Memorandum

Date: 4/22/2016

To: Mary Wong, Senior Policy Director

Steve Chan, Senior Policy Manager

From: Edward Swaine

RE: IGO Immunity

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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 (hereinafter "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. The merits of such an action will depend on the law of the jurisdiction concerned, but this memo simply assumes that a court would properly exercise jurisdiction over the action but for the possibility that the IGO is entitled to immunity.

Even with this focus, some generalization is required. Immunity obligations vary by state and by the IGO concerned: immunity is 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 particularly active offer substantial 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, such as 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 is whether, in principle, an IGO would enjoy immunity from judicial process with respect to name-related rights it might assert in the UDRP proceedings. The answer depends on whether 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, for example, unless an IGO benefits from broader treaty protections—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 courts interpret the statute as establishing absolute immunity and others view it as establishing restrictive immunity only. The answer is a bit more straightforward elsewhere, and other states tend to favor either an absolute or a

[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.

functional approach. The choice among these approaches would 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, by virtue of its initiation of UDRP proceedings (or its registration of a domain name)—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 immunity as a defense if another party commences a judicial action falling within the scope of that waiver. The grant of Mutual Jurisdiction should establish such a waiver, just as it would for a state entity otherwise entitled to immunity. 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 to judicial process; if, on the other hand, the Mutual Jurisdiction clause were maintained, as in the status quo, the IGO's immunity is less germane because it would have been waived. Equitable considerations might influence any judicial analysis. If the UDRP were left to stand on its own, without any possibility of judicial recourse, it might be considered an insufficient remedy for domain registrants. And where the IGO has availed itself of a remedy to which it would not otherwise be entitled, by initiating UDRP proceedings, it may seem less fair for it to invoke a defense unavailable to the other party.

This will be little consolation to IGOs faced with a compromise of their ordinary immunity, so it is worth exploring alternatives. It may be possible for IGOs to use an assignment of rights, or similar mechanism, that would enable them to initiate UDRP proceedings while, at the same time, disassociating the IGO itself from any subsequent judicial proceedings. The more conventional option would be to use a non-judicial dispute resolution process, usually consisting of arbitration—according either to an internal IGO procedure (as used, for example, for employees) or third-party procedure, like that of the United Nations Commission on International Trade Law ("UNCITRAL"). Unfortunately, this approach translates imperfectly to the UDRP context. Unlike a contract partner, who may decide whether to elect such an alternative arrangement or take its business elsewhere, the arbitration alternative to Mutual Jurisdiction works only if a domain-name registrant is forced to accept that process in order to accomplish registration—essentially, curing the immunity concession presently made by IGOs by imposing an arbitration concession on domain registrants, potentially awakening judicial concerns about access to courts. An alternative dispute resolution would also require compliance by a third party, ICANN, to a greater than conventional degree. Other avenues may be worth exploring, but they should be explored 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*, these interests—which are often registered as marks—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]

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[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 mark 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

Although the Policy describes this procedure as "mandatory" (para. 4), it is less coercive than that would suggest, and the fact that IGOs are subject to the UDRP is not itself particularly problematic. An IGO that is *not* a domain-name registrant, but which seeks to vindicate its interest in a protectable name, may instead 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)[7]—though that may be unappealing in light of certain barriers to relief.[8]

For those IGOs that *are* domain-name registrants, or that elect to initiate a UDRP complaint, the constraint on using the UDRP process is not especially onerous. 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."[9] Thus, any obligation to

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International Settlements v. Fortune Nwaiwu, D2004-0575 (WIPO Oct. 1, 2004). A few other matters are 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.

[8] In addition to conventional hurdles, like proper venue and personal jurisdiction, an IGO may not have a protectable interest under U.S. law. See *infra* note 17. United States courts have consistently held that the provisions of the Lanham Act, including generally-applicable restrictions on the nature of the rights protected, are sufficient to discharge U.S. obligations under the 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. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617. 628-29 (4th Cir. 2003); 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.

[9] For ease of discussion, this memo will generally assume that any litigation follows resolution of the administrative proceeding.

submit to UDRP proceedings does not interfere unduly with the preexisting option to submit the matter to judicial proceedings.[10] In this sense, the UDRP simply affords an alternative arbitral process, not in itself entailing waiver of immunity for any other proceeding.

