to allow this *type* of suit, by this *type* of plaintiff, would benefit the organization over the long term."[80] The approach distinguishes, for example, between commercial transactions, in which failure to waive immunity would "unreasonably hobble [an IGO's] ability to perform the ordinary activities of a financial institution operating in the commercial marketplace," and other matters like employment, where the benefit of waiver is less clear and the potential for disruptive interference is greater.[81]

Applying that inquiry here—for financial IGOs and those with similar articles—is not straightforward. A waiver is not a commercial precondition allowing an IGO to enter into commercial relationships with others concerning their domain; that is, it does not arise in a contractual setting in which legal exposure to the plaintiff is necessary to secure a negotiated transaction.[82] An IGO might well argue, accordingly, that its objectives are furthered if its exposure to adverse determinations concerning its name is limited. Still, one could argue that the IGO's consent is necessary to sustain the UDRP process and the validity of a domain-name registrant's own consent to Mutual Jurisdiction and that, like the waivers in prior cases, is the price of access to domains and the interests they touch. Moreover, the costs do not seem as disruptive as in other cases. Unlike a waiver for employment actions, a waiver permitting domain-related suits would not likely impose "devastating administrative costs" by requiring differentiated policies for each jurisdiction, nor would it offer only marginal advantages relative to established internal administrative procedures as available for employees. In the end, though the argument for waiver under this kind of article is colorable, the presumption against construing such provisions as establishing a waiver may be decisive.[83]

2. Waiver by agreement or pleading

Waiver may also be accomplished by agreement or pleading. Article 2(2) of the General Convention, for example, provides that the UN's absolute immunity from legal process (other than relative to execution) may be expressly waived in particular cases. More generally, under

[78] Id. at 617.

[79] Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338 (D.C. Cir. 1998).

[80] Osseiran v. Int'l Finance Corp., 552 F.3d 836, 840 (D.C. Cir. 2009).

[81] *Mendaro*, 717 F.2d at 618; accord id. at 620 (discussing how the finding of waiver for suits by borrowers, approved in *Lutcher*, "would directly aid the Bank in attracting responsible borrowers"). Compare *Osseiran*, 552 F.3d at 840 (deeming IFC's charter to have waived immunity for breaches of agreements), and Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 278 (D.C. Cir. 2009) (waiver for unjust enrichment claim brought by advisor), with *Atkinson*, 156 F.3d at 1338-39 (no waiver for action to garnish employee wages), and Jam v. Int'l Finance Corp., 2016 WL 1170936 (D.D.C. 2016) (no waiver for action alleging breach of IFC environmental and social policies).

[82] See *Atkinson*, 156 F.3d at 1338 (D.C. Cir. 1998) (discussing *Mendaro*).

[83] See, e.g., *Jam v. Int'l Finance Corp.*, at *6 (concluding lengthy assessment of costs and benefits on the basis of this presumption).

the IOIA, IGOs "may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[84]

Putting aside potential complications, such as limits on who is entitled to waive, granting Mutual Jurisdiction—via initiation of a complaint or, for that matter, registration—would likely be understood as a waiver of any immunity the IGO might otherwise assert. The case law regarding waiver by IGOs is not particularly well developed, not least because IGOs are typically reluctant to waive their immunity. As noted above, numerous U.S. cases in the D.C. Circuit conclude that the governing instruments of international financial institutions, which refer to the bringing of actions in specified jurisdictions, amount to a sufficiently express waiver of immunity—rather than a mere venue provision—despite the fact that such provisions lack any explicit reference to immunity. For similar reasons, reference in the Mutual Jurisdiction provision to complainants' obligation to "submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction" (Rules, ¶ 3(b)(xii)), seems to require submission to judicial jurisdiction rather than mere non-objection to the choice among putative venues.

Cases concerning the waiver of sovereign immunity may be instructive, though the underlying scope of immunity likely differs, as may national practices concerning waiver for IGOs.[85] These circumstances are different than the categories originally thought to establish waiver by implication under the FSIA—"where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," or in "a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."[86] That said, the Mutual Jurisdiction provision seems more "unmistakable" or "unambiguous"[87] than those examples: unlike instances in which a foreign state has agreed to *arbitration* in a state *other than* the one assessing its

[84] 22 U.S.C. § 288a(b).