What is more controversial, however, is the fact that the UDRP also *compels* consent to judicial proceedings if the losing party elects to pursue them—in the principal scenario, meaning that complained-against domain-name registrant can take the IGO to court.[11] According to the Rules for the Uniform Domain Name Dispute Resolution Policy ("Rules"),[12] 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)(xiii). Such "Mutual Jurisdiction" is defined as either the principal office of the Registrar or the domain-name holder's stipulated address.[13] Accordingly, an IGO complainant will have consented to judicial proceedings if a losing respondent wishes to challenge a cancellation or transfer[14]—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.

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[10] 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.

[11] Likewise, IGO registrants responding to another's complaint (should such circumstances arise) will have committed at the time of registration to judicial proceedings. 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." This is reinforced by the Registrar Accreditation Agreement, which 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. It appears that Registration Agreements do in fact require a mutual jurisdiction commitment designed to parallel the commitment made by complainants under UDRP. Levine, *supra* note 4, at 53 (2015).

[12] See https://www.icann.org/resources/pages/rules-be-2012-02-25-en.

[13] 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.

[14] 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.

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.[15] Such follow-on litigation is expensive and may be infrequently pursued, but even so it poses legitimate concerns. The UDRP result receives no deference.[16] 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 rights protectable under U.S. law, notwithstanding any obligations that would appear to arise under Article 6ter of the Paris Convention.[17] Results may vary, of course, by jurisdiction.

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[15] 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."). This discussion assumes that a judicial proceeding would appear *in personem*. Id. § 1125(d)(1). The ACPA, however, also allows for *in rem* proceedings by a mark's owner against a domain name in the judicial district in which the domain name register, domain name registry, or other domain name authority that registered or assigned the domain name is located 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. Id. § 1125(d)(2). To the extent the IGO has a property interest in a transferred domain name, it is likely that the same 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).

[16] 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).

[17] Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617, 627-29 (4th Cir. 2003) (reversing decision in favor of mark established on the basis of Spanish law, because "United States courts do not entertain actions seeking to enforce trademark rights that exist only under foreign law," and holding that the Barcelona "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 (or, apparently, under Spanish 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*). At the same time, 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). 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).

In short, the Mutual Jurisdiction concession means that certain IGOs will have agreed to the possibility of a judicial process, notwithstanding any immunity to which they otherwise would be entitled. This concession will loom largest in cases in which the IGO is not only the complainant in the UDRP proceedings, but also benefited from an initial panel decision in its favor, such that the decision to resort to judicial proceedings—and the risks that creates for adverse results—is entirely at the behest of the private party.

3. Discussion

The core question is whether an IGO is "entitled to immunity," but the baseline assumptions may be disaggregated. An IGO's immunity would be most clearly at issue if the IGO had not itself initiated any related judicial proceeding—since that would risk waiving any immunity to which it would be entitled, including to counterclaims[18]—and the UDPRP's Mutual Jurisdiction provision were absent. This might be the case, for example, where a domain-name registrant has sought a declaratory judgment in relation to some actual or potential infringement by an IGO.[19] Although that is not the scenario of principal concern here, imagining that scenario usefully isolates the question as to whether an IGO has a legitimate expectation that it would be entitled to immunity *absent* the UDRP and its concessions. 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 in general enjoy broad 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.

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

[19] 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).

A. Scope of IGO Immunity

1. Varied Bases for immunity

Immunity under international law depends on context. First, 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.[20] The differences are meaningful. IGO immunity is often likened to foreign "sovereign" immunity, which is afforded to states, but the two principles 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 places and through persons not their own. On the other hand, IGOs tend to be purpose-built, unlike states, and may more easily be restricted fulfilling specific functions; these vary by organization, of course, and so may their immunity.[21]

Second, 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.[22] Many 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 in accordance with negotiated agreements.[23] The Special Convention has been ratified by 127 parties—some states that loom

[20] 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.

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

[22] 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).

[23] 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

large in IGO dealings, like Belgium and Switzerland (as of 2012), are parties, while others (notably, the United States) are not.[24] As discussed below, the Special Convention appears to confer broad immunity on IGOs subject to it, but its scope is more contingent: even states parties have varied obligations,[25] and may modify those obligations yet further with IGOs they host.[26] The Special Convention is not unique in accommodating bilateral arrangements. Whether by headquarters agreements or otherwise, the immunities of a number of IGOs subject to Article 6ter of the Paris Convention are governed at least in part by yet additional treaties. The variety this introduces is all the more consequential in light of the fact that some states, such as Italy, have intimated that IGO immunity can only be resolved on the basis of treaties.[27]

National law may also determine 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.[28] The United States, in contrast, accords self-executing effect to some treaties (like the General Convention),[29] and implements other

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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).

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

[25] States may file reservations when acceding, and in some cases these bear on privileges and immunities; the treaty also provides for individuation by agency 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 Organization: Practice and Challenges, in Immunity of International Organizations 93 (Niels Blokker & Nico Schrijver eds., 2015).

[26] 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).

[27] See Beatrice Bonafè, Italian Courts and the Immunity of International Organizations, 10 Int'l Org. L. Rev. 505, 512 (2013); see also Eric De Brabandare, 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).

[28] 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.

[29] 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

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).[30] The IOIA provides privileges and immunities to international organizations that have been designated by the President through an executive order, which may also modify the privileges and immunities as the President considers appropriate.[31] 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.[32]

Treaties and statutory obligations are in principle complemented 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, which may in principle govern in situations not addressed by a treaty. 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.

Unfortunately, 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. 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."[33] Not insignificantly, even those cases recognizing a customary international law basis for immunity appear to differ on its

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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.

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

[31] 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).

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

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

extent.[34] 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.

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 tightly 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.[35]

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—not least, because there are fewer states parties, and greater potential according to its terms for variation in the treatment of particular IGOs—but the treaty language creates a

[34] 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").

[35] 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 29-30. 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.

presumption in favor of similarly broad immunity.[36] Bilateral agreements (such as headquarters agreements) may also establish immunity that appears comprehensive in scope.[37]

National law may also afford extremely broad immunity, but its administration requires careful scrutiny. In the United States, for example, some decisions treat the immunity conferred by IOIA designation as absolute in character,[38] though it remains contingent in some respects.[39] 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.[40] 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.[41]

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[36] 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.

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

[38] 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 52-55 (discussing *OSS Nokalva*).

[39] It is common ground that, 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).

[40] See Schmalenbach, *supra* note 32, 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 28, at 47-49 (same).

[41] 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 28, at 8 (concluding that "[i]t appears that, in practice, the concept of functional immunity frequently leads to *de facto* absolute immunity"); De Brabandare, *supra* note 27, 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").

The customary international law of IGO immunity—which some courts tend to deny altogether[42]—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.[43]

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 that they are entitled to absolute immunity in a given jurisdiction without particular information about the treaty obligations or national law 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,[44] 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

[42] See Wood, *supra* note 33, especially at 299 & nn. 39-42.

[43] 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"—differentiating IGO from state immunity as being founded on international agreements. Somewhat in contrast, 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 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 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 28, at 242-51.

[44] 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).

Cassation, which resolved the case on other grounds.[45] Italian courts, at least in cases involving the Food and Agriculture Organization and the Bari Institute of the International Center for Advanced Mediterranean Agronomic Studies (ICAMAS), have previously shown a persistent interest in denying immunity for acts they regard as being of a private character, but such decisions may be unusual insofar as they were driven in by a now-dormant dispute over Italy's accession to the Special Convention[46]—with Italy's more recent and general case law being better characterized as entailing a narrower approach to functional immunity.[47]

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."[48] 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).[49]

This puzzle remains unsolved. Section 467 of 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, the more salient question for cases arising in U.S. courts, IGOs enjoyed the privileges and immunities provided "by international agreements to which the United States is party," and IGOs "designated by the

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[45] 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).

[46] For discussion, see Ricccardo Pavoni, Italy, in Privileges and Immunities, *supra* note 28, 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.

[47] See Bonafè, *supra* note 27, at 508, 522-23, 537.

[48] 22 U.S.C. § 288a(b).

[49] 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).

President under the [IOIA] are entitled to the privileges and immunities provided in that Act."[50] 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."[51]

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.[52] The court self-consciously diverged from the D.C. Circuit, which over a decade earlier had resolved uncertainty in that court by holding that the IOIA conferred 1945-era, absolute immunity for IGOs that has not tracked changes in sovereign immunity.[53]

To date, the Supreme Court has shown no interest in resolving this conflict.[54] Consequently, for the foreseeable future, 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.[55] The D.C. Circuit may enjoy a degree of deference given its relative

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

[51] 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."

[52] 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 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.

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

[54] 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).