[85] In the United States, from which examples in the text are drawn, the FSIA provides an exception to foreign sovereign immunity for "cases . . . in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Under the IOIA, which governs most IGOs, "international organizations . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a. As previously discussed, the IOIA's structure leaves it unclear whether it is subject to the same exceptions as available under the FSIA—including, in this instance, waiver by implication—or whether, as seems more likely here, its waiver provision is independent and exclusive. Even assuming the latter reading, though, it remains unclear whether a requirement that IGOs "expressly" waive their immunity imposes in practice a substantially higher threshold than the FSIA's requirement that they do so "explicitly or by implication," since courts construing the FSIA have read waiver by implication narrowly. See, e.g., Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991).

[86] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617.

[87] *Shapiro*, 930 F.2d at 1017.

immunity (which some courts have in fact resisted as indicating an implicit waiver),[88] Mutual Jurisdiction indicates an IGO's consent to a judicial action (rather than just arbitration) in exactly the state that would be assessing its jurisdiction.[89] Cases involving the UDRP seem to bear this out. In one U.S. action, initiated by a domain registrant disputing the outcome of the UDRP, the City Council of Barcelona—after asserting that it was entitled to sovereign immunity under U.S. law—appeared to concede that it was subject to U.S. jurisdiction by operation of its waiver under the UDRP, though it contended that such waiver should be narrowly construed so as to permit challenges to the UDRP transfer decision only.[90] In another, more recent decision, a district court held that tribal sovereign immunity, waivers of which must also be strictly construed, had nonetheless been waived when a tribe initiated a UDRP proceeding—to the extent that a follow-on lawsuit actually challenged "a decision in the administrative proceedings canceling or transferring the domain name," though immunity was sustained to the extent the complaint sought broader or different relief not encompassed by the initial proceedings.[91] Likewise, it seems plausible that the Mutual Jurisdiction provision would relieve the jurisdiction designated and entertaining the action of any responsibility for having violating the IGO's immunity.

Perhaps an IGO might argue that a waiver was compelled and therefore ineffective. It might argue compulsion or duress, for example, if a state party to the Paris Convention were to demand that an IGO waive its immunity in exchange for the state's willingness to respect the IGO's privileges. These facts, however, seem quite different. As a threshold matter, ICANN is not in a position comparable to a self-dealing state: to my knowledge, ICANN is not itself constrained by any obligation to respect immunity, nor does it seek the waiver of immunity to *its* jurisdiction as the price of conforming to that obligation. Accordingly—even as to the

---

[88] See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir.1985) (asserting that "most courts refuse to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States"); see also Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 122-23 (D.C. Cir. 1999) (viewing skeptically the scope of implicit waiver as described in the FSIA's legislative history); Seetransport Wiking Trader v. Navimpex Centrala, 989 F.2d 572, 577 (2d Cir. 1993) (same).

[89] It is not, on the other hand, so direct as to refer to immunity as such. See Gulf Resources America, Inc. v. Republic of Congo, 370 F.3d 65, 72-74 (D.C. Cir. 2014); see also World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154, 1162-64 (D.C. Cir. 2002) (noting waiver of immunity pursuant to two agreements adverting to waiver immunity, but contrasting two that did not—and which also referred to resolution by arbitration in other jurisdictions).

[90] See Brief for Appellee, Barcelona.com, Inc. v. Excelentisimo Ayuntamiento De Barcelona at 26, 330 F.3d 617 (4th Cir. 2003). That issue was not the focus of proceedings, though the court of appeals eventually favored the view of the registrant on the ground that (under the Lanham Act) the domain name in question implicated a purely descriptive geographical designation that, having not acquired any secondary meaning, was not entitled to protection. Barcelona.com, Inc. v. Excelentisimo Ayuntamiento De Barcelona, 330 F.3d 617, 628-29 (4th Cir. 2003).

[91] See Order Granting with Leave to Amend Defendant's Motion to Dismiss at 7-11, Virtualpoint, Inc. v. Poarch Band of Creek Indians, Dba PCI Gaming Authority, Case No. SACV 15-02025-CJC(KESx) (C.D. Cal. May 10, 2016), available at https://www.scribd.com/doc/312906586/Virtualpoint-v-Poarch-Band-of-Creek-Indians-opinion-pdf.

agreement to Mutual Jurisdiction made by an IGO while registering a domain-name—any compulsion objection seems attenuated. The objection is even harder to make when an IGO has filed a UDRP complaint. As noted previously, nothing compels any complainant to initiate the UDRP and accept Mutual Jurisdiction; beyond tolerating an infringement of its interests, an IGO might elect instead to proceed first (or solely) to court. Even if these options are unappealing (including because filing in court would waive immunity), those are the options that would confront IGOs in the absence of the present UDRP, so it is not as though a preexisting or independent privilege were being conditioned or withdrawn. IGOs might, indeed, take consolation from the advantages afforded them by the UDRP, which—but for cases in which judicial review is later sought by a losing registrant—affords them an efficient recourse to which they are not otherwise entitled.[92]

National courts may have other reasons to pause before reading this waiver narrowly. Allowing an IGO that *prevailed* in the UDRP process to avoid its waiver and rest on the UDRP result by invoking immunity, while allowing it to waive that immunity by initiating judicial proceedings if it *loses* to a domain-name registrant, will likely seem asymmetrical and unfair.[93] In addition, courts may resist letting matters rest after the abbreviated UDRP process. There is broad acceptance of a principle, expressed in some treaties and governing instruments, according to which IGOs *should* waive immunity in the absence of any sufficient alternative.[94] The absence of a sufficient alternative may not be a basis for overriding immunity—at least not in the United States[95]—but it might reduce the appeal of arguments for limiting the scope of waiver by Mutual Jurisdiction.

---

[92] IGOs that have submitted to Mutual Jurisdiction as the price for domain-name registration may have a stronger claim that their submission is compulsory, but they too derive benefit from the UDRP procedure, and fewer IGOs are likely to find themselves subjected to judicial proceedings based on their own registration.

[93] By analogy, the enforceability of arbitration agreements is sometimes limited on the ground that they lack a "bilateral" quality or "mutuality": requiring one party to submit its claims to arbitration, while allowing the other to elect between arbitration and court, or allowing one side only to appeal. Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 117, 120, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000); Higgins v. Superior Court, 140 Cal. App. 4th 1238, 1253-54, 45 Cal. Rptr. 3d 293, 304-05 (Ct. App. 2006); Sullenberger v. Titan Health Corp., 2009 WL 1444210, *5-*6 (E.D. Cal. 2009).

[94] See, e.g., General Convention, art. 29 (providing that "[t]he United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of private law character to which the United Nations is a party"); see generally Institut de Droit International, Resolution on Contracts Concluded by International Organizations with Private Persons(1977), art. 9 ("If a dispute arises in connection with a contract which contains no clause on the settlement of disputes, the organization concerned should either waive immunity from jurisdiction or negotiate with the other party to the contract with a view to settling the dispute or to establishing an appropriate procedure for its settlement - particularly through arbitration.").

[95] See, e.g., Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010) ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]"); Georges v. United Nations, 84 F. Supp. 3d 246, 249 (S.D.N.Y. 2015) (rejecting argument that absolute immunity "is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29" of the General Convention);

C. The UDRP and Its Alternatives

The question of IGO immunity may be resolved, at least in part, outside ICANN—to the extent that national courts were inclined to find that the matter lies outside a particular IGO's immunity, or that any immunity was waived by the IGO's governing instrument. In other cases, though, a national court might find that Mutual Consent effectuates a waiver, even though it would otherwise be inclined to recognize the IGO's immunity from judicial process. With respect to this latter possibility, ICANN confronts a policy question infused with legal principles. Several alternatives may be considered.

1. Maintaining the Status Quo

One legally available option is to maintain the status quo. Even if one assumes that an IGO, absent Mutual Jurisdiction, might be capable of asserting immunity, affording them a means of surrendering that immunity via the Mutual Jurisdiction provision is not *itself* an infringement. Accordingly, as a purely legal matter, it seems unlikely that the Mutual Jurisdiction provision, as it may be accepted by an IGO, establishes or occasions a violation of IGO immunity. And as explored further below, it may seem more appropriate to require an IGO to abide by a judicial process, given that it has elected to initiate UDRP proceedings, than it would be require a domain-name registrant to accept the IGO's preferred alternative.