[55] 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.

expertise concerning IGOs, but its approach has been criticized and appears inconsistent with the view espoused by the U.S. government.[56]

If the restrictive approach were taken, it is possible it would 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.[57] To be sure, this translates imperfectly IGOs, and before the D.C. Circuit settled on an absolute standard for IGO immunity, its decisions considering a commercial activities exception adapted it their perceived needs.[58] It is possible, therefore, that an IGO's registration of trademarks in the United States solely for defensive purposes might not be deemed commercial activity;[59] 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,[60] is frequently urged as a basis for assessing IGO immunity claims as

[56] 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.").

[57] 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.

[58] 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 (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.

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

[60] 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.").

well[61]—not least, because the governing treaties often contain language suggesting that IGO immunity should be limited by its purposes.[62] This may carry over into the national law 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.[63]

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.[64] As noted below, however, applications of this principle vary considerably in their stringency. Important variables include, for example,

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[61] 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).

[62] 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").

[63] See Wickremasinghe, *supra* note 28, 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 28, 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).

[64] 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).

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.[65]

Despite its appeal elsewhere, including under international law,[66] 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.[67] At the 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 to 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."[68] 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

[65] See Amaratunga, *supra* note 63, ¶ 53; see also Saunders, *supra* note 63, at 94-98 (discussing lower court proceedings).

[66] 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).

[67] 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).

[68] Euratom, *supra* note 64, ¶¶ 6.3-6.4; see Ryngaert, *supra* note 45, at 130-32.

nominally absolute standard[69]—while others have more readily classified matters that are private and less diplomatic in character as falling outside functional immunity.[70]

In a well-known 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.[71]

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 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,[72] 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 by means of the IGO's governing instruments, or through a particular agreement or pleading.

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[69] See Neumann & Peters, *supra* note 43, 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.

[70] For the range of results from the Netherlands, see Rosanne van Alebeek & Andre Nollkaemper, The Netherlands, in Privileges and Immunities, *supra* note 28, at 179, 190-93 (contrasting decisions in Pichon-Duverger v. PCA and Stichting Mothers of Srebrenica).

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

[72] Id. at 42.

1. Waiver by governing instrument

International financial institutions like the IBRD, the IFC, and the Inter-American Development Bank, among others, provide in their Articles of Agreement or comparable instrument for the waiver of immunity with respect to particular suits. That 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."[73] In the United States, at least, this is understood as a waiver of immunity and a designation of venue, rather than a provision that merely establishes venue in the event of individual waivers.[74]

The scope of waiver, however, is not entirely clear, and the construction of this and similar provisions has produced a wealth of decisions. The D.C. Circuit has been particularly active, developing a functional approach to construing these waivers (one that preceded, but now exists alongside, its precedent upholding an absolute immunity standard that governs in the *absence* of waiver).[75] This approach assumes that waiver would have been intended to secure "a corresponding benefit which would further the organization's goals" or "when an insistence on immunity would actually prevent or hinder the organization from conducting its activities."[76] The presumption is against waiver,[77] 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."[78] This 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

[73] 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.

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

[75] The earlier 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).

[76] Id. at 617.

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

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

like employment, where the benefit of waiver is less clear and the potential for disruptive interference is greater.[79]

Applying that inquiry here—for financial IGOs and those with similar articles—is not easy. 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.[80] An IGO might well argue, rather, that its objectives are furthered if its exposure to adverse determinations concerning its name is limited. At the same time, 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, the strength of the presumption against construing such provisions as establishing a waiver may be decisive.[81]

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. Under the IOIA, likewise, relevant IGOs have immunity "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."[82]

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—is likely to be understood as a waiver of any immunity the IGO might otherwise assert. Like the provisions in the governing instruments of financial institutions, the concession of Mutual Jurisdiction is unlikely to be regarded as a simple venue provision, but rather should relieve the jurisdiction designated and entertaining the action of any responsibility for having violating the IGO's

[79] 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).

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

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

[82] 22 U.S.C. § 288a(b).

immunity. Sovereign immunity case law seems directly comparable in this limited regard. 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.[83]

In some circumstances, an IGO might be able to argue that a waiver was compelled or resulted from duress, such that the immunity still obtained. If, for example, 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, the threat of treaty breach might render the waiver ineffective. The analogy to these facts, however, is imperfect. 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 Mutual Jurisdiction concessions made by an IGO while registering a domain-name—the compulsion objection seems attenuated.