Even the status quo, moreover, may leave IGOs some room for adaptation. An IGO will have no interest in giving others an exclusive right to use its name, but it may be able, according to the law of its seat, to assign a right of use to another (or, at least, to appoint an agent to enforce its interest).[96] It is presumably within ICANN's authority to establish standing rules permitting such assignees to act as complainants. Indeed, no reform may be necessary: in at least one case, a panel permitted a legal representative of an IGO to proceed as the complainant.[97]

Lempert v. Rice, 956 F. Supp. 2d 17, 24-25 (D.D.C. 2013) (rejecting argument that the UN had implicitly waived immunity by failing to provide an adequate alternative dispute settlement in violation of due process and obligations arising under the General Convention). The United States government has explicitly rejected the view that the General Convention encumbers the UN's capacity to assert immunity, either by virtue of an obligation to waive that immunity or to establish alternative mechanisms. Reply in Support of the Statement of Interest of the United States of America, Lempert v. Rice, 956 F. Supp. 2d 17 (D.D.C. 2013), http://www.state.gov/documents/organization/226371.pdf, 2013 Digest U.S. Prac. Int'l L. 297; Statement of Interest of the United States of America at 11-12, Sadikoglu v. United Nations Development Programme, 11 Civ. 0294 (PKC) (S.D.N.Y. 2011), http://www.state.gov/documents/organization/194079.pdf, 2011 Digest U.S. Prac. Int'l L. 352, 353.

[96] Of course, either instrument would license the IGO the right to use its name and associated marks. Such license-back schemes are consistent with a valid assignment, notwithstanding the "assignment in gross" doctrine. E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir. 1992).

[97] Lenz & Staehelin Ltd v. Christopher Mikkelsen, D2012-1922 (WIPO Jan. 8, 2013). As noted previously (see *supra* note 5), UNITAID, an IGO hosted by the World Health Organization (WHO), had assigned its trademark rights by a fiduciary agreement to Lenz & Staehelin, a private enterprise, which registered them on behalf of the WHO and UNITAID.

While the validity of assignments under foreign law may be assumed,[98] their consequences are uncertain, and will undoubtedly depend on national trademark and immunity law. One problem is that such assignments could themselves be regarded as waivers of immunity, although that risk that could be reduced by careful drafting.[99] A second is that the assignment might be attacked as falling outside the scope of the IGO's immunity. The significance of these issues will depend on whether the IGO is in principle entitled to absolute immunity under national law (and, if not, whether the assignment would be considered to be outside the IGO's restrictive or functional immunity), and whether any domain-related claim could be brought based on the assignment itself.[100]

Third, and finally, the assignment might be ineffective—for example, because it is transferred without the accompanying goodwill previously associated with the mark, thus constituting an invalid "assignment in gross"[101]—and fail to establish an enforceable interest for the assignee. This concern is genuine, but it may not be disabling, and it is certainly not unique. It is already possible that the substantive standard resulting in a UDRP transfer will be different than the one applied in any following judicial proceeding.[102] Just as a name protectable within the UDRP may not be entitled to protection under national law, an assignment that enables an IGO to prevail in the UDRP may not be sufficient to prevail in an action initiated by a losing registrant. This may not be a serious problem in terms of the dispute at hand: if the assignment is imperfect, it would require reversal of the transfer, but the IGO still would not have consented to being involved in the judicial proceedings against it; if, on the other hand, the assignment is sufficient, the matter can proceed with the IGO assignee, and the IGO's immunity is again not at issue. The graver problem is that a flawed assignment might diminish the assignor's priority in the underlying mark for all purposes, making it indispensable to scrutinize national trademark law.[103] As partial consolation, because the IGO (or surrogate) complainant initiating the UDRP

---

[98] Federal Treasury Enterprise Sojuzplodoimport v. Spirits Intern. B.V., 809 F.3d 737, 742-43 (2nd Cir. 2016); id. at 743-45 (Act of State doctrine).

[99] See Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in International and Foreign Courts, 898 F. Supp. 2d 301, 310-11 (D. Mass. 2012) (concluding that agreement and other legal documents do not explicitly or implicitly waive a foreign state's immunity).