The context of more immediate concern, in which an IGO is involved as a UDRP complainant, fares yet worse. The central difficulty is that nothing compels any complainant to initiate the UDRP and accept Mutual Jurisdiction. Beyond tolerating an infringement of its interests, an IGO might in principle elect instead to proceed first (or solely) to court. This is undoubtedly unappealing, because it would accomplish waiver by other means. Even so, that would be the alternative were the UDRP not to exist in its present form; it is not as though a preexisting or independent privilege were being conditioned or withdrawn. IGOs might also take some 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.[84]

While national courts might nonetheless sympathize with IGO defendants, they may pause for other reasons before reading 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 in the event it has *lost* to a

[83] See Brief for Appellee, Barcelona.com, Inc. v. Excelentisimo Ayuntamiento De Barcelona at 26, 330 F.3d 617 (4th Cir. 2003). That precise issue was not the focus of proceedings, even 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).

[84] 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.

domain-name registrant, will likely be perceived as asymmetrical and problematic.[85] In addition, leaving resolution to the truncated UDRP process may be resisted. 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.[86] To be clear, the absence of a sufficient alternative may not constitute a basis for overriding immunity—at least not in the United States[87]—but it might reduce the appeal of arguments for limiting the scope of waiver by Mutual Jurisdiction.

C. The UDRP and Its Alternatives

Assuming a national court would find that the Mutual Consent commitment effectuates a waiver of IGO immunity—as opposed to finding that the matter lies outside a particular IGO's immunity in the relevant jurisdiction, or that any such immunity was waived by the IGO's governing instrument—the issue confronting ICANN is a policy question infused with legal principles. The alternatives this presents, for better or for worse, are fairly limited.

[85] 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).

[86] 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.").

[87] 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); 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.

1. Maintaining the Status Quo

For the reasons discussed, even if one assumes that an IGO would otherwise have the capacity to assert immunity to judicial process, affording them a means of surrendering that immunity via a Mutual Jurisdiction provision is not *itself* an infringement. Accordingly, as a purely legal matter, it seems unlikely that the Mutual Jurisdiction concession establishes or occasions a violation of IGO immunity. And as explored further below, it may seem more appropriate to force an IGO to abide by a judicial process, given that it has elected to initiate UDRP proceedings, than to force a domain-name registrant to accept any alternative.

None of this is to suggest, however, that the status quo leaves IGOs without any room for adaptation—and one potential workaround, assignment, deserves elaboration. 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).[88] 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.[89]

While the validity of assignments under foreign law should not themselves be questioned,[90] their consequences are uncertain, and will undoubtedly depend on national trademark and immunity law. At least three issues are implicated. First, such assignments could be regarded as an explicit or implicit waiver of immunity, although that risk that could be minimized by careful drafting.[91] Second, the assignment itself may comprise conduct outside the scope of the IGO's immunity. The significance of that issue 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.[92] Third, and finally, the

[88] 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).

[89] Lenz & Staehelin Ltd v. Christopher Mikkelsen, D2012-1922 (WIPO Jan. 8, 2013). As noted previously, 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.

[90] 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).

[91] 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).

[92] 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.

assignment might be ineffective under the laws of the jurisdiction in question—for example, because it is transferred without the accompanying goodwill previously associated with the mark, thus constituting an invalid "assignment in gross"[93]—and fail to establish an enforceable interest for the assignee.

While this third concern, in particular, is wholly legitimate, it need not be disabling, and it is certainly not unique. As noted previously, 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.[94] Just as a name protectable within the UDRP may not be entitled to protection according to national law, an assignment that enables an IGO to prevail initially will not necessarily suffice afterward in an action initiated by a losing registrant. 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. There is, to be sure, a distinctive problem insofar as assignments or similar arrangements might, if flawed, diminish the assignor's priority in the underlying mark, so prior scrutiny of national trademark law is absolutely indispensable.[95] That said, because the IGO (or surrogate) complainant initiating the UDRP 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 or other instrument, well before filing a UDRP complaint.

2. Establishing Non-Judicial Alternatives

The way that IGOs typically resolve the conflict 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.[96] Of particular relevance here, however, some IGOs provide in their standard agreements for settling

[93] 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).

[94] See *supra* note 17.

[95] 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).