[100] In *Universal Trading*, the Ukraine conducted commercial activity insofar as it contracted with a private party to conduct asset recovery, but in that case the claims were actually based on a breach of the asset-recovery agreement. In the arrangement contemplated here, the domain-registrant's claim would likely be viewed as based on the UDRP transfer order as opposed to the assignment itself. 898 F. Supp. 2d at 313-17.

[101] 3 McCarthy on Trademarks & Unfair Competition § 18:2 (4th ed. 2015); Parkinson v. Robanda Intern., Inc., 2016 WL 761633 (9th Cir. 2016). United States application of this doctrine has been affected by TRIPs, NAFTA, and the Trademark Treaty, but that analysis is complex and outside the scope of this memorandum. See generally 3 McCarthy, *supra*, § 19:31.75; Irene Calboli, Trademark Assignment "With Goodwill": A Concept Whose Time Has Gone, 57 Fla. L. Rev. 771 (2005).

[102] See *supra* note 15.

[103] Neil R. Platt, Good Will Enduring: How to Ensure That Trademark Priority Will Not Be Destroyed By the Sale of a Business, 99 Trademark Rep. 788 (2009).

process gets to choose among the jurisdictions initially proposed by the registrant, it could take such matters into account in deciding whether to execute an assignment prior to filing a UDRP complaint.

2. Non-Judicial Alternatives

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—either as part of an internal procedure, typically for employee matters, or involving a third-party provider. The form of this procedure varies widely, even within organizations, and depends on the nature of the claim and the relation of the parties.[104] Of particular relevance here, however, IGOs often provide for settling contractual disputes by negotiation and conciliation or, failing that, according to arbitration under United Nations Commission on International Trade Law ("UNCITRAL") or similar rules.[105]

These practices are generally accepted by commercial partners.[106] For example, Apple's software licenses anticipate that some IGO licensees, at least, might object to judicial processes, providing as follows:

> If You (as an entity entering into this Agreement) are an international, intergovernmental organization that has been conferred immunity from the jurisdiction of national courts through Your intergovernmental charter or agreement, then any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by

[104] It is difficult to describe contract-based practices of IGOs, which are not transparent, with certainty, and of course hazardous to generalize about quite different organizations. Cf. Reinisch, *supra* note 48, at 130 (acknowledging that "[d]ue to the limited case-law and an equally limited number of arbitral awards, it is very difficult to ascertain the real practice of international organizations with regard to the law applied to contracts with private parties"). For a survey for one IGO with extensive practice, see Bruce C. Rashkow, Immunity of the United Nations: Practice and Challenges, 10 Int'l Org. L. Rev. 332 (2013).

[105] International Fund for Agricultural Development (IFAD), General Terms and Conditions for the Procurement of Goods, art. 24, http://www.ifad.org/governance/procurement/procure_21.pdf; International Labour Office, Terms and Conditions Applicable to ILO Contracts for Services, para. 13, http://www.ilo.org/wcmsp5/groups/public/---ed_mas/---inter/documents/legaldocument/wcms_117516.pdf; International Labour Office, Terms and Conditions Applicable to ILO Contracts, para. 13, http://www.ilo.org/wcmsp5/groups/public/---ed_mas/---inter/documents/legaldocument/wcms_117515.pdf; see also Edward Kwakwa & Marie-Lea Rols, The Privileges and Immunities of the World Intellectual Property Organization, 10 Int'l Org. 373, 391 (2013) (quoting WIPO General Conditions of Contract). For a like declaration, expressed as a policy rather than as a contractual provision, see International Organization for Migration, General Procurement Principles and Practices, para. 5.4, https://www.iom.int/sites/default/files/about-iom/procurement/IOM-General-Procurement-Principles-and-Processes-Jan-2016-final.pdf.

[106] See Yves Renouf (WTO Secretariat), When Legal Certainty Matters Less than a Deal: Procurement in International Administrations 3, Inst. for Int'l L.J. (March 19, 2009), http://www.iilj.org/gal/documents/GALch.Renouf.pdf (reporting that bidders and contractors typically accept IGO-proposed mechanisms "without a word").

> arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. The place of arbitration shall be London, England; the language shall be English; and the number of arbitrators shall be three. Upon Apple's request, You agree to provide evidence of Your status as an intergovernmental organization with such privileges and immunities.[107]

Adopting a similar mechanism as a supplement to the UDRP process would likely appeal to IGOs, which may regard it as unfair that the Mutual Jurisdiction provision asks them to pay a greater price for UDRP participation (the loss of their immunity from jurisdiction) than other parties, which are merely asked to waive objection to a *particular* jurisdiction. Still, the UDRP context seems materially different. Unlike a contracting situation, in which a typical prospective partner can agree to the IGO's preferred mechanism or pursue similar opportunities elsewhere, a party interested in registering a domain name would have less freedom; conceding to the IGO's preferred mechanism, at least its possibility, would be an inescapable aspect of registration. (There may be little sympathy, of course, for those who actually register their names in bad faith, but that premise is in theory open for reexamination after the UDRP proceeding; those whose misconduct is less apparent, moreover, may have had little cause to scrutinize an IGO-specific resolution option, which may appear to them like a remote contingency.) An alternative dispute resolution would also require compliance by a third party to a greater degree, since ICANN would be facilitating the IGO's preference by changing the terms it prescribes, as opposed to a situation in which IGOs and their contract partners decided the question the question bilaterally.

ICANN is, of course, prescribing terms in any event. But as against compelling waiver by IGOs, compelling arbitration may be more easily challenged in domestic courts, including as the basis for suggesting a further exception to IGO immunity. The conflict between immunity and access to courts was developed most famously in the *Waite and Kennedy* case, which involved employment-related actions brought against the European Space Agency in German courts. In upholding immunity, the European Court of Human Rights stated that a material factor was "whether the [employees] had available to them reasonable alternative means to protect effectively their rights under the Convention," though it held that the ESA appeals board sufficed.[108] Other decisions have permitted the assertion of immunity against employee dismissal lawsuits based on the perceived adequacy of the Administrative Tribunal of the International Labour Organization.[109]

---

[107] Xcode and Apple SDKs Agreement, para. 8.6(c), https://www.apple.com/legal/sla/docs/xcode.pdf.

[108] See Waite & Kennedy v. Germany, App. No. 26083/94, 30 Eur. H.R. Rep. 261, 265-67, 274-75 (1999); see also Beer & Regan v. Germany, App. No. 28934/95, 33 Eur. H.R. Rep. 3, 78-79 (1999).

[109] See Thomas Henquet, The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg, 10 Int'l Org. L. Rev. 538, 551-52 (2013).

These cases show that inquiring into reasonable alternative means does not necessarily imperil immunity, and there are grounds for differentiating this context or otherwise avoiding this exception.[110] First, domain-related rights are unlikely to be considered the equivalent of employee rights.[111] Second, the principle may be limited to states subject to the European Convention on Human Rights, meaning that other jurisdictions would have to simulate this doctrine under other international or domestic human rights instruments.[112] Third, even for employee matters and for states subject to the European Court of Human Rights, national courts have distinguished matters involving IGOs entitled to absolute immunity (at least where that immunity is reinforced, as for the United Nations, by the UN Charter)[113] and organizations for which immunity was established in the state concerned before the European Convention came into force.[114]

Subject to these important qualifications, were an IGO able to secure from ICANN the transfer of another registrant's domain, without adequate means of challenging that result, such proceedings might pose concerns for those states disposed to employ a *Waite & Kennedy* assessment. If the Mutual Jurisdiction provisions were revisited so as to permit only non-judicial review for IGOs, ICANN should pay close attention to the robustness of these alternatives, whether they likewise constrain the options for losing IGOs, and whether such recourse may be made voluntary only.

---

[110] See, among many treatments, August Reinisch, The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals, 7 Chinese J. Int'l L. 285 (2008). Some argue, naturally, that the doctrine is excessively limited. See, e.g., Emmanuel Gaillard & Isabelle Pingel-Lenuzza, International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass, 51 Int'l & Comp. L.Q. 1 (2002).

[111] But cf. Fox & Webb, *supra* note 23, at 577 (noting that "it has additionally been contended that the interest of individuals dealing with the [international] organization whether as suppliers of goods or services or employees . . . also require legal protection").