[96] 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 46, 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).

contractual disputes by negotiation and conciliation or, failing that, according to arbitration under United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules.[97]

These practices are well understood by commercial partners, and usually pass without objection.[98] 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 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.[99]

Establishing a similar arbitral or other dispute resolution process, and permitting that to suffice under the UDRP, may be desirable because it would not require the IGO to submit to judicial proceedings concerning domain-related disputes. There are, however, difficulties with translating this practice to the UDRP setting, since the latter is dissimilar in at least two respects. First, more than in the normal commercial setting, the IGO's counterpart would not be entering into this alternative procedure of its free will: unlike a prospective employee or contractor who could take a job or do business elsewhere, a domain name registrant would be forced to make a

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[97] 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.

[98] 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").

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

concession in order to accomplish registration—a reversal of the forced concession made by IGOs submitting to Mutual Jurisdiction. Second, an alternative dispute resolution would require compliance by a third party, ICANN, to a greater degree than in a conventional bilateral contract.

To an extent, this is simply a matter of balancing equities. There is, however, another potential difference between compelling waiver by IGOs and compelling other parties to arbitrate: the latter may be more easily challenged in domestic courts, including at least potentially as 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" and held that the ESA appeals board sufficed.[100] 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.[101]

As these cases suggest, the existence of some such principle does not mean that immunity is easily unsettled, and there are numerous bases for differentiating this context or otherwise avoiding this exception.[102] First, domain-related rights are not the equivalent of employee rights.[103] Second, the principle may be limited beyond states parties 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.[104] 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,

[100] 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).

[101] For discussion of these cases, 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).

[102] 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).

[103] But see, e.g., Fox & Webb, *supra* note 21, 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").

[104] The United States government has emphasized that this differentiates the United States. Statement of Interest of the United States of America at 11-12, Sadikoglu v. United Nations Development Programme, *supra* note 87. But see, e.g., Amaratunga, *supra* note 63, ¶¶ 59-63 (rejecting attempt to defeat invocation of IGO immunity by alluding to analogous denial-of-justice principles in the Canadian Bill of Rights and the International Covenant on Civil and Political Rights).

as for the United Nations, by the UN Charter)[105] and organizations for which immunity was established in the state concerned before the European Convention came into force.[106]

Even so, it is worth bearing this potential constraint in mind. If the Mutual Jurisdiction concessions were revisited for IGOs, so as to permit non-judicial review, ICANN—and, eventually, registrants losing in the UDRP process and forced afterward into an arbitral process—should play close attention to the robustness of these alternatives, whether they likewise constrain the options available to a losing IGO, and whether any means may be found of making such recourse voluntary only. Ultimately, the enforceability of IGO immunity might in some jurisdictions depend on the generosity of these non-judicial remedies. Were an IGO able to secure from ICANN the transfer of another registrant's domain, without adequate recourse to challenge that result, such proceedings might pose concerns for those states disposed to employ a *Waite & Kennedy* assessment.

3. Other Possible UDRP Reforms

Beyond maintaining the status quo, or bending the Mutual Jurisdiction concession toward the non-judicial alternatives familiar to IGOs, other compromises may be possible.

First, ICANN could distinguish among IGOs: maintaining Mutual Jurisdiction terms in general, but permitting some—perhaps those clearly subject to absolute immunity according to treaty obligations, like the United Nations and (in many jurisdictions) its specialized agencies—to elect instead to submit disputes to UNCITRAL arbitration or some comparable procedure. This partial accommodation could be done provisionally, and expanded if it proved to be successful and objection-free.

Second, the Mutual Jurisdiction clause could be rewritten to address the special case of IGOs *without* prejudging the question of their immunity. The Rules could 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

[105] 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).

[106] Entico, *supra* note 36, ¶¶ 23-29 (concluding, in the alternative, that arbitration according to UNCITRAL rules is a sufficient available alternative).

> 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.

Such an approach would avoid exaggerating 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 the scope of immunity. At the same time, it would not require that an IGO waive immunity to which it would otherwise be entitled. The provision would, obviously, have to be fine-tuned: drafted, for example, to make sure that it selected an appropriate arbitral mechanism (or even deferred to the choice by the domain-name registrant), and to control forum-shopping as between the options available under the Mutual Jurisdiction clause.

Finally, it may be possible to ameliorate the hardship that a non-judicial process might impose on the other party. For example, any IGO electing arbitration might be asked to bear some or all of the cost of arbitration, which may be considerable in comparison to the UDRP and even, perhaps, as against a judicial action. The formulation of such a provision may be complex, particularly given that national law may influence its enforceability.[107] In principle, though, such a mechanism could eliminate the higher costs arbitration may impose relative to litigation and, potentially, compensate the would-be litigant for the lost opportunity to proceed in court.

[107] 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.