[112] The United States government has emphasized that, for this reason, such arguments are of limited value in U.S. court. Statement of Interest of the United States of America at 11-12, Sadikoglu v. United Nations Development Programme, *supra* note 95; see note 95 and accompanying text (discussing potential for arguing the inadequacy of alternatives in construing the scope of waiver); *Amaratunga*, *supra* note 65, ¶¶ 59-63 (examining and rejecting, as a basis for avoiding IGO immunity, attempt to invoke analogous denial-of-justice principles in the Canadian Bill of Rights and the International Covenant on Civil and Political Rights).

[113] Stichting Mothers of Srebrenica v. Netherlands & United Nations, ¶¶ 4.3.3-4.3.6, LJN:BW 1999 (Neth. Sup. Ct. Apr. 13, 2012), http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf. See also Brzak v. United Nations, 597 F.3d 107, 112 (2nd Cir. 2010) (suggesting that where absolute immunity is otherwise conferred, attempting to measure the adequacy of internal mechanisms would be inconsistent with absolute immunity and the requirement that waivers be express).

[114] *Entico*, *supra* note 38, ¶¶ 23-29 (concluding, in the alternative, that arbitration according to UNCITRAL rules is a sufficient alternative).

3. Other Possible UDRP Reforms

Beyond simply maintaining the status quo, or accepting non-judicial alternatives familiar to IGOs, several possible compromises are worth considering.

First, ICANN could distinguish among IGOs: maintaining existing Mutual Jurisdiction terms in general, but permitting particular IGOs to elect instead to submit to arbitration (according to UNCITRAL or some similar procedure) disputes persisting beyond the UDRP process. The most obvious candidates would be IGOs almost universally entitled by treaty to absolute immunity, like the United Nations. Starting with the clearest cases would also allow ICANN to evaluate the alternative mechanisms before permitting them generally, but repeated modification of the terms (including conforming changes in registration agreements) may pose logistical problems.

Second, the Mutual Jurisdiction clause could be rewritten to address the special case of IGOs *without* prejudging the question of their immunity. The objective would be to avoid assuming IGO immunity in circumstances where the relevant jurisdiction would not be inclined to afford it anyway—because, for example, its courts would apply a functional or restrictive approach and regard the activity as beyond immunity's scope. It may be difficult, of course, to agree on the proper threshold for diverting cases toward an alternative mechanism, in particular whether and by what means a legal evaluation could be obtained from the jurisdiction concerned, and the issue of the appropriate alternative would have to be resolved. Bracketing these questions, however, the Rules could in principle provide something like the following:

> Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction, *except that*: in the event the action depends on the adjudication of the rights of an international intergovernmental organization that would, but for this provision, be entitled to immunity from such judicial process according to the law applicable in that jurisdiction, [as established by a decision of a court in that jurisdiction,] the challenge must be submitted instead for determination [by UNCITRAL in accordance with its rules].

Finally, it may be possible to ameliorate the hardship that a non-judicial process might impose on the other party. For example, an IGO might be permitted to elect arbitration if it agreed to bear some or all of the cost. Assuming IGOs were found that appealing, the formulation of such a provision might be complex, given that national law may influence its enforceability.[115] In principle, though, such a mechanism could eliminate the higher costs

[115] See, e.g., John L. Gardiner & Timothy G. Nelson, Recovery of Attorneys' Fees in International Arbitration: The Dueling 'English' and 'American' Rules, 2010 Arb. Rev. of the Americas 25.

arbitration may impose relative to litigation and, potentially, compensate the would-be litigant for the lost opportunity to proceed in court.

Reforming Mutual Jurisdiction along one of these three lines would benefit IGOs to the extent it restored to them a version of their pre-UDRP immunity.[116] By the same token, however, it would tend to discount the benefit they received from the UDRP process. And even if either losing party were permitted to initiate a post-UDRP arbitration, even one subsidized by the IGO, the mechanism would still be one imposed by ICANN as an accommodation to IGOs rather than to other parties—which would continue to resort to judicial action in cases not involving IGOs. Whether such an accommodation is appropriate, in light of the immunity often owed IGOs, is ultimately a policy question.

[116] That which they might have enjoyed, for example, in a declaratory judgment action commenced against them by a domain-name registrant. See *supra* text accompanying note 21